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UNITED STATES

SUPREME COURT REPORTS.

ANNUAL.

FROM BEGINNING OF VOLUME 123 TO END OF VOLUME 126.

c

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

THE UNITED STATES,

IN THE

OCTOBER TERM, 1887.

COMPLETE EDITION,

WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS,
Counselor at Law.

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BOOK XXXI.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MORRISON R. WAITE.[1]

ERRATA.

BOOK 31, VOLUMES 123–126, U. S. SUPREME COURT REPORTS.

Page 55, right column, line 34, change "24" to "25."
" 152, change top or reference paging "298" to "288," and in line 12, first column, change "23" to "11."
" 205 to 215, inclusive, for top paging insert "623–678." Also insert same figures to fill blanks in reference line under title, p. 205.
" 232, right column, last line but one, change "27" to "29."
" 289, right column, 24th line from bottom, change "Wrgiht" to "Wright."
" 215, in running title, change "Fire" to "Life."
" 466, left column, 19th line from bottom, change "Er" to "Ex."
" 512, right column, line 17, change "106:65" to "10:865."
" 525, right column, line 15 from bottom, change "Hantington" to "Huntington."
" 653, right column, line 17, change "Augusta" to "Bank of Augusta."
" 663, right column, line 12, change "134" to "154."
" 725, right column, fourth line, change "Feming" to "Fleming."

If the reader will immediately make the above corrections with ink, he will confer a favor.

JOHN M. WRIGHT, ESQ.

[1] Died March 23, 1888.
[2] Commissioned Jan. 16, 1888; Sworn in Jan. 18, 1888.

61697

E. R. ANDREWS, Printer, Rochester, N. Y.

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OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MORRISON R. WAITE.[1]

ASSOCIATE JUSTICES,

HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. JOHN M. HARLAN,
HON. STANLEY MATTHEWS,
HON. HORACE GRAY,
HON. SAMUEL BLATCHFORD,
HON. LUCIUS Q. C. LAMAR.[2]

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MARSHAL,

JOHN G. NICOLAY, ESQ.

to Jan. 4, 1888; after that

JOHN M. WRIGHT, ESQ.

1 Died March 23, 1888.
2 Commissioned Jan. 16, 1888; Sworn in Jan. 18, 1888.

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ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERM OF 1887, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

(Allotments Jan. 23, 1888, and Apr. 2, 1888. See Appendixes III and V.)

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS, 1887, 1888.	COMMISSIONED.	SWORN IN.	TERMINATION.
ASSOCIATE JJ. HORACE GRAY, Massachusetts.	President ARTHUR.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1881. (Dec. 20.)	1882. (Jan. 9.)	
SAMUEL BLATCHFORD, New York.	President ARTHUR.	SECOND. VERMONT, CONN., NEW YORK.	1882. (Mar. 22.)	1882. (April 3.)	
JOSEPH P. BRADLEY, New Jersey.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Mar. 21.)	1870. (Mar. 23.)	
CHIEF JUSTICE. MORRISON R. WAITE, Ohio.	President GRANT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)	Died 1888. (Mar. 28.)
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ASSOCIATE JJ. LUCIUS Q. C. LAMAR, Mississippi.	President CLEVELAND.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1888. (Jan. 16.)	1888. (Jan. 18.)	
STANLEY MATTHEWS, Ohio.	President GARFIELD.	SIXTH. KY., TENN., OHIO, MICH.	1881. (May 12.)	1881. (May 17.)	
JOHN M. HARLAN, Kentucky.	President HAYES.	SEVENTH. IND., ILL., WIS.	1877. (Nov. 29.)	1877. (Dec. 10.)	
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO. KAN., ARK.., NEB. COL.	1862. (July 16.)	1862. (Dec. 1.)	
STEPHEN J. FIELD, California.	President LINCOLN.	NINTH. CALIFORNIA, OREGON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)	

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 123, 124, 125, 126.

A.

Abbott, Worthington *v.* - - - - - 494
Adams, Addington *v.* - - - - - 853
Orient Mut. Ins. Co. *v.* - - - - 63
Addington *v.* Adams - - - - - 853
"Addington *v.* Burke" (125 U. S. 698) - 853
Ætna Life Ins. Co. *v.* Davey (123 U. S. 739) 315
v. Middleport (124 U. S. 534) - - 537
Albany Stove Co., Hailes *v.* - - - 284
Allen, United States *v.* - - - - - 147
American Bell Tel. Co., Clay Commercial Tel. Co. *v.* - - - - - 863
Dolbear *v.* - - - - - - - 863
Molecular Tel. Co. *v.* - - - 863
Overland Tel. Co. *v.* - - - - 863
People's Tel. Co. *v.* - - - - 863
Andrews *v.* Cone - - - - - - - 564
v. Hovey (123 U. S. 267: 124 U. S. 694) - - - - - - - 160, 557
"Arthur's Exrs. *v.* Butterfield" (125 U. S. 70) - - - - - - - - 643
Association, Mound City Land & Water, Phillips *v.* - - - - - - 588
Asylum, Portland Female Orphan, Robison *v.* - - - - - - - 293
Attorney-General of Mass., Western Union Tel. Co. *v.* - - - - - - 790
Ayers, *Ex parte* (123 U. S. 443) - - 216

B.

Baker *v.* Power (124 U. S. 165) - - 882
United States *v.* - - - - 824
Baker Salvage Co., Potomac Steamboat Co. *v.* - - - - - - - 75
Baltimore & O. R. R. Co. *v.* Burns (124 U. S. 165) - - - - - - 333
Bank, Commercial Nat. of Chicago, North Pa. R. R. Co. *v.* - - 287
Davenport Nat., *v.* Board of Equalization - - - - 94
First Nat., Bull *v.* - - - - 97
Nat., of Redemption *v.* Boston (125 U. S. 60) - - - - - - - 689
Pacific Nat., *v.* Demmon - - 567
v. Mixter - - - - - - - 567
v. Whitney - - - - - - - 567
State Nat., *v.* Dodge - - - 458
Barber, White *v.* - - - - - - - 243
Barnes, Vetterlein *v.* - - - - - 400
Beard, Porter *v.* - - - - - - - 490
v. Porter (124 U. S. 437) - - 492
Beeson *v.* Johns (124 U. S. 56) - - 360
Beidelman, Dow *v.* - - - - - 841
Benites *v.* Hampton (123 U. S. 519) - 260
Benjamin, Roberts *v.* - - - - - 834
Bilby, Teal *v.* - - - - - - - - 263
Bissell *v.* Township of Spring Valley - 411
Wall *v.* (124 U. S. 225) - - - 772
Bloxham, Shoecraft *v.* - - - - - 574
Board of Equalization, Davenport Nat. Bank *v.* - - - - - - - 94
Bohanan *v.* State (Neb.) (125 U. S. 692) 854
Bond *v.* Davenport (123 U. S. 619) - - 279
United States *v.* - - - - 473
Boston, National Bank of Redemption *v.* 689
Bowerman *v.* Rogers (125 U. S. 585) - 815
Bowman *v.* Chicago & Northwestern R. Co. (125 U. S. 465) - - - - 700
Boyd *v.* Wyly (124 U. S. 98) - - 369
Brazee *v.* Schofield (124 U. S. 495) - - 484
Bridge Co., Willamette Iron, *v.* Hatch 629
British Steamer Strathairly, United States *v.* (124 U. S. 558) - - 580
Brooks *v.* State (Mo.) (124 U. S. 394) - 454
Brown, Florence Mining Co. *v.* - - 424
v. McConnell (124 U. S. 489) - 495
Bucher *v.* Cheshire R. Co. (125 U. S. 555) 795
Bull *v.* First Nat. Bank of Kasson (123 U. S. 105) - - - - - - 97
Burchard, United States *v.* - - - - 662
Burlington, C. R. & N. R. Co. *v.* Simmons (123 U. S. 52) - - - 73
Burns, Baltimore & O. R. R. Co. *v.* - 333
Butler *v.* Coleman (124 U. S. 721) - 567
Butterfield, Miller *v.* - - - - - 643

C.

Cadwalader, Mustin *v.* - - - - - 169
Carr, Doolan *v.* - - - - - - - 844
Carter, Shreveport *v.* - - - - - 854
Chapin *v.* Streeter (124 U. S. 360) - - 475
Chapman *v.* Crane - - - - 194, 235
"Chapman *v.* Goodnow's Adm'r." (123 U. S. 540) - - - - - - - 235
Chesapeake & O. R. Co., Hoard *v.* - 130
Cheshire R. Co., Bucher *v.* - - - - 795
Chicago *v.* Taylor (125 U. S. 161) - - 638
Chicago & Northwestern R. Co., Bowman *v.* - - - - - - - 700
Childers, Widdicombe *v.* - - - - 427
Christian, Johnson *v.* - - - - - 820
Cissel *v.* Dutch (125 U. S. 171) - - 642
Clark *v.* City & County of San Francisco (124 U. S. 639) - - - - 553
Clay Commercial Tel. Co. *v.* American Bell Tel. Co. - - - - 863
Clement *v.* Packer (125 U. S. 309) - - 721
Cleveland, C. C. & I. R. Co., St. Louis, A. & T. H. R. Co. *v.* - - 832

Clock Co., Yale, Parker & Whipple Co. *v.* 100
Coal & Iron Co., Colorado, *v.* United States - - - - - - 182
Coan *v.* Flagg (128 U. S. 117) - - 107
Coasting Co., Inland & Seaboard, *v.* Hall 369
Coffee *v.* Groover (128 U. S. 1) - - 51
Coleman, Butler *v.* - - - - - 567
Colorado Coal & Iron Co. *v.* United States (128 U. S. 307) - - - - 182
Commercial Nat. Bank of Chicago, North Pa. R. R. Co. *v.* - - 287
Cone, Andrews *v.* - - - - - 564
Conger, Williams *v.* - - - - - 778
Cox *v.* Western Land & Cattle Co. (128 U. S. 375) - - - - - - 178
Craft, *Ex parte* (124 U. S. 370) - - 449
Smith *v.* - - - - - - 267
"Craig *v.* Leitensdorfer" (123 U. S. 189) 114
Crane, Chapman *v.* - - - - 194, 235
Litchfield *v.* - - - - - 194, 199
Plumb *v.* - - - - - - 268
Stryker *v.* - - - - - 194, 235
Welles *v.* - - - - - - 194
Crawford *v.* Halsey (124 U. S. 648) - - 572
v. Heysinger (128 U. S. 589) - 269
Crooks, Shreveport *v.* - - - - - 854
Cunningham *v.* Norton (125 U. S. 77) - 624

D.

Dale Tile Mfg. Co. *v.* Hyatt (125 U. S. 46) 683
Davenport, Bond *v.* - - - - - 279
Davenport Nat. Bank *v.* Board of Equalization (128 U S. 83) - - 94
Davey, Ætna Life Ins. Co. *v.* - - 315
Davis, Davison *v.* - - - - - - 635
v. Key (128 U. S. 79) - - - - 112
Davison *v.* Davis (125 U. S. 90) - - 635
Dayton, Town of, Gilson *v.* - - - 74
Demmon, Pacific Nat. Bank *v.* - - 567
DeMorant, United States *v.* - - 171, 565
Des Moines Nav. & R. R. Co. *v.* Iowa Homestead Co. (128 U. S. 552) 202
Development Co., Southern, of Nevada *v.* Silva - - - - - - - 678
Dewey *v.* West Fairmont Gas Coal Co. (128 U. S. 329) - - - - 179
DeWolf *v.* Hays (125 U. S. 614) - - 818
District of Columbia *v.* Gallaher (124 U. S. 505) - - - - - - - 526
v. McBlair (124 U. S. 320) - - 449
Dodge, State. Nat. Bank *v.* - - - 458
Dolbear *v.* American Bell Tel. Co. - 863
Doolan *v.* Carr (125 U. S. 618) - - - 844
Dow *v.* Beidelman (125 U. S. 680) - 841
v. Memphis & Little Rock R. R. Co. (124 U. S. 652) - - - 565
Downs *v.* Hubbard (128 U. S. 189) - 114
Dreyfus *v.* Searle (124 U. S. 60) - - 352
Dryfoos *v.* Wiese (124 U. S. 32) - - 362
Dull, Union R. R. Co. *v.* - - - - 417
Dumbleton, Talkington *v.* - - - - 313
Dundee Mortgage & T. Ins. Co. *v.* Hughes (124 U. S. 157) - - 537
Dun, Walker *v.* - - - - - - - 175
Dutch, Cissel *v.* - - - - - - - 642

E.

East Tenn. Va. & Ga. R. Co. *v.* Southern Tel. Co. (125 U. S. 695) - - 853
Equalization, Board of, Davenport Nat. Bank *v.* - - - - - - 94
"Excelsior, The," (128 U. S. 40) - - 75
Ex parte Ayers (128 U. S. 443) - - 216
Craft (124 U. S. 370) - - - 449
Henry (128 U. S. 372) - - - 174
McCabe (128 U. S. 443) - - 216
Sawyer (124 U. S. 200) - - - 402
Scott (128 U. S. 443) - - 216
Sherman (124 U. S. 364) - - 423
Spies (128 U. S. 131) - - - 80

F.

Fant, Glenn *v.* - - - - - - - 352
Fayolle *v.* Texas Pac. R. Co. (124 U. S. 519) - - - - - - - - 533
Felix *v.* Scharnweber (125 U. S. 54) - 687
Finn *v.* United States (128 U. S. 227) - 128
First Nat. Bank, Bull *v.* - - - - 97
Fisher, Hoskin *v.* - - - - - - - 759
Flagg, Coan *v.* - - - - - - - 107
Florence Mining Co. *v.* Brown (124 U. S. 385) - - - - - - - - 424
Floyd, Lawson *v.* - - - - - - 347
Folsom, Radford *v.* - - - - - 292
Forstall's Sons, Lacombe *v.* - - 255
French *v.* Hopkins (124 U. S. 524) - - 536
Frerichs, United States *v.* - - - - 471
Friedenstein *v.* United States (125 U. S. 224) - - - - - - - - 736

G.

Gallaher, District of Columbia *v.* - 526
Garland, Great Falls Mfg. Co. *v.* - - 527
Gas Coal Co., West Fairmont, Dewey *v.* 179
Gilson *v.* Town of Dayton (128 U. S. 59) 74
Gleeson, United States *v.* - - - 421
Glenn *v.* Fant (124 U. S. 128) - - - - 352
Great Falls Mfg. Co. *v.* Garland (124 U. S. 581) - - - - - - - 527
Grinnell, Sherman *v.* - - - - - 278
Groover, Coffee *v.* - - - - - - 51
Guarantee Ins. T. & Safe Deposit Co. *v.* Sellers (128 U. S. 276) - - 153
Gumbel *v.* Pitkin (124 U. S. 131) - - 374

H.

Hailes *v.* Albany Stove Co. (128 U. S. 582) 284
Hall, Inland & Seaboard Coasting Co. *v.* Western Union Tel. Co. *v.* - 479
Halsey, Crawford *v.* - - - - - 572
Hamburg-American Steam Packet Co., Mayor, etc. of Hoboken *v.* - 543
Hamilton, Lawther *v.* - - - - - 325
Hampton, Benites *v.* - - - - - 260
Hannibal & St. J. R. R. Co. *v.* Missouri River Packet Co. (125 U. S. 260) - - - - - - - - 731
"Harshman *v.* Winterbottom" (123 U. S. 215) - - - - - - - - 124
Hartranft *v.* Langfeld (125 U. S. 128) - 672
v. Oliver (125 U. S. 525) - - 813
v. Sheppard (125 U. S. 387) - - 763
Hatch, Willamette Iron Bridge Co. *v.* 629
Hays, De Wolf *v.* - - - - - - - 818
Hedden, Kelly *v.* - - - - - - - 389
Hefner *v.* Northwestern Mut. L. Ins. Co. (128 U. S. 747) - - - 309

Hendee, United States *v.* 465
Henderson *v.* Louisville & N. R. R. Co. (123 U. S. 61) 92
Henry, *Ex parte* (123 U. S. 372) 174
Hess, United States *v.* 516
Heysinger, Crawford *v.* 269
Hill, Maynard *v.* 654
United States *v.* 275
Hinchman *v.* Lincoln (124 U. S. 38) 337
Hitz *v.* Jenks (123 U. S. 297) 156
"Hoadley *v.* San Francisco" (124 U. S. 639) 553
Hoard *v.* Chesapeake & O. R. Co. (123 U. S. 222) 130
Hoboken, Mayor, etc., *v.* Hamburg-American Steam Packet Co. (124 U. S. 656) 543
v. North German Lloyd Steamship Co. (124 U. S. 656) 543
v. Pennsylvania R. R. Co. (124 U. S. 656) 543
v. Schmidt (124 U. S. 656) 543
Holmes, Shreveport *v.* 854
Homestead Co., Iowa, Des Moines Nav. & R. R. Co. *v.* 202
Hood, Norton *v.* 364
Hopkins, French *v.* 536
v. Orr (124 U. S. 510) 523
Hoskin *v.* Fisher (125 U. S. 217) 759
Hovey, Andrews *v.* 160, 557
Hubbard, Downs *v.* 114
Hughes, Dundee Mortgage & T. Ins. Co. *v.* 357
Humiston *v.* Wood (124 U. S. 12) 354
Hyatt, Dale Tile Mfg. Co. *v.* 683

I.

Ice Co., Washington, *v.* Webster 799
Improvement Co., Manistee River, Ruggles *v.* 152
Manistee River, Sands *v.* 149
Inland & Seaboard Coasting Co. *v.* Hall (124 U. S. 121) 369
Insurance Co., Ætna Life, *v.* Davey 315
v. Middleport 537
Northwestern Mut. L., Hefner *v.* 309
Orient Mut., *v.* Adams 63
Sun Mut. of N. O. *v.* The Kountz Line 79
Union, *v.* Smith 497
Union Mut. Life, *v.* Waters 474
Iowa Homestead Co., Des Moines Nav. & R. R. Co. *v.* 202
Iron Clad Mfg. Co., Matthews *v.* 477
Iron Silver Mining Co. *v.* Reynolds (124 U. S. 374) 466

J.

Jacksonville, P. & M. R. Co., Trask *v.* 521
James, Yale Lock Mfg. Co. *v.* 807
Jenks, Hitz *v.* 156
Jerome, Richter *v.* 132
Jewell *v.* Knight (123 U. S. 426) 190
Johns, Beeson *v.* 360
Johnson *v.* Christian (125 U. S. 642) 820
Zeckendorf *v.* 277
Johnston, United States *v.* 389
Jung Ah Lung, United States *v.* 591

K.

Keeler, Lamaster *v.* 238
Kelly *v.* Hedden (124 U. S. 196) 389
Kennedy, Lessassier & Binder *v.* 262
Key, Davis *v.* 112
King Iron Bridge & Mfg. Co. *v.* County of Otoe (124 U. S. 459) 514
Knight, Jewell *v.* 190
v. Paxton (124 U. S. 552) 518
Kountz Line, The, Sun Mut. Ins. Co. of N. O. *v.* 79
Kreiger *v.* Shelby R. R. Co. 675

L.

Lacombe *v.* Forstall's Sons (123 U. S. 562) 255
Lamaster *v.* Keeler (123 U. S. 376) 238
Land & Water Asso., Mound City, Phillips *v.* 588
Langdon *v.* Sherwood (124 U. S. 74) 342
Langfeld, Hartranft *v.* 674
Lawson *v.* Floyd (124 U. S. 108) 347
Lawther *v.* Hamilton (124 U. S. 1) 325
Lessassier & Binder *v.* Kennedy (123 U. S. 521) 262
Lincoln, Hinchman *v.* 337
Litchfield *v.* Crane 194, 199
"Litchfield *v.* Goodnow" (123 U. S. 549) 199
Little Rock & Fort Smith Railway, Tompkins *v.* 615
Little Rock, M. R. & T. Railway, Williams *v.* 615
Lockhart, Morey *v.* 68
Louisiana Sugar Refining Co., New Orleans Waterworks Co. *v.* 607
Louisville & N. R. R. Co., Henderson *v.* 92
Lyon *v.* Perin & Gaff Mfg. Co. (125 U. S. 698) 839

M.

McBlair, District of Columbia *v.* 449
McCabe, *Ex parte* (123 U. S. 448) 216
McConnell, Brown *v.* 495
Mackall, Richards *v.* 396
McLean, United States, *ex rel.*, *v.* Vilas 329
Madison, New York, L. E. & W. R. R. Co. *v.* 258
"Maggie J. Smith, The," (123 U. S. 349) 175
Maggie J. Smith, The, *v.* Walker 175
Manistee River Improvement Co., Ruggles *v.* 152
Sands *v.* 149
Manufacturing Co., Dale Tile, *v.* Hyatt 683
Great Falls, *v.* Garland 527
Iron Clad, Matthews *v.* 477
King Iron Bridge, *v.* County of Otoe 514
Perin & Gaff, Lyon *v.* 839
Smith & Griggs, *v.* Sprague 141
Yale Lock, *v.* James 807
Mares, Northern Pac. R. Co. *v.* 296
Marlor, Texas & Pac. R. Co. *v.* 303
Marquette, H. & O. R. R. Co. *v.* United States, (123 U. S. 722) 302
Marshall *v.* United States (124 U. S. 391) 475
Masterson, Stewart *v.* 507
Mathews *v.* United States (123 U. S. 182) 127

Matthews *v.* Iron Clad Mfg. Co. (124 U. S. 347) - - - - - 477
Maverick, Sabariego *v.* - - - - - 430
Maynard *v.* Hill (125 U. S. 190) - - 654
Mayor, etc. of Hoboken *v.* Hamburg-American Steam Packet Co. 543
v. North German Lloyd Steamship Co. - - - - 543
v. Pennsylvania R. R. Co. - 543
v. Schmidt - - - - - 543
N. Y., Munson *v.* - - - - - 586
Memphis & Little Rock R. R. Co., Dow *v.* 565
Sage *v.* - - - - - - 694
Merchant, Spencer *v.* - - - - - 763
Merritt, Oelbermann *v.* - - - - 164
Middleport, Ætna Life Ins. Co. *v.* - - 537
Miller *v.* Butterfield - - - - - 643
Mining Co., Florence, *v.* Brown - - 424
Iron Silver, *v.* Reynolds - - 466
Mining etc. Co., Pembina Consolidated Silver, *v.* Pa. - - - - - 650
Missionary Society of M. E. Church, Woodman *v.* - - - - - 852
Missouri River Packet Co., Hannibal & St. J. R. R. Co. *v.* - - 731
Mixter, Pacific Nat. Bank *v.* - - - 567
Molecular Telephone Co. *v.* American Bell Tel. Co. - - - 863
Morant, United States *v.* - - 171, 565
Morden, Weir *v.* - - - - - - 645
Morey *v.* Lockhart (123 U. S. 56) - 68
Morrison, Union Trust Co. of N. Y. *v.* - 825
Mortgage & T. Ins. Co., Dundee, *v.* Hughes - - - - - 357
Mouat, United States *v* - - - - - 463
Mound City Land & Water Asso., Phillips *v.* - - - - - - 588
Mugler *v.* State (Kan.) (123 U. S. 123) - 205
Mullan, United States *v.* - - - - 140
Munson *v.* Mayor, etc. of N. Y. (124 U. S. 601) - - - - - - 586
Mustin *v.* Cadwalader (123 U. S. 369) - 169

N.

Natal *v.* State (La.) (123 U. S. 516) - - 233
National Bank of Redemption *v.* Boston 689
New Orleans Pac. R. Co. *v.* United States (124 U. S. 124) - - - - 383
New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co. (125 U. S. 18) - - - - - - 607
New York, Mayor, etc., Munson *v.* - 586
New York, L. E. & W. R. R. Co. *v.* Madison (123 U. S. 524) - - - 258
Northern Pac. R. Co. *v.* Mares (123 U. S. 710) - - - - - - 296
North Pa. R. R. Co., *v.* Commercial Nat. Bank of Chicago (123 U. S. 727) 287
Northwestern Mut. L. Ins. Co., Hefner *v.* 309
Norton, Cunningham *v.* - - - - 624
v. Hood (124 U. S. 20) - - 364
Nutt *v.* United States (125 U. S. 650) - 821

O.

Oelbermann *v.* Merritt (123 U. S. 369) - 164
Oliver, Hartranft *v.* - - - - - 813
Orient Mut. Ins. Co. *v.* Adams (123 U. S. 67) - - - - - - - 63
Origet *v.* United States (125 U. S. 240) 743
Orr, Hopkins *v.* - - - - - - - 523
Otoe County, King Iron Bridge & Mfg. Co. *v.* - - - - - - 514
Overland Telephone Co. *v.* American Bell Tel. Co. - - - - - 863

P.

Pacific Nat. Bank *v.* Demmon (124 U. S. 721) - - - - - - - 567
v. Mixter (124 U. S. 721) - - 567
v. Whitney (124 U. S. 721) - - 567
Packer, Clement *v.* - - - - - 721
Packet Co., Hamburg-American Steam, Mayor, etc. of Hoboken *v.* - 543
Missouri River, Hannibal & St. J. R. R. Co. *v.* - - - - 731
Parker & Whipple Co. *v.* Yale Clock Co. (123 U. S. 87) - - - - - 100
Paxton, Knight *v.* - - - - - - 518
Pembina Consolidated Silver Mining etc. Co. *v.* Pa. (125 U. S. 181) - 650
Pennsylvania, Pembina Consolidated Silver Mining etc. Co. *v.* - 650
Pennsylvania R. R. Co., Mayor, etc. of Hoboken *v.* - - - - - 543
People's Telephone Co. *v.* American Bell Tel. Co. - - - - - 863
Perin & Gaff Mfg. Co., Lyon *v.* - - 839
Philadelphia & R. R. R. Co., United States *v.* - - - - - 138
Phillips *v.* Mound City Land & Water Asso. (124 U. S. 605) - - 588
Pitkin, Gumbel *v.* - - - - - 374
Plumb *v.* Crane (123 U. S. 560) - - 268
Porter *v.* Beard (124 U. S. 429) - - 490
Beard *v.* - - - - - - 492
Portland Female Orphan Asylum, Robison *v.* - - - - - - - 298
Potomac Steamboat Co. *v.* Baker Salvage Co. (123 U. S. 40) - - - 75
Potts *v.* United States (125 U. S. 173) - 661
Power, Baker *v.* - - - - - - 382
Proctor, Tilghman *v.* - - - - - 664

R.

Radford *v.* Folsom (123 U. S. 725) - - 292
Railroad Co., Baltimore & O., *v.* Burns 333
Burlington, C. R. & N., *v.* Simmons - - - - - - 73
Chesapeake & O., Hoard *v.* - - 130
Cheshire, Bucher *v.* - - - - 795
Chicago & Northwestern, Bowman *v.* - - - - - - - 700
Cleveland, C. C. & I., St. Louis, A. & T. H. R. Co. *v.* - - 882
East Tenn. Va. & Ga., *v.* Southern Tel. Co. - - - - - 853
Hannibal & St. J., *v.* Missouri River Packet Co. - - - - 731
Jacksonville, P. & M., Trask *v.* - 521
Louisville & N., Henderson *v.* - 92
Marquette, H. & O., *v.* United States - - - - - - 302
Memphis & Little Rock, Dow *v.* 565
Sage *v.* - - - - - - 694
New Orleans Pac., *v.* United States 383
New York, L. E. & W. *v.* Madison 258
Northern Pac., *v.* Mares - - 296

Railroad Co., North Pa., v. Commercial Nat. Bank of Chicago - - 287
Pennsylvania, Mayor, etc. of Hoboken v. - - - - - 543
Philadelphia & R., United States v. 138
St. Louis, A. & T. H., v. Cleveland C. C. & I. R. Co. - - 832
Shelby, Kreiger v. - - - - 675
Texas & Pac., v. Marlor - - 303
Texas Pac., Fayolle v. - - 533
Union, v. Dull - - - - - 417
Railway, Little Rock & Fort Smith, Tompkins v. - - - - 615
Little Rock, M. R. & T., Williams v. 615
"Re Royall" (125 U. S. 696) - - 855
Reynolds, Iron Silver Mining Co. v. - 466
Richards v. Mackall (124 U. S. 183) - 396
Richter v. Jerome (123 U. S. 233) - 132
Riddle, Wilson v. - - - - - - 280
Roberts v. Benjamin (124 U. S. 64) - 334
Robertson, Whitney v. - - - - - 386
Robison v. Female Orphan Asylum of Portland (123 U. S. 702) - 293
Rogers, Bowerman v. - - - - - 315
Royall v. State (Va.) (125 U. S. 696) - 855
Ruggles v. Manistee River Improvement Co. (123 U. S. 297) - - 152

S.

Sabariego v. Maverick (124 U. S. 261) 430
Sage v. Memphis & Little Rock R. R. Co. (125 U. S. 361) - - - - 694
St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co. (125 U. S. 658) 832
Salvage Co., Baker, Potomac Steamboat Co. v. - - - - - - 75
Sands v. Manistee River Improvement Co. (123 U. S. 288) - - - - 149
San Francisco, Clark v. - - - - 553
San Jacinto Tin Co., United States v. - 747
Sawyer, *Ex parte* (124 U. S. 200) - - 402
Scharnweber, Felix v. - - - - 687
Schmidt, Mayor, etc. of Hoboken v. - 543
Schofield, Brazee v. - - - - - 484
School District, Searl v. - - - - - 415
Schreiber, Thornton v. - - - - 577
Scott, *Ex parte* (123 U. S. 443) - - 216
Searl v. School District (124 U. S. 197) 415
Searle, Dreyfus v. - - - - - - 352
Seddon, Woodfolk v. - - - - - 598
Sellers, Guarantee Ins. T. & Safe Deposit Co. v. - - - - - - 153
Shelby R. R. Co., Kreiger v. - - 675
Sheppard, Hartranft v. - - - - - 763
Sherman, *Ex parte* (124 U. S. 364) - 423
v. Grinnell (123 U. S. 679) - - 278
Sherwood, Langdon v. - - - - 344
Shields v. Shiff (124 U. S. 351) - - 445
Shiff, Shields v. - - - - - - 445
Shoecraft v. Bloxham (124 U. S. 730) - 574
Shreveport v. Carter (125 U. S. 694) - 854
v. Crooks (125 U. S. 694) - - 854
v. Holmes (125 U. S. 694) - - 854
"Siemens v. Sellers" (123 U. S. 276) - 153
Silva, Southern Development Co. of Nevada v. - - - - - - 678
Simmons, Burlington, C. R. & N. R. Co. v. 73
Smith v. Craft (123 U. S. 436) - - - 267
v. State (Ala.) (124 U. S. 465) - 506
Union Ins. Co. v. - - - - - 497
United States v. - - - - 534
Smith & Griggs Mfg. Co. v. Sprague (123 U. S. 249) - - - - - 141
Southern Development Co. of Nevada v. Silva (125 U. S. 247) - - 678
Southern Tel. Co., East Tenn. Va. & Ga. R. Co. v. - - - - - 853
Spencer v. Merchant (125 U. S. 345) - 763
Spies, *Ex parte* (123 U. S. 131) - - 80
Sprague, Smith & Griggs Mfg. Co. v. - 141
Spring Valley Township, Bissell v. - 411
State, (Ala.) Smith v. - - - - - 508
(Ala.) United States v. - - 73
(Kan.) Mugler v. - - - - - 205
(Kan.) v. Ziebold (123 U. S. 623) - 205
(La.) Natal v. - - - - - 233
(La.) United States v. - - 69
(Miss.) United States v. - - 73
(Mo.) Brooks v. - - - - - 454
(Mo.) v. Walker (125 U. S. 339) - 769
(Mo.) v. Winterbottom (123 U. S. 215) 124
(Neb.) Bohanan v. - - - - 854
(Neb.) Wilkinson v. - - - - 152
(Va.) Royall v. - - - - - 855
State Nat. Bank v. Dodge (124 U. S. 388) 458
Steamboat Co., Potomac, v. Baker Salvage Co. - - - - - 75
Steamer Strathairly, United States v. 580
Steamship Co., North German Lloyd, Mayor etc. of Hoboken v. - 543
Stewart v. Masterson (124 U. S. 493) - 507
Stove Co., Albany, Hailes v. - - 284
"Strathairly, The" (124 U. S. 558) - 580
Streeter, Chapin v. - - - - - 475
Strong, United States v. - - - - 823
Stryker v. Crane - - - - - 194, 235
"Stryker v. Goodnow" (123 U. S. 527) - 194
Sun Mut. Ins. Co. of N. O. v. The Kountz Line (123 U. S. 65) - - - - 79

T.

Talkington v. Dumbleton (123 U. S. 745) 313
Taylor, Chicago v. - - - - - - 638
Teal v. Bilby (121 U. S. 572) - - - 263
Telegraph Co., Southern, East Tenn. Va. & Ga. R. Co. v. - - - - 853
Western Union, v. Attorney-General of Mass. - - 790
v. Hall - - - - 479
Telephone Cases (126 U. S. 1) - - - 863
Telephone Co., American Bell, Clay Commercial Tel. Co. v. - - 863
Dolbear v. - - - - - 863
Molecular Tel. Co. v. - - 863
Overland Tel. Co. v. - - 863
People's Tel. Co. v. - - 863
Clay Commercial, v. American Bell Tel. Co. - - - - - 863
Molecular, v. American Bell Tel Co. 863
Overland, v. American Bell Tel. Co. 863
People's, v. American Bell Tel. Co. 863
Texas & Pac. R. Co. v. Marlor (123 U. S. 687) - - - - - - 303
Texas Pac. R. Co., Fayolle v. - - 533
Thornton v. Schreiber (124 U. S. 612) - 577
Tilghman v. Proctor (125 U. S. 136) - 664
Tin Co., San Jacinto, United States v. 747
Tompkins v. Little Rock & Fort Smith Railway (125 U. S. 109) - 615
Trask v. Jacksonville, P. & M. R. R. Co. (124 U. S. 515) - - - 521
Trust Co., Union, of N. Y., v. Morrison 825

Tufts *v.* Tufts (123 U. S. 76) - - - 91

U.

Union Ins. Co., *v.* Smith (124 U. S. 405) 497
Union Mut. L. Ins. Co. *v.* Waters (124 U. S. 369) - - - - - - 474
Union R. R. Co. *v.* Dull (124 U. S. 163) 417
Union Trust Co. of N. Y. *v.* Morrison (125 U. S. 591) - - - - - 825
United States *v.* Allen (123 U. S. 345) - 147
v. Baker (125 U. S. 646) - - 824
v. Bond (124 U. S. 301) - - 473
v. Burchard (125 U. S. 176) - - 662
Colorado Coal & Iron Co. *v.* - 182
v. De Morant (123 U. S. 335; 124 U. S. 647) - - - - - 171, 565
Finn *v.* - - - - - - 128
v. Frerichs (124 U. S. 315) - - 471
v. Friedenstein *v.* - - - - 786
v. Gleeson (124 U. S. 255) - - 421
v. Hendee (124 U. S. 309) - - 465
v. Hess (124 U. S. 483) - - - 516
v. Hill (123 U. S. 681) - - 275
v. Johnston (124 U. S. 236) - - 389
v. Jung Ah Lung (124 U. S. 621) 591
Marquette, H. & O. R. R. Co. *v.* 302
Marshall *v.* - - - - - - 475
Mathews *v.* - - - - - - 125
v. Mouat (124 U. S. 303) - - 463
v. Mullan (123 U. S. 186) - - 140
New Orleans Pac. R. Co. *v.* - 383
Nutt *v.* - - - - - - - 821
Origet *v.* - - - - - - - 743
v. Philadelphia & R. R. R. Co. (123 U. S. 113) - - - - - 136
Potts *v.* - - - - - - 661
v. San Jacinto Tin Co. (125 U. S. 273) 747
v. Smith (125 U. S. 527) - - 584
v. State (Ala.) (123 U. S. 39) - - 73
v. State (La.) (123 U. S. 32) - 69
v. State (Miss.) (123 U. S. 39) - - 73
v. Strong (125 U. S. 656) - - - 823
v. The Strathairly (124 U. S. 558) 580
ex rel. McLean, *v.* Vilas (124 U. S. 36) 329

V.

Vetterlein *v.* Barnes (124 U. S. 169) - 400
Vilas, United States, *ex rel.* McLean *v.* 329

W.

Walker *v.* Dun (123 U. S. 349) - - 175
State (Mo.) *v.* - - - - - 769
The Maggie J. Smith *v.* - - - 175
Wall *v.* Bissell (125 U. S. 382) - - 772
Washington Ice Co. *v.* Webster (125 U. S. 426) - - - - - - - 799
Waters, Union Mut. L. Ins. Co. *v.* - 474
Waterworks Co., New Orleans, *v.* Louisiana Sugar Refining Co. - 607
Webster, Washington Ice Co. *v.* - 799
Weir *v.* Morden (125 U. S. 98) - - 645
Welles *v.* Crane - - - - - - 194
Western Land and Cattle Co., Cox *v.* - 178
Western Union Tel. Co. *v.* Attorney-General of Mass. (125 U. S. 530) 790
v. Hall (124 U. S. 444) - - - 479
West Fairmont Gas Coal Co., Dewey *v.* 179
White *v.* Barber (123 U. S. 392) - - 243
Whitney, Pacific Nat. Bank *v.* - - 567
v. Robertson (124 U. S. 190) - 386
Widdicombe *v.* Childers (124 U. S. 400) 427
Wiese, Dryfoos *v.* - - - - - 362
Wilkinson *v.* State (Neb.) (123 U. S. 286) 152
Willamette Iron Bridge Co. *v.* Hatch (125 U. S. 1) - - - - - - 629
Williams *v.* Conger (125 U. S. 397) - 778
v. Little Rock, M. R. & T. Railway (125 U. S. 109) - - - - 615
Wilson *v.* Riddle (123 U. S. 608) - - 280
Winterbottom, State (Mo.) *v.* - - 124
Wood, Humiston *v.* - - - - - 354
Woodfolk *v.* Seddon - - - - - 598
Woodman *v.* Missionary Society of M. E. Church (124 U. S. 161) - 352
Worthington *v.* Abbott (124 U. S. 434) - 494
Wyly, Boyd *v.* - - - - - - 369

Y.

Yale Clock Co., Parker & Whipple Co. *v.* 100
Yale Lock Mfg. Co. *v.* James (125 U. S. 447) - - - - - - 807

Z.

Zeckendorf *v.* Johnson (123 U. S. 617) 277
Ziebold, State (Kan.) *v.* - - - - - 205

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

Abbott *v.* Middleton, 7 H. L. Cas. 68..... 295
Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 530 (30:740, 742).....299, 505
Adair *v.* Davis, 71 Ga. 769..... 284
Adams *v.* Palmer, 51 Me. 481, 483..... 659
Adams County *v.* Burlington & M. R. R. Co., 112 U. S. 123, 126, 127, 129 (28:678, 679, 680)....238, 458, 612, 678, 689
Adderly *v.* American Mut. Ins. Co., Taney, 126..... 506
Adriatic, The, 107 U. S. 512 (27:497)..... 177
Airhart *v.* Massieu, 98 U. S. 491, 493, 497 (25:213–215)..... 790
Albright *v.* Teas, 106 U. S. 613 (27:295).. 686
Alexandria *v.* Fairfax, 95 U. S. 774 (24:583)..... 442
Alexandria Canal Co. *v.* Swann, 46 U. S. 5 How. 83 (12:60)..... 336
Allen *v.* Baltimore & O. R. R. Co., 114 U. S. 311 (29:200).....228, 232
v. Brown, 5 Mo. 323..... 458
v. McVeigh, 107 U. S. 433 (27:572) 736
v. Rivington, 2 Saund. 111..... 444
Almonester *v.* Kenton, 50 U. S. 9 How. 1, 9 (13:21, 24)..... 611
American Bridge Co. *v.* Heidelbach, 94 U. S. 798 (24:144)..... 698
American Hide & L. S. & D. M. Co. *v.* American Tool & M. Co., 4 Fish. Pat. Cas. 284..... 561
American Ins. Co. *v.* Insley, 7 Pa. 229..... 66
v. Ogden, 20 Wend. 287..... 506
Anderson County Comrs. *v.* Beal, 113 U. S. 227, 241 (28:966, 971)..... 290
Andrews *v.* Carman, 13 Blatchf. 307, 324 161, 563
v. Cross, 19 Blatchf. 294..... 161
v. Hovey, 123 U. S. 267 (31:160)..... 558
v. Marshall, 26 Tex. 212..... 789
Annie Lindsley, The, 104 U. S. 185 (26:716)..... 178
Antoni *v.* Greenhow, 107 U. S. 784 (27:474)..... 231
Apothecaries Co. *v.* Bently, 1 Car. & P. 538..... 187
Arkansas *v.* Little Rock, M. R. & T. R. Co., 31 Ark. 701..... 620
Arnold *v.* Bishop, 1 MacArthur's Pat. Cas. 27..... 562
Arnson *v.* Murphy, 109 U. S. 238 (27:920); 115 U. S. 579 (29:491).....491, 494
Arrowsmith *v.* Harmoning, 118 U. S. 194, 195 (30:243)..... 85
Arthur *v.* Lahey, 96 U. S. 112 (24:766)..... 495
v. Morrison, 96 U. S. 108 (24:764) 495, 645
v. Sussfield, 96 U. S. 128 (24:772).. 645
Atherton *v.* Fowler, 96 U. S. 513 (24:732) 852
Atlantic Delaine Co. *v.* James, 94 U. S. 207, 214 (24:112, 114)..... 421
Atlantic Works *v.* Brady, 107 U. S. 192, 203 (27:438, 442)..... 1000
Atty-Gen. *v.* Clarendon, 17 Ves. Jr. 491, 498..... 406
v. Cleaver, 18 Ves. Jr. 211, 229..... 406
v. Forbes, 2 Myl. & C. 123, 129, 133 214
v. Great Northern R. Co., 1 Drew. & S. 161..... 214
v. Hunter, 1 Dev. Eq. 13..... 214
v. New Jersey R. R. & T. Co., 3 N. J. Eq. 139..... 214
v. Tudor Ice Co., 104 Mass. 244..... 214
v. Utica Ins. Co., 2 Johns. Ch. 371, 378..... 406
Attwood *v.* Small, 6 Clark & F. 232..... 681
Atwood *v.* Winterport, 60 Me. 250..... 443
Aurora *v.* Gillett, 56 Ill. 132..... 640
v. Reed, 57 Ill. 29..... 640
Avegno *v.* Schmidt, 35 La. Ann. 585..... 447
v. Schmidt, 113 U. S. 293, 300 (28:976, 978)..... 449
Ayers, *Ex parte*, 123 U. S. 443, 507 (31:216, 230)..... 409

B.

Babcock *v.* Buffalo, 56 N. Y. 268..... 216
Badger *v.* Badger, 69 U. S. 2 Wall. 95 (17:838)..... 399
Bagnell *v.* Broderick, 38 U. S. 13 Pet. 436 (10:235).....346, 848
Bailey *v.* Ogden, 3 Johns. 421; 3 Am. Dec. 509..... 342
Bain, *Ex parte*, 121 U. S. 1 (30:849)...223, 409
Baird *v.* Williams, 19 Pick. 381..... 379
Baldey *v.* Parker, 2 Barn. & C. 37..... 342
Baldwin *v.* Snowden, 11 Ohio St. 203..... 159
Baltimore & P. R. R. Co. *v.* Grant, 98 U. S. 398, 401 (25:231, 232)..... 279
Bancks *v.* Ollerton, 10 Exch. 168, 182..... 159
Bank of Augusta *v.* Earle, 38 U. S. 13 Pet. 519 (10:274).....652, 653
Commerce *v.* Bissell, 72 N. Y. 615.. 291
Kentucky *v.* Ashley, 27 U. S. 2 Pet. 327 (7:440) 525
Leavenworth *v.* Hunt, 78 U. S. 11 Wall. 391 (20:190)..... 268
West Tenn. *v.* Citizens Bank of La., 80 U. S. 13 Wall. 432 (20:514) 613, 615, 678
Banks *v.* Walker, 2 Sandf. Ch. 344; 3 Barb. Ch. 438..... 311
Barbier *v.* Connolly, 113 U. S. 27, 31 (28:923, 924).....211, 654

Barclay *v.* Howell, 31 U. S. 6 Pet. 498 (8: 477)---- 548
Barnett *v.* Stanton, 2 Ala. 181---- 683
Barron *v.* Baltimore, 32 U. S. 7 Pet. 243, 247 (8:672, 674)---- 86
Barrow *v.* Bank of Louisiana, 2 La. Ann. 453---- 94
Bartemeyer *v.* Iowa, 81 U. S. 14 Wall. 26 (20:792)---- 689
v. Iowa, 85 U. S. 18 Wall. 129 (21: 929)---- 209, 716
Bartram *v.* Robertson, 122 U. S. 116 (30: 1118)---- 387
Bates *v.* Coe, 98 U. S. 31 (25:68)---- 562
v. Days, 17 Fed. Rep. 167---- 380
Batesville Institute *v.* Kauffman, 85 U. S. 18 Wall, 151 (21:775)---- 777
Beall *v.* New Mexico, 83 U. S. 16 Wall. 535 (21:292)---- 525
v. Territory, 1 New Mex. 507, 519- 525
Bean *v.* Patterson, 122 U. S. 496 (30:1126) 193
Beard *v.* Burts, 95 U. S. 434 (24:485)---- 631
Beaver *v.* Taylor, 93 U. S. 46 (23:797)---- 505
Beebe *v.* Robinson, 52 Ala. 66---- 407
Beedle *v.* Bennett, 122 U. S. 71 (30:1074) 161, 564
Beer Co. *v.* Massachusetts, 97 U. S. 25, 33 (24:989. 992)---- 716
Beers *v.* Arkansas, 61 U. S. 20 How. 527 (15:991)---- 229
Bellas *v.* Cleaver, 40 Pa. 260---- 771
Bender *v.* Pitzer, 27 Pa. 335---- 727
Best *v.* Polk, 85 U. S. 18 Wall. 112, 117 (21: 805, 807)---- 847, 850
Bethel *v.* Demaret, 77 U. S. 10 Wall. 537 (19:1007)---- 613
Bigelow *v.* Forrest, 76 U. S. 9 Wall. 339 (19:696)---- 447
v. Winsor, 1 Gray, 299, 301---- 841
Binghamton Bridge, 70 U. S. 3 Wall. 75 (18:143)---- 736
Birckhead *v.* Brown, 5 Sandf. 134---- 415
Birdsall *v.* Coolidge, 93 U. S. 64, 69 (23: 802, 804)---- 668
Birdsell *v.* Shaliol, 112 U. S. 485, 488 (28: 768, 769)---- 668
Black *v.* Thorne, 111 U. S. 122 (28:372)--- 668
Blackington *v.* Douglass, 1 MacArthur's Pat. Cas. 622---- 563
Blake *v.* Robertson, 94 U. S. 728 (24: 245)- 669
Blum *v.* Welborne, 58 Tex. 157, 161---627, 629
Boardman *v.* Reed, 31 U. S. 6 Pet. 328, 341 (8:415, 420)---- 726
Board of Liquidation *v.* McComb, 92 U. S. 531, 541 (23:623, 628)---- 230
Bond *v.* Dustin, 112 U. S. 604, 606, 607 (28:835, 836)---336, 337, 360, 525
Boogher *v.* N. Y. L. Ins. Co., 103 U. S. 90 (26:310)---- 360
Boosey *v.* Gardener, 5 De Gex, M. & G. 122---- 295
Booth *v.* Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487---- 488
Borrowscale *v.* Bosworth, 99 Mass. 381-- 841
Boston Beer Co. *v.* Massachusetts, 97 U. S. 32, 33 (24:991, 992)--209, 212, 218
Bosworth *v.* Swansey, 10 Met. 363----796, 799
Bouchaud *v.* Dias, 3 Denio, 239---- 414
Bowen *v.* Newell, 8 N. Y. 190---- 100
Boyd *v.* U. S., 116 U. S. 634 (29:752)---- 742
Bradlie *v.* Maryland Ins. Co., 37 U. S. 12 Pet. 378, 397 (9:1123, 1131)--- 67
Bradshaw *v.* Atkins, 110 Ill. 329---- 521
Bradstreet *v.* Neptune Ins. Co., 3 Sumn. 600---- 442
Bragg *v.* Fitch, 121 U. S. 478 (30:1008)--- 274
Brandies *v.* Cochrane, 105 U. S. 262 (26: 989)---- 496
Brashier *v.* Gratz, 19 U. S. 6 Wheat. 528 541 (5: 322, 326)---- 637
Brewer *v.* Otoe County, 1 Neb. 373, 382, 384---- 516
Brickill *v.* Mayor of N. Y., 18 Blatchf. 273---- 562
Bridge Proprietors *v.* Hoboken Land & I. Co., 68 U. S. 11 Wall. 116, 142, 143, 145 (17:571, 575, 576)--556, 611, 614, 766
Brine *v.* Hartford F. Ins. Co., 96 U. S. 627 (24:858)---- 346
Brobst *v.* Brobst, 71 U. S. 4 Wall. 2 (18: 387)---- 192
Brockett *v.* Brockett, 44 U. S. 3 How. 691 (11:786)---- 283
Bronson *v.* La Crosse & M. R. R. Co., 67 U. S. 2 Black, 524, 531 (17:359, 360) 74
Brooklyn, C. & N. R. R. Co. *v.* National Bank, 102 U. S. 14, 22 (26:61, 64)---- 201
v. National Bank of the Republic, 102 U. S. 14 (26:61)---- 513
Brown, *Ex parte*, 116 U. S. 401 (29:676)- 122
Re, 2 Story, 502, 513---- 100
v. Atwell, 92 U. S. 327, 330 (23:511, 513)---612, 687, 689
v. Houston, 114 U. S. 622, 630, 631 (29: 257, 260)---710, 715
v. McConnell, 124 U. S. 489 (31: 495) 507
v. Maryland, 25 U. S. 12 Wheat. 419, 439, 441, 446, 447 (6:677, 678, 685, 686, 688)---215, 710, 712, 714, 716, 717
v. Shannon, 61 U. S. 20 How. 55, (15:826)---- 686
v. Spivey, 53 Ga. 155---- 284
Buccleuch *v.* Metropolitan Board of Works, L. R. Eng. & I. App. 5 H. L. 418---- 168
Buchanan *v.* Litchfield, 102 U. S. 278 (26:138)---- 541
Bucher *v.* Fitchburg R. R. Co., 131 Mass. 156---- 797
Buck *v.* Colbath, 70 U. S. 3 Wall. 334 (18: 257)---- 378
Buckingham *v.* McLean, 54 U. S. 13 How. 151, 167 (14:91, 97)---- 193
Buckman *v.* Buckman, 4 N. H. 319---- 379
Buffington *v.* Harvey, 95 U. S. 99 (24:381) 631
Bulkley *v.* Wilford, 2 Clark & F. 102--- 158
Burdell *v.* Denig, 92 U. S. 716 (23:764)--- 666
Burgess *v.* Seligman, 107 U. S. 20 (27:359) 799
Burnham *v.* Bowen, 111 U. S. 776, 783 (28:596, 598)---831, 837
Burr *v.* Duryee, 68 U. S. 1 Wall. 531, 577 (17:650, 660)---- 104
Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53 (28:349)---- 577
Bushell *v.* Wheeler, 15 Q. B. 442---- 841
Butchers Union S. H. & L. S. L. Co. *v.* Crescent City L. S. Co., 111 U. S. 746, 751 (28:585, 587)--211, 718
Butler *v.* Pennsylvania, 51 U. S. 10How. 402 (13:472)---- 659
Butt *v.* Stinger, 4 Cranch, C. C. 252---- 525
Butterfield *v.* Smith, 101 U. S. 570 (25:868) 201
Bywell Castle, The, L. R. 4 P. Div. 219- 178

C.

Caillot v. Deetken, 113 U. S. 215 (28:983) 534
Calder v. Bull, 3 U. S. 3 Dall. 386 (1:648) 408
California, etc. Paving Co. v. Molitor, 118 U. S. 609 (28:1106) 192
Camanche, The, 75 U. S. 8 Wall. 448, 477 (19:397, 405) 79
Campbell v. Mayor of N. Y., 20 Blatchf. 67 562
Canal Bank v. Albany, 9 Wend. 244 168
Candace, The, 1 Low. 126 582
Capen v. Washington Ins. Co., 12 Cush. 517 506
Cardwell v. Am. Bridge Co., 113 U. S. 205 (28:959) 632, 720
Carpenter v. Going, 20 Ala. 587 776
v. Providence Washington Ins. Co., 41 U. S. 16 Pet. 495 (10:1044) 512
v. Turrell, 100 Mass. 450, 452 571
Carpentier v. Montgomery, 80 U. S. 13 Wall. 480, 496 (20:698, 701) 430
Carroll v. Gambrill, 1 MacArthur's Pat. Cas. 581 562
Carter v. Carter, 10 B. Mon. 327 776
v. Greenhow, 114 U. S. 317 (29:202) 229
v. Gregory, 8 Pick. 165 379
Carver v. Astor, 29 U. S. 4 Pet. 1, 83 (7:761, 790) 439
Castle v. Bullard, 64 U. S. 23 How. 172, 183 (16:424, 427) 505
Castro v. U. S., 70 U. S. 3 Wall. 46 (18:163) 497
Catteris v. Cowper, 4 Taunt. 548 444
Caufman v. Cedar Spring Congregation, 6 Binn. 59 726, 727
Cawood Patent, 94 U. S. 695 (24:238) 667
Central Bank v. Copeland, 18 Md. 305 158
Central Nat. Bank v. Conn. Mut. L. Ins. Co., 104 U. S. 54, 64 (26:693, 698) 462
Chambers v. Fisk, 23 Tex. 504 789
Chapman v. Douglas County, 107 U. S. 348, 354, 359 (27:378, 380, 382) 516
v. Goodnow, 123 U. S. 540, 548 (31:235, 238) 458
Charles v. Hoboken, 27 N. J. L. 203 407
Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 544 (9:822) 786
Cheatham v. United States, 92 U. S. 85 (23:561) 494
Chenango Bridge Co. v. Paige, 83 N. Y. 189 216
Cherry v. Boyd, Litt. Sel. Cas. 8 728
Chesapeake & O. R. Co. v. Miller, 114 U. S. 176 (29:121) 132
Chicago v. Rumsey, 87 Ill. 348, 363 640
v. Union Building Asso., 102 Ill. 379, 391 641
Chicago & A. R. R. Co. v. Wiswall, 90 U. S. 23 Wall. 507 (23:103) 69, 279
Chicago & W. I. R. Co. v. Ayres, 106 Ill. 518 641
Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155 (24:94) 842
v. McGinniss, 79 Ill. 269 640
Chicago, M. & St. P. R. R. Co. v. Ackley, 94 U. S. 179 (24:99) 843
Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 579 (28:1084, 1086) 766
Chickenbeard v. U. S., 88 U. S. 21 Wall. 65 (22:477) 139
Chorpenning v. U. S., 94 U. S 397, 398 (24:126, 127) 822
Chouteau v. Gibson, 111 U. S. 200 (28:400) 288, 458, 612
Christy v. Scott, 55 U. S. 14 How. 282 (14:422) 444
Church v. Kelsey, 121 U. S. 282 (30:960) 85
Chy Lung v. Freeman, 92 U. S. 275 (23:550) 709
Citizens Bank v. Board of Liquidation, 98 U. S. 140 (25:114) 612
Clark v. Graham, 19 U. S. 6 Wheat. 577 (5:334) 846
v. Keith, 106 U. S. 464 (27:302) 788
Clarke v. Mathewson, 37 U. S. 12 Pet. 164, 172 (9:1041, 1044) 378
Clay County v. McAleer, 115 U. S. 616 (29:482) 127
Clement v. Northumberland Coal Co., 87 Pa. 291 780
Cleveland v. Chandler, 3 Stew. (Ala.) 489 776
Clifton v. U. S., 45 U. S. 4 How. 242, 250 (11:957, 961) 740, 741, 742
Clinton v. Englebrecht, 80 U. S. 13 Wall. 444 (20:661) 656
Cochran v. McCleary, 22 Iowa, 75 406
Cochrane v. Deener, 94 U. S. 780, 787, 788 (24:139, 141) 989
Coffee v. Groover, 20 Fla. 64, 81 55
Coffey v. U. S., 116 U. S. 427, 433, 434, 436, 442, 443 (29:681, 683, 684, 686) 740, 741, 747
Coffin v. Knott, 2 G. Greene (Iowa) 582 415
v. Ogden, 85 U. S. 18 Wall. 120 (21:821) 147
Cohen v. Goldsboro Comrs., 77 N. C. 2 406
Collins v. Barclay, 7 Pa. 78 728
Colorado Cent. R. R. Co. v. White, 101 U. S. 98 (25:860) 428
Colorado Coal & Iron Co. v. U. S., 123 U. S. 307 (31:182) 751
Colorado Midland R. Co. v. Jones, 29 Fed. Rep. 193 417
Columbia Ins. Co. v. Lawrence, 35 U. S. 10 Pet. 517 (9:516) 66
Columbus Ins. Co. v. Peoria Bridge Asso., 6 McLean, 70 736
Comegys v. Clarke, 44 Md. 108 159
Commonwealth v. Alger, 7 Cush. 53 212
v. Webster, 5 Cush. 295 87
Confederate Note Case, 86 U. S. 19 Wall. 548 (22:196) 613
Confiscation Cases, 87 U. S. 20 Wall. 92 (22:320) 447
Conn v. Penn, 1 Pet. C. Ct. 496 727
Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51 (27:648) 846
Connemara, The, 108 U. S. 352 (27:751) 79
Conry v. Caulfield, 2 Ball & B. 255 158
Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92 (24:68) 562
Continental Ins. Co. v. Rhoades, 119 U. S. 237 (30:380) 820
Converse v. Burgess, 59 U. S. 18 How. 413 (15:455) 168
Cook v. Lillo, 103 U. S. 792 (26:460) 613
v. Pa., 97 U. S. 566, 574 (24:1015, 1018) 710
Cooley v. Port Wardens, 53 U. S. 12 How. 299, 318, 319 (13:996, 1004) 705, 707, 715
Coon v. Wilson, 113 U. S. 268, 277 (28:963, 965) 107

Cooper *v.* Roberts, 59 U. S. 18 How. 173 (15:388) 851
v. State, 16 Ohio St. 328 87
Copeland *v.* New Eng. Mar. Ins. Co., 2 Met. 432 506
Corbet *v.* Johnson, 1 Brock. 77, 81 313
Corbin *v.* Black Hawk Co., 105 U. S. 659 (26:1186) 576
Corcoran *v.* Chesapeake & O. Canal Co., 94 U. S. 741, 745 (24:190, 191) .. 137
Corning *v.* Burden, 56 U. S. 15 How. 252, 267 (14:683, 690) 989
v. Smith, 6 N. Y. 82 311
Corn-planter Patent, 90 U. S. 23 Wall. 181, 217 (23:161, 168) 107
Corser *v.* Cartwright, L. R. 7 H. L. 781 .. 777
Cousin *v.* Labatut, 60 U. S. 19 How. 202 (15:601) 611
Covell *v.* Heyman, 111 U. S. 176 (28:390) 378
Cox *v.* Baldwin, 1 La. 401 542
Crandall *v.* Nev. 73 U. S. 6 Wall. 42 (18:746) 705
Crane *v.* Meginnis, 1 Gill & J. 474 658
v. Morris, 31 U. S. 6 Pet. 598 (8:514) 505
Crescent City Co. *v.* Butchers Union Co., 120 U. S. 141, 146 (30:614, 616) 611
Crommelin *v.* Minter, 9 Ala. 594 852
Cromwell *v.* Sac County, 94 U. S. 351 (24:195) 414
Cronise *v.* Cronise, 54 Pa. 260 657
Crosby *v.* Beale, 84 U. S. 17 Wall. 336 (21:602) 399
Crossley *v.* New Orleans, 108 U. S. 105 (27:667) 611
Crow *v.* Oxford, 119 U. S. 215 (30:388) .. 75
Crowell *v.* Randell, 35 U. S. 10 Pet. 368, 398 (9:458, 470) 611
Crum *v.* Cotting, 22 Iowa, 411 311
Cummins *v.* Boston, 25 Ga. 277, 283 284
Cunningham *v.* Macon & B. R. R. Co., 109 U. S. 446 (27:992) 224
Curtis *v.* Kitchen, 8 Mart. O. S. 706 542
Cutting *v.* Grand Trunk R. Co., 13 Allen, 381 483

D.

Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46 (31:683) 688
Daniels *v.* Chicago & R. I. R. R. Co., 70 U. S. 3 Wall. 250 (18:224) 192
Darrah *v.* Bryant, 56 Pa. 75 729
Dartmouth College Case, 17 U. S. 4 Wheat. 519 (4:630) 659
Davenport National Bank *v.* Davenport Equalization Board, 123 U. S. 83 (31:94) 693
Davidson *v.* New Orleans, 96 U. S. 97, 101 (24:616, 618) 86, 767
Davis *v.* Am. Society etc., 75 N. Y. 362 ... 406
v. Fredericks, 21 Blatchf. 556 562
v. Gray, 83 U. S. 16 Wall. 203, 220 (21:447, 453) 223, 232
Day *v.* Green, 4 Cush. 433, 438 612
v. Highland St. R. Co., 135 Mass. 113 798
v. Micou, 85 U. S. 18 Wall. 156, 160 (21:860, 862) 447
Dean *v.* Frellsen, 23 La. Ann. 513 366
v. Mason, 61 U. S. 20 How. 198 (15:876) 666
Deffeback *v.* Hawke, 115 U. S. 392, 404 (29:423, 426) 190
De Florez *v.* Raynolds, 17 Blatchf. 436; 8 Fed. Rep. 484 156
De La Croix *v.* Chamberlain, 25 U. S. 12 Wheat. 600 (6:742) 55, 63
Delahanty *v.* Warner, 75 Ill. 185 407
Delassus *v.* U. S., 34 U. S. 9 Pet. 117 (9:71) 56
Delmas *v.* Merchants Mut. Ins. Co., 81 U. S. 14 Wall. 661, 663, 667 (20: 757–759) 611, 613
De Modo Levandi Fines, 18 Edw. I 158
Dennistoun *v.* Stewart, 59 U. S. 18 How. 565, 568 (15:489, 490) 192
Denny *v.* Williams, 5 Allen, 5 341
Des Moines Nav. & R. R. Co. *v.* Iowa Homestead Co., 123 U. S. 522 (31:202) 409
Detroit City R. Co. *v.* Guthard, 114 U. S. 133 (29:118) 612, 678
Devonshire, The, 8 Sawy. 209 585
Devron *v.* First Municipality, 4 La. Ann. 11 406
Dexter, The, 90 U. S. 23 Wall. 69 (23:84) 178
Dewey *v.* Campau, 4 Mich. 565 159
DeWolf *v.* Rabaud, 26 U. S. 1 Pet. 476 (7:227) 505
Dial *v.* Reynolds, 96 U. S. 340 (24:644) 311, 409
Dickey *v.* Reed, 78 Ill. 261 407
Diggs *v.* Wolcott, 8 U. S. 4 Cranch, 179 (2:587) 409
District Atty. *v.* Lynn & B. R. R. Co., 16 Gray, 245 214
Ditson *v.* Ditson, 4 R. I. 101 659
Dixon *v.* Ramsay, 7 U. S. 3 Cranch, 319, 323 (2:453, 454) 775
Dobson *v.* Hartford Carpet Co., 114 U. S. 439, 444, 445 (29:177–179) 669
Dodge *v.* Hollinshead, 6 Minn. 25 159
Doe *v.* Dyson, 1 Mood. & M. 77 444
v. Eslava, 50 U. S. 9 How. 443 (13: 209) 56
v. Newton, 5 Ad. & El. 514 786
v. Reade, 8 East, 356 444
v. Whitehead, 8 Ad. & E. 571 187
Doll *v.* Meador, 16 Cal. 295 852
Dollar Savings Bank *v.* U. S., 86 U. S. 19 Wall. 227 (22:80) 139
Dolph *v.* Barney, 5 Oreg. 191 159
Donahue *v.* Will County, 100 Ill. 94 407
Donnell *v.* Columbian Ins. Co., 2 Sumn. 366, 371 668
Donoho *v.* Fish, 58 Tex. 164 627
Dow *v.* Memphis & L. R. R. R. Co., 124 U. S. 652, 654 (31:565) .. 698, 831, 837
Draper *v.* Davis, 102 U. S. 370, 371 (26: 121, 122) 496
v. Wattles, 3 Bann. & Ard. 618 562
Drew *v.* Swift, 46 N. Y. 204 444
Driscoll *v.* U. S. 18 Ct. Cl. 15, 40 423
Drummond *v.* Prestman, 25 U. S. 12 Wheat. 515 (6:712) 807
Drury *v.* Foster, 69 U. S. 2 Wall. 24, 34 (17:780, 781) 159
Dubuque & P. R. R. Co. *v.* Litchfield, 64 U. S. 23 How. 66 (16:500) .. 195, 786
Ducat *v.* Chicago, 77 U. S. 10 Wall. 410 (19:972) 652, 653
Dugger *v.* Bocock, 104 U. S. 596, 601 (26: 846, 848) 613
Dunlop *v.* Munroe, 11 U. S. 7 Cranch, 270 (3:339) 260
Durant *v.* Essex Company, 74 U. S. 7 Wall. 107, 109 (19:154, 156) .. 841

E.

Eagle Fire Co. *v.* Lent, 1 Edw. Ch. 301; 6 Paige, 635 311
Eames *v.* Andrews, 122 U. S. 40, 47 (30: 1064, 1066) 161
Eastern Transportation Line *v.* Hope, 95 U. S. 297, 298 (24:477) 505
Easton *v.* Salisbury, 62 U. S. 21 How. 426 428 (16:181, 182) 847, 850
East St. Louis *v.* Zebley, 110 U. S. 321 (28:162) 127
Eberstein *v.* Oswalt, 47 Mich. 254 477
Edwards *v.* Darby, 25 U. S. 12 Wheat. 206, 210 (6:603, 604) 396
v. Elliott, 88 U. S. 21 Wall. 532, 557 (22:487, 492) 86
v. Schoeneman, 104 Ill. 278 521
v. United States, 102 U. S. 575 (26: 293) 534
Egbert *v.* Lippmann, 15 Blatchf. 295 563
v. Lippmann, 104 U. S. 333, 334 (26:755) 144, 161
Ehrhardt *v.* Hogaboom, 115 U. S. 67 (29: 346) 852
Eldridge *v.* Kuehl, 27 Iowa, 160 311
Elgin *v.* Eaton, 83 Ill. 535 641
Elizabeth *v.* Pavement Co., 97 U. S. 126, 134, 139 (24:1000, 1004, 1006) 144, 163, 667, 669
Elizabeth Jones, The, 112 U. S. 526 (28: 816) 178
Ellicott *v.* Pearl, 35 U. S. 10 Pet. 412 (9: 475) 727
Elliott *v.* Peirsol, 26 U. S. 1 Pet. 328, 340 (7:164, 170) 159, 409, 847
v. Swartwout, 35 U. S. 10 Pet. 151 (9:378) 645
v. Wiltz, 107 U. S. 711 (27:448) 225
Ellithorp *v.* Robertson, 1 MacArthur's Pat. Cas. 585 563
Escanaba Co. *v.* Chicago, 107 U. S. 678, 688, 690 (27:442, 447) 152, 631, 632, 684, 720
Everett *v.* Beebe, 37 Iowa, 452 311

F.

Farnsworth *v.* Minnesota & P. R. R. Co., 92 U. S. 49 (23:530) 385
Fay *v.* Cordesman, 109 U. S. 408 (27:979) 274
Fellows *v.* Comrs., 36 Barb. 655 237
Fenn *v.* Holme, 62 U. S. 21 How. 481, 484–487 (16:198–200) 846, 405
Ferson *v.* Dodge, 23 Pick. 287 295
Field *v.* Seabury, 60 U. S. 19 How. 323 (15:650) 851
Finley *v.* Bank of U. S., 24 U. S. 11 Wheat. 304 (6:480) 312
First Nat. Bank *v.* Colby, 88 U. S. 21 Wall. 609, 613 (22:687, 688) 570
v. Kentucky, 76 U. S. 9 Wall. 353 (19:701) 794
of Cleveland *v.* Shedd, 121 U. S. 74 (30:877) 74
Fisher *v.* Bassett, 9 Leigh, 119, 131–133 409
v. Cockerell, 30 U. S. 5 Pet. 248, 255 (8:114, 116) 678
v. Meister, 24 Mich. 447 158
v. U. S., 15 Ct. Cl. 328 423
Fisk, *Ex parte*, 113 U. S. 713, 718, 720 (28:1117, 1119, 1120) 223, 409, 798
v. Newton, 1 Denio, 45 290
Fletcher *v.* Holmes, 32 Ind. 497 775
Florida *v.* Georgia, 58 U. S. 17 How. 478 (15:181) 58
Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118 (26:327) 621
Floyd Acceptances, 74 U. S. 7 Wall. 676 (19:178) 759
Forbes *v.* Boston & L. R. R. Co., 133 Mass. 154 290
Ford *v.* U. S. 116 U. S. 213 (29:608) 130
Forgay *v.* Conrad, 47 U. S. 6 How. 201, 204 (12:404, 405) 74
Fosdick *v.* Schall, 99 U. S. 235 (25:339) 881, 887
Foster *v.* Kansas, 112 U. S. 201, 206 (28: 629, 697) 209, 716
v. Mora, 98 U. S. 425 (25:191) 846
v. Neilson, 27 U. S. 2 Pet. 253 (7: 415) 61
Four Packages *v.* U. S., 97 U. S. 404, 411 (24:1031) 739
Fowler *v.* Whiteman, 2 Ohio St. 270 444
Fox *v.* Harding, 7 Cush. 516 433
v. Ohio, 46 U. S. 5 How. 410, 434 (12:213, 223) 86
Freeman *v.* Howe, 65 U. S. 24 How. 450 (16:749) 378
Friedenstein *v.* U. S., 125 U. S. 224 (31: 736) 746
Frisbie *v.* Whitney, 76 U. S. 9 Wall. 187 (19:668) 852
Fritz *v.* Brandon, 78 Pa. 351 728
Furman *v.* Nichol, 75 U. S. 8 Wall. 44, 56 (19:370, 375) 766
v. Union Pac. R. Co., 9 Cent. Rep. 284; 106 N. Y. 579 291
Fussell *v.* Gregg, 113 U. S. 550 (28:993) .. 112

G.

Gadsden *v.* Brown, Speer's Eq. (S. C.) 37, 41 542
Gaines *v.* Fuentes, 92 U. S. 20 (23:528) .. 416
v. Thompson, 74 U. S. 7 Wall. 347 (19:62) 122
Galveston, H. & H. R. R. Co. *v.* Cowdrey, 78 U. S. 11 Wall. 459, 483 (20: 199, 207) 566, 698
Garcia *v.* Lee, 37 U. S. 12 Pet. 511 (9:1176) 61
Garretson *v.* Clark, 111 U. S. 120 (28:371) 668
Gault *v.* Wallis, 53 Ga. 675 406
Gay *v.* Minot, 3 Cush. 352 776
Gee *v.* Pritchard, 2 Swanst. 402, 413 406
General Mut. Ins. Co. *v.* Sherwood, 55 U. S. 14 How. 352 (14:452) 66
Georgia *v.* Brailsford, 2 U. S. 2 Dall. 402 (1:433) 224
Giant Powder Co. *v.* California Powder Works, 98 U. S. 126 (25:77) .. 106
Gibbons *v.* Ogden, 22 U. S. 9 Wheat. 1, 203, 205 (6: 23, 71, 72) .. 210, 708, 716
Gibson *v.* Shufeldt, 122 U. S. 27 (30:1083) 192
Gildart *v.* Gladstone, 12 East, 668 736
Gill *v.* Wells, 89 U. S. 22 Wall. 1 (22:699) 106
Gillham *v.* Madison Co. R. Co., 49 Ill. 484 640
Gilman *v.* Illinois & M. Tel. Co., 91 U. S. 603 (23:405) 698
v. Philadelphia, 70 U. S. 3 Wall. 713, 718, 724, 730 (18:96, 101) 632, 634, 705, 716, 720
Gleason *v.* Florida, 76 U. S. 9 Wall. 779 (19:730) 689

Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 203 (29:158, 161) 215, 715
Gonzales *v.* Ross, 120 U. S. 605, 624 (30: 801, 808) 789
Goodnow *v.* Chapman, 64 Iowa, 602 197
v. Litchfield, 68 Iowa, 275; 67 Iowa, 692 ..... 197, 201
v. Plumb, 64 Iowa, 672 269
v. Stryker, 61 Iowa, 261; 62 Iowa, 221 ..... 197, 287
v. Wells, 67 Iowa, 654 ..... 197, 198
Goodrich *v.* Beaman, 37 Iowa, 563 199
Goodwin *v.* Morse, 9 Met. 278 525
Goodyear Dental V. Co. *v.* Davis, 102 U. S. 222, 228 (26:149, 151) 274
Gordon *v.* Green, 10 Ga. 534, 543 284
v. U. S., 69 U. S. 2 Wall. 561 (17: 921) 533
v. U. S., 74 U. S. 7 Wall. 188, 195 (19:35, 37) 822
Goulds Mfg. Co. *v.* Cowing, 105 U. S. 253 (26:987) 668
Governor of Georgia *v.* Madrazo, 26 U. S. 1 Pet. 110, 123, 124 (7:73, 79) 224
Graham *v.* Anderson, 42 Ill. 514 159
v. McCormick, 10 Biss. 39; 5 Bann. & Ard. 247 562
v. Peat, 1 East, 246 444
Grand Gulf R. Co. *v.* Marshall, 53 U. S. 12 How. 165, 167 (13:988, 989) 611
Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700 (27:266) 505
Grant *v.* Vaughan, 3 Burr. 1516 525
Greely *v.* Thompson, 51 U. S. 10 How. 225 (13:397) 167, 169
Green *v.* Biddle, 21 U. S. 8 Wheat. 1, 84 (5:547, 568) 233
Greene *v.* Godfrey, 44 Me. 25 159
Greenwood *v.* Greenwood, L. R. 5 Ch. Div. 954 295
Griffin *v.* Colver, 16 N. Y. 489 483
Griffith *v.* Williams, 1 Cromp. & J. 47 786
Grigsby *v.* Purcell, 99 U. S. 505, 507 (25: 354, 355) 298, 534
Gross *v.* U. S. Mortgage Co., 108 U.S. 481, 487 (27:796, 798) 678

H.

Hadley *v.* Baxendale, 9 Exch. 341 483
Hagan *v.* Lucas, 35 U. S. 10 Pet. 400 (9:470) 378
v. Walker, 55 U. S. 14 How. 29, 37 (14:312, 316) 312
Hagar *v.* Reclamation Dist., 111 U. S. 701 (28:569) 767
Hagerty *v.* Mathers, 31 Pa. 348 728
Hagner *v.* Heyberger, 7 Watts. & S. 104 406
Hagood *v.* Southern, 117 U. S. 52 (29: 805) 224, 228
Hahn *v.* U. S., 107 U. S. 402 (27:527) 396
Haines *v.* Beach, 3 Johns. Ch. 459 312
v. Carpenter, 91 U. S. 254 (23:345) 409
Hale *v.* Finch, 104 U. S. 261, 265 (26:732, 733) 201
v. Huse, 10 Gray, 99 168
Hall *v.* DeCuir, 95 U. S. 485, 488 (24:547, 548) 215, 707
v. Macneale, 107 U. S. 90, 97 (27: 367, 369) 147
v. Patterson, 51 Pa. 289 158
v. Russell, 101 U. S. 503 (25:829) 489, 660
Hall *v.* Wisconsin, 103 U. S. 5 (26:302) .. 772
Hamilton *v.* Boston, 14 Allen, 475 798
v. Menor, 2 Serg. & R. 70 727
v. Vicksburg R. Co. 119 U. S. 280, 281 (30:393, 394) 682, 720
Hancock *v.* Holbrook, 119 U. S. 587 (30: 538) 204
Hannibal & St. J. R. R. Co. *v.* Husen, 95 U. S. 465, 471 (24:527, 530) 211, 716
Hanrick *v.* Barton, 88 U. S. 16 Wall. 166, 171, 172 (21:350, 352) 789
Harkins *v.* Forsyth, 11 Leigh, 294 159
Harris *v.* Elliott, 35 U. S. 10 Pet. 25 (9:333) 193
v. Schryock, 82 Ill. 119 407
v. Sumner, 2 Pick. 129 268
Hart *v.* Bowie, 34 La. Ann. 323 94
Hartell *v.* Tilghman, 99 U. S. 547 (25:357) 686
Hartley *v.* Ferrell, 9 Fla. 374 173
v. Frosh, 6 Tex. 208 159
Hartnett *v.* Wandell, 60 N. Y. 346, 350 .. 776
Hatch *v.* Wallamet Iron Bridge Co., 7 Sawy. 127, 141 631
Havemeyer *v.* Iowa County, 70 U. S. 3 Wall. 294 (18:38) 193
Hayes *v.* Missouri, 120 U. S. 68, 71 (30: 578, 580) 87, 654
Hays *v.* Vickery, 41 Ind. 583 776
Hayward *v.* Eliot Nat. Bank, 96 U. S. 617 (24:857) 399
Head Money Cases, 112 U. S. 580 (28:798) 388
Heath *v.* Hildreth, 1 MacArthur's Pat. Cas. 12 562
Heckers *v.* Fowler, 69 U. S. 2 Wall. 123 (17:759) 336
Heine *v.* Levee Comrs., 86 U. S. 19 Wall. 655 (22:223) 405
Henderson *v.* Mayor of N. Y., 92 U. S. 259, 273 (23:543, 549) 211, 706
v. Poindexter, 25 U. S, 12 Wheat. 530 (6:718) 60
Henry *v.* Francestown Soapstone Stove Co., 2 Bann. & Ard. 221; 5 Bann. & Ard. 108 562
v. Providence Tool Co., 3 Bann. & Ard. 501 562
Hepburn *v.* Dubois, 37 U. S. 12 Pet. 345 (9:1111) 159
v. School Directors, 90 U. S. 23 Wall. 480 (23:112) 97
Herron *v.* Dater, 120 U. S. 464 (30:748) .. 439
Hesper, The, 122 U. S. 256 (30:1175) 79
Hewitt *v.* Filbert, 116 U.S. 142 (29:581) 293, 497
Hickey *v.* Stewart, 44 U. S. 3 How. 750 762 (11:814, 819) 60, 409
Hickman *v.* Haynes, L. R. 10 C. P. 598, 337
Higgins *v.* McCrea, 116 U. S. 671 (29:764) 254
Hill *v.* Smith, 34 Vt. 535, 547 337
v. Tucker, 54 U. S. 13 How. 458, 466 (14:223, 226) 775
Hilton *v.* Dickinson, 108 U. S. 168 (27: 689) 663
v. Merritt, 110 U. S. 97 (28:83) 166
Hitz *v.* National Met. Bank, 111 U. S. 722 (28:577) 157, 160
Hoadley *v.* San Francisco, 94 U. S. 4 (24:34) 556
Hoboken Land & I. Co. *v.* Hoboken, 7 Vroom, 540 ..... 548, 553
Hodges *v.* U. S. 18 Ct. Cl. 704 396
Hogan *v.* Hogan, 89 Ill. 428 521
Holderstaffe *v.* Saunders, Cas. *temp.* Holt. 136; 6 Mod. 16 406

Hole *v.* Rittenhouse, 25 Pa. 491 729
Holloway *v.* Whiteley, 71 U. S. 4 Wall. 522 (18:385) 122
Holmes *v.* Trout, 32 U. S. 7 Pet. 171 (8:660) 111
Holt *v.* People, 13 Mich. 224 87
Home Ins. Co. *v.* City Council of Augusta, 93 U. S. 116 (23:825) 612
v. New York, 119 U. S. 129 (30:350) 855
Hood *v.* Frellsen, 31 La. Ann. 577 368
Hoofnagle *v.* Anderson, 20 U. S. 7 Wheat. 212 (5:437) 851
Hoole *v.* Atty-Gen. 22 Ala. 194 214
Hooper *v.* Scheimer, 64 U. S. 23 How. 235 (16:452) 346
Hoover *v.* Epler, 52 Pa. 522 542
Hoppet, The. *v.* U. S., 11 U. S. 7 Cranch, 389, 393 (3:380, 382) 741
Hopt *v.* Utah, 120 U. S. 430 (30:708) 87
Horn *v.* New Lots, 83 N. Y. 100 766
v. Ross, 20 Ga. 210, 223 284
Horne *v.* Midland R. Co., L. R. 8 C. P. 131 483
Horton *v.* Ingersoll, 13 Mich. 409 312
Hovey *v.* Stevens, 1 Wood. & M. 290; 3 Wood. & M. 17 559
Howard *v.* Borden, 13 Allen, 299 341
Hoxie *v.* Pacific Mut. Ins. Co., 7 Allen, 211 506
Hudnit *v.* Nash, 16 N. J. Eq. 550 312
Hughes *v.* U. S., 71 U. S. 4 Wall. 236 (18: 304) 750
Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258 (25:344) 831
Huiskamp *v.* Moline Wagon Co., 121 U. S. 310, 319 (30:971, 974) 193
Humberstone *v.* Stanton, 1 Ves. & B. 388, 295
Hume *v.* Beale, 84 U. S. 17 Wall. 336 (21: 602) 399
Hunnicutt *v.* Peyton, 102 U. S. 333 (26: 113) 727
Hunt *v.* Howe, 1 MacArth. Pat. Cas. 366, 562
v. Rousmanier, 21 U. S. 8 Wheat. 174, 204 (5:589, 597) 772
v. Weiner, 39 Ark. 70 401
Huse *v.* Glover, 119 U. S. 543, 544, 546, 548 (30:487, 488, 489) 151, 152, 632, 720

I.

Illinois Cent. R. R. *v.* Turrill, 110 U. S. 301, 303 (28:154, 155) 672
Independence, The, 2 Curt. C. C. 350, 357 79
Iowa County *v.* Mineral Point R. R. Co., 24 Wis. 93, 121 212
Iowa Falls & S. C. R. R. Co. *v.* Cherokee County, 37 Iowa, 483 199
v. Woodbury County, 38 Iowa, 498, 199
Iowa Homestead Co. *v.* Des Moines Nav. & R. R. Co., 63 Iowa, 285 203
v. Des Moines Nav. & R. R. Co., 84 U. S. 17 Wall. 153 (21:622) 195, 197, 201, 236, 269
Irvine *v.* Lowry, 39 U. S. 14 Pet. 293 (10: 462) 100
Irwin *v.* Keen, 3 Whart. 344, 355 401
Ives *v.* Sargent, 119 U. S. 652, 662, 663 (30:544, 548) 107

J.

Jacks *v.* Helena, 115 U. S. 288 (29:392) .. 678
Jackson *v.* Boston & W. R. R. Corp. 1 Cush. 575 444
Jackson *v.* Denn, 5 Cow. 200 ..... 444, 445
v. Harder, 4 Johns. 202 444
v. Hayner, 12 Johns. 469 158
v. Hazen, 2 Johns. 22, 438 444
v. Meyers, 3 Johns. 388 444
v. Rightmyre, 16 Johns. 314 444
v. Schoonmaker, 4 Johns. 161 158
v. Walker, 7 Cow. 637 444
Jacksonville *v.* Lambert, 62 Ill. 519 640
James *v.* Campbell, 104 U. S. 356 (26:786) 811
Jamison *v.* Jamison, 3 Whart. 457 159
Jefferson Branch Bank *v.* Skelly, 66 U. S. 1 Black, 436 (17:173) 614
Jeffries *v.* Mutual L. Ins. Co., 110 U. S. 305 (28:156) 772
Jennings *v.* Broughton, 5 De Gex, M. & G. 126 683
Jerome *v.* McCarter, 94 U. S. 734 (24:136) 312
Jersey City *v.* Morris Canal & Banking Co., 1 Beas. 548 548
Jewell *v.* Boston, 101 Mass. 585 693
v. Knight, 123 U. S. 426 (31:190) .. 423
Johnson *v.* Harmon, 94 U. S. 371 (23:271) 283
v. M'Intosh, 21 U. S. 8 Wheat. 589 (5:692) 63
v. Towsley, 80 U. S. 13 Wall. 72, 87 (20:485, 488) 122, 123, 430
Johnston *v.* Wallace, 53 Miss. 331 159
Jones *v.* Andover, 10 Allen, 18 ..... 796, 798
v. Bolles, 76 U. S. 9 Wall. 364, 369 (19:734, 736) 122
v. Buckell, 104 U. S. 554 (26:841) .. 260
v. McMasters, 61 U. S. 20 How. 17 (15:809) 56
v. Montes, 15 Tex. 351, 352 789
v. Muisbach, 26 Tex. 235 439
v. Sewall, 3 Cliff. 563 561
v. Simpson, 116 U. S. 609 (29:742) .. 193
Justice *v.* Jones, 1 MacArth. Pat. Cas. 635, 563
Justices, The, *v.* Murray, 76 U. S. 9 Wall. 274, 278 (19:658, 660) 86

K.

Kafer *v.* Harlow, 5 Allen, 348 805
Kansas Pac. R. Co. *v.* Dunmeyer, 113 U. S. 629, 642 (28:1122, 1126) 847, 850
Kansas Pac. R. Co. *v.* Prescott, 83 U. S. 16 Wall. 603 (21:373) 386
Kaufman *v.* Lee, 106 U. S. 196, 213, 215 (27:171, 179, 180) 232
Keating *v.* Vaughn, 61 Tex. 518 628
Kelleher *v.* Darling, 4 Cliff. 434 562
Kelly *v.* Pittsburgh, 104 U. S. 78, 79, 80 (26:658, 659) 86, 767
Kelsey *v.* Abbott, 13 Cal. 609 312
Kendall *v.* Winsor, 62 U. S. 21 How. 322 (16:165) 558, 559
Kennebec & P. R. R. Co. *v.* Portland & K. R. Co., 81 U. S. 14 Wall. 23, 25, 26 (20:850, 851) 614, 678
Kennedy *v.* Hunt, 48 U. S. 7 How. 586, 593 (12:829, 833) 591
v. Lubold, 88 Pa. 246 726
Kentucky *v.* Dennison, 65 U. S. 24 How. 66, 96, 97, 98 (16:717, 725, 726) 227
Kerr *v.* Preston, L. R. 6 Ch. D. 463 406
Kerrison *v.* Stewart, 93 U. S. 155, 160 (23:843, 845) 137, 401
Ketchum *v.* St. Louis, 101 U. S. 306 (25: 999) 622
Killian *v.* Clark, 111 U. S. 784 (28:599) .. 534

Kimball *v.* Wellington, 20 N. H. 439.... 379
King *v.* Picton, 30 How. St. Tr. 869–871 439
Kinsman *v.* Parkhurst, 59 U. S. 18 How. 289 (15:385)..... 687
Kirtland *v.* Hotchkiss, 100 U. S. 491, 497 (25:558, 561)..... 767
Kittredge *v.* Folsom, 8 N. H. 98, 111.... 776
Klein *v.* Russell, 86 U. S. 19 Wall. 433 (22:116)..... 561
Klinger *v.* Missouri, 80 U. S. 13 Wall. 257, 263 (20:635, 637).....611, 614
Knight *v.* Knight, 3 P. Wms. 331, 334.. 313
Knox *v.* Exchange Bank, 79 U. S. 12 Wall. 379, 383 (20:414, 415)... 612
Kohl *v.* U. S., 91 U. S. 367 (23:449)..... 416
Kountze *v.* Omaha Hotel Co., 107 U. S. 378 (27:609)..... 698
Kramer *v.* Goodlander, 98 Pa. 366..... 727
Kreiger *v.* Shelby R. Co., 125 U. S. 39 (31:675)..... 686
Krippendorf *v.* Hyde, 110 U. S. 276, 283, 284 (28:145, 148)..181, 378, 380, 821

L.

Lafayette Ins. Co. *v.* French, 59 U. S. 18 How. 404 (15:451)..... 652
Lammon *v.* Feusier, 111 U. S. 17, 19 (28: 337)..... 378
Landers *v.* Bolton, 26 Cal. 393..... 159
Lange, *Ex parte*, 85 U. S. 18 Wall. 163 (21:872)..... 223
Lawrence *v.* Heister, 3 Harr. & J. 371... 158
Leasure *v.* Coburn, 57 Ind. 274..... 193
Leavenworth, L. & G. R. R. Co. *v.* U. S., 92 U. S. 733 (23:634)..736, 847, 850
Leffingwell *v.* Warren, 67 U. S. 2 Black, 599 (17:261)..... 798
Leggett *v.* Avery, 101 U. S. 256 (25:865).. 274
Leighton *v.* Brown, 98 Mass. 515..... 805
Leitensdorfer *v.* Webb, 61 U. S. 20 How. 176 (15:891)..... 56
Levy *v.* Shreveport, 27 La Ann. 620.... 406
Lewis *v.* Smith, 9 N. Y. 502, 516..... 312
License Cases, 46 U. S. 5 How. 504, 599 (12:256, 299).....209, 704, 708, 716
License Tax Cases, 72 U. S. 5 Wall. 462 (18:497)..... 212
Lincoln Twp. *v.* Cambria Iron Co., 103 U. S. 412, 415 (26:518, 519)... 740
Litchfield *v.* Ballou, 114 U. S. 190 (29:132) 541
v. Crane, (31:199).....204, 269
v. Hamilton County, 40 Iowa, 66.. 198
v. Hamilton County, 101 U. S. 781 (25:928)..... 198
v. Register & Receiver, 76 U. S. 9 Wall. 575 (19:681)..... 122
v. Vernon, 41 N. Y. 123, 141:.... 766
v. Webster County, 101 U. S. 773 (25:925)..... 198
Littlefield *v.* Perry, 88 U. S. 21 Wall. 205, 229 (22:577, 581).....666, 672
Livingston *v.* Moore, 35 U. S. 7 Pet. 469, 552 (8:751, 781)..... 86
v. Woodworth, 56 U. S. 15 How. 546 (14:809)..... 666
Loan Asso. *v.* Topeka, 87 U. S. 20 Wall. 663 (22:461)..... 657
Locke *v.* U. S., 7 Cranch, 339 (3:364)..740, 742
Lodge *v.* Lodge, 5 Mason, 407..... 379
Louden *v.* Blythe, 16 Pa. 532; 27 Pa. 22.. 158
Louisiana *v.* Jumel, 107 U. S. 711, 728 (27:448, 454).....225, 231
Louisiana *v.* New Orleans, 102 U. S. 203 (26: 132)..... 229
Louisiana City *v.* Wood, 102 U. S. 294 (26:153)..... 541
Louisville & N. R. Co. *v.* Palmes, 109 U. S. 244 (27:922)..... 614
Lovejoy *v.* Murphy, 70 U. S. 3 Wall. 1, 19 (18:129, 134)..... 201
Ludkins *v.* Aird, 73 U. S. 6 Wall. 78 (18: 750)..... 268
Luther *v.* Borden, 48 U. S. 7 How. 1, 40, 47 (12:581, 598, 601).....193, 798

M.

McAllister *v.* McAllister, 7 B. Mon. 269. 786
McCausland *v.* Fleming, 63 Pa. 38..... 727
McCluny *v.* Jackson, 6 Gratt. 96..... 379
McClurg *v.* Kingsland, 42 U. S. 1 How. 202 (11:102).....558, 562, 564
v. Lecky, 3 Penr. & W. 83..... 268
McComb *v.* Spangler, 71 Cal. 418..... 312
McCormick *v.* Seymour, 2 Blatchf. 240.. 559
v. Sullivant, 23 U. S. 10 Wheat. 192 (6:300).....204, 346
McCulloch *v.* Maryland, 17 U. S. 4 Wheat. 316, 428 (4: 579, 606). 767
McDearmon *v.* Maxfield, 38 Ark. 631.... 776
McDonald *v.* Trafton, 15 Me. 225..... 683
McElrath *v.* United States, 102 U. S. 426 441 (26:189, 192)..... 664
McEntee *v.* New Jersey S. B. Co., 45 N. Y. 34..... 290
McGowan *v.* American Pressed Tan-Bark Co., 121 U. S. 575, 609 (30: 1027, 1038)..... 505
McGregor & M. R. Co. *v.* Brown, 39 Iowa, 655..... 198
Mackall *v.* Richards, 3 Mackey, 271..... 399
v. Richards, 112 U. S. 369, 376 (28: 737, 739)..... 398
McKnight *v.* U. S., 13 Ct. Cl. 298, 309.... 395
McLaughlin *v.* U. S., 107 U. S. 526, 528 (27:621)..... 189
McManus *v.* O'Sullivan, 91 U. S. 578 (23: 390)..... 678
McMicken *v.* U. S., 97 U. S. 204, 217, 218 (24:947, 952).:..... 385
McMillen *v.* Anderson, 95 U. S. 37 (24: 335..... 768
M'Millin *v.* Barclay, 5 Fish. Pat. Cas. 189 561
Madrazo, *Ex parte*, 32 U. S. 7 Pet. 627 (8: 808)..... 224
Magniac *v.* Thompson, 32 U. S. 7 Pet. 348 (8:709)..... 193
Maguire *v.* Maguire, 7 Dana, 181, 183.... 659
Mahn *v.* Harwood, 112 U. S. 354, 359 (28: 665, 667).....106, 274, 479, 812
Malone *v.* Sallada, 48 Pa. 419, 425..... 729
Manhattan, The, 2 Ben. 88..... 585
Manville *v.* W. Union Tel. Co., 37 Iowa, 214..... 484
Marbury *v.* Madison, 5 U. S. 1 Cranch, 137, 167 (2:60, 70)..... 210
Marquette, H. & O. R. R. Co. *v.* Probate Judge, 53 Mich. 217..... 168
Marquez *v.* Frisbie, 101 U. S. 473, 475 (25:800, 801).....123, 430
Marsh *v.* Hyde, 3 Gray, 331..... 343
v. Rouse, 44 N. Y. 643..... 341
v. Seymour, 97 U. S. 348 (24:963).. 668
v. Whitmore, 88 U. S. 21 Wall. 184–5 (22:485)..... 399

Marshall *v.* Delaware Ins. Co., 8 U. S. 4 Cranch, 202 (2:596)..... 67
Marshalsea Case, 10 Rep. 68, 76..... 409
Martin *v.* Peck, 2 Yerg. 298..... 776
v. U. S., 10 Ct. Cl. 276..... 423
Marye *v.* Parsons, 114 U. S. 325 (29:205).. 226
Mason *v.* Crosby, 3 Woodb. & M. 258, 269..... 668
v. Graham, 90 U. S. 23 Wall. 261 (23:86)..... 667
Mason Lumber Co. *v.* Buchtel, 101 U. S. 638 (25:1073)..... 414
Masterton *v.* Brooklyn, 7 Hill, 61..... 483
Matthews *v.* Iron Clad Mfg. Co., 123 U. S. 347 (31:477)..... 812
Mattoon *v.* McGrew, 112 U. S. 718 (28: 824)..... 157
Maxwell, *Ex parte*, 37 Ala. 362, 364..... 776
Maxwell Land Grant Case, 121 U. S. 325, 379 (30:949, 958)..... 186, 756
Mayor, etc. & Corporation of York *v.* Pilkington, 2 Atk. 302; 9 Mod. 273..... 406
Meader *v.* Norton, 78 U. S. 11 Wall. 442, 458 (20:184, 187, 188)..... 185, 430
Mechanics & Traders Bank *v.* Debolt, 59 U. S. 18 How. 380 (15:458)... 614
Medsker *v.* Bonebrake, 108 U. S. 66 (27: 654)..... 193, 668
Medway *v.* U. S., 6 Ct. Cl. 421..... 786
Memphis & C. R. Co. *v.* Gaines, 97 U. S. 697, 709 (24:1091, 1094)..... 614
v. Tennessee, 101 U. S. 337 (25:960) 229
Memphis & Little Rock R. R. Co. *v.* Dow, 120 U. S. 287 (30:595)..... 542
v. Railroad Comrs., 112 U. S. 609 (28:837)..... 843
Memphis Gas Light Co. *v.* Shelby County, 109 U. S. 398 (27:976)..... 614
Mercantile Nat. Bank *v.* Mayor of N. Y. 121 U. S. 138, 160 (30:895, 903) 97, 693
Merchants Bank *v.* State Bank, 77 U. S. 10 Wall. 647 (19:1019)..... 100
Merchants Mut. Ins. Co. *v.* Sweet, 6 Wis. 670..... 506
Meriwether *v.* Garrett, 102 U. S. 472 (26: 197)..... 612, 767
Metcalf *v.* Framingham Parish, 128 Mass. 370, 374..... 295
Metropolitan R. R. Co. *v.* Moore, 121 U. S. 558 (30: 1022)..... 369
Mevs *v.* Conover, 11 Pat. Off. Gaz. 1111.. 667
Meyer *v.* Dubuque County, 49 Iowa, 198 477
Miles *v.* Loomis, 75 N. Y. 288..... 786
Miller *v.* Austen, 54 U. S. 13 How. 218, 228 (14: 119, 123)..... 100
v. Bridgeport Brass Co., 104 U. S. 350 (26: 783)..... 479, 811
v. Moses, 56 Me. 128, 141..... 806
Miltenberger *v.* Logansport, C. & S. W. R. Co., 106 U. S. 286, 307 (27: 117, 125)..... 312, 831, 837
Milwaukee & M. R. R. Co. *v.* Soutter, 69 U. S. 2 Wall. 609, 633 (17: 886, 895)..... 821
Mima Queen *v.* Hepburn, 11 U. S. 7 Cranch, 290, 296 (3: 348, 350).. 726
Mineral Range R. Co. *v.* Detroit & L. S. Copper Co., 25 Fed. Rep. 515.. 417
Minkler *v.* State, 14 Neb. 181..... 407
Minter *v.* Crommelin, 59 U. S. 18 How. 87 (15: 279)..... 189
Mississippi & Rum River Boom Co. *v.* Patterson, 98 U. S. 403, 405 (25: 206, 207)..... 416
Missouri *v.* Lewis, 101 U. S. 22, 30 (25: 989, 992)..... 654
Missouri & M. R. Co. *v.* Rock, 71 U. S. 4 Wall. 177, 181 (18: 381, 382).. 612
Missouri River Packet Co. *v.* Hannibal & St. J. R. R. Co., 1 McCrary, 281..... 736
Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512 (29: 463)..... 654
Mitchell *v.* Tilghman, 86 U. S. 19 Wall. 287, 419 (22: 125, 144)..... 664, 668
Mobile County *v.* Kimball, 102 U. S. 691, 697, 699, 701, 703, 704 (26: 238, 239, 241, 242)..... 151, 215, 707, 712, 715, 720, 767
Mock *v.* Astley, 13 Serg. & R. 382..... 728
Moffat *v.* U. S., 112 U. S., 24 (28:623)..189, 750
Monroe *v.* James, 4 Munf. 194..... 776
Montague *v.* Dudman, 2 Ves. Sr. 396. 398 406
Montault *v.* U. S., 53 U. S. 12 How. 47 (13: 887)..... 61
Moore *v.* Huntington, 84 U. S. 17 Wall. 417 (21: 642)..... 525
v. Robbins, 96 U. S. 530, 533, 535 (24: 848, 850)..... 122, 123, 430, 750
v. U. S., 91 U. S. 270 (23: 346)..512, 786
Moran *v.* January, 52 Mo. 523..... 458
Morey *v.* Lockhart, 123 U. S. 56 (31: 68) 158, 279
Morgan *v.* Gay, 86 U. S. 19 Wall. 81 (22: 100)..... 820
Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S. 455 (30: 237)..... 211
Morton *v.* Nebraska, 88 U. S. 21 Wall. 660, 674 (22: 639, 645)..... 189
v. Tibbett, 15 Q. B. 428..... 841
Moses *v.* Mobile, 52 Ala. 198..... 406
v. Pittsburg, Ft. W. & C. R. Co., 21 Ill. 516..... 640
Moulton *v.* Reid, 54 Ala. 320..... 407
Mowry *v.* Barber, 1 McArthur's Pat. Cas. 563..... 562
v. Whitney, 81 U. S. 14 Wall. 440, 620, 651 (20: 859, 860, 866).... 666, 672, 750
Mugler *v.* Kansas, 123 U. S. 623, 664 (31: 205, 211)..... 703, 713, 718
Mullan *v.* U. S., 118 U. S. 271 (30: 170).. 190
Munn *v.* Illinois, 94 U. S. 113, 124 (24: 77, 83)..... 210, 842, 843
Murdock *v.* Memphis, 87 U. S. 20 Wall. 590, 633, 636 (22: 429, 443, 444) 458, 678, 686, 756
Murley *v.* Sherren, 1 Perry & D. 126; 8 Ad. & El. 754..... 158
Murphy *v.* Chicago, 29 Ill. 279..... 640
v. State, 15 Neb. 383..... 87
Murray *v.* Charleston, 96 U. S. 432, 440, 442 (24, 760, 161)..... 612, 766
Myrick *v.* Michigan Cent. R. R. Co., 107 U. S. 102 (27: 325)..... 291

N.

National Park Bank *v.* Whitmore, 104 N. Y. 297..... 268
National Savings Bank *v.* Ward, 100 U. S. 202 (25: 623)..... 127
Neal *v.* Spooner, 20 Fla. 38..... 53

Nelson *v.* Hill, 46 U. S. 5 How. 127, 132 (12: 81, 83) 311
Nesmith *v.* Sheldon, 47 U. S. 6 How. 41 (12: 335) 193
Nevins *v.* Peoria, 41 Ill. 502 640
Newcomb *v.* Williams, 9 Met. 525, 533 .. 776
Newhall *v.* Sanger, 92 U. S. 761 (23: 769) 847, 850
New Hampshire *v.* Louisiana, 108 U. S. 76 (27: 656) 224
New Jersey *v.* New York, 30 U. S. 5 Pet. 284, 288, 290 (8: 127, 128, 129) 227
v. Wilson, 11 U. S. 7 Cranch, 164, 166 (3: 303) 233
v. Yard, 95 U. S. 104 (24: 352) 614
New Orleans *v.* U. S., 35 U. S. 10 Pet. 717, 730 (9: 594, 599) 548, 847
New Orleans Gas Light Co. *v.* Louisiana Light Co., 115 U. S. 650, 672, 673 (29: 516, 524) 211, 233, 718
N. O. M. & T. R. Co. *v.* Ellerman, 105 U. S. 166, 172 (26: 1015, 1017) ... 612
New Orleans Waterworks Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18 (31: 607) 678
v. Rivers, 115 U. S. 674 (29: 525) .. 612
New Process Fermentation Co. *v.* Maus, 122 U. S. 413, 427, 428 (30: 1193, 1198) 989
Newton *v.* Wales, 3 Robt. 453 337
New York *v.* Louisiana, 108 U. S. 76 (27: 656) 224
v. Ransom, 64 U. S. 23 How. 487 (16: 515) 666
N. Y. Cent. R. R. Co. *v.* Lockwood, 84 U. S. 17 Wall. 357 (21: 627) .. 512
Nichols, The, 74 U. S. 7 Wall. 656 (19: 157) 178
Nichols *v.* U. S., 74 U. S. 7 Wall. 126 (19: 127) 130
Nickle *v.* Stewart, 111 U. S. 776 (28: 599) 631
Noel *v.* Ewing, 9 Ind. 37 660
Nolte *v.* Creditors, 7 Mart. N. S. 602 542
Northern Pac. R. R. Co. *v.* Traill County, 115 U. S. 600 (29: 477) 886
Northern Transportation Co. *v.* Chicago, 99 U. S. 635, 641 (25: 336, 338) 640
Northumberland Coal Co. *v.* Clement, 95 Pa. 126 ..... 729, 730
Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 660 (24: 1036) .. 736
North Western L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 502 (30: 1101) 317
Nudd *v.* Burrows, 91 U. S. 426, 441 (23: 286, 290) 241

O.

Oates *v.* First Nat. Bank, 100 U. S. 239 (25: 580) 512
Oelbermann *v.* Merritt, 123 U. S. 356 (31: 164) 170
O'Ferrall *v.* Simplot, 4 Iowa, 381 159
Ogilvie *v.* Knox Ins. Co., 59 U. S. 18 How. 577, 581 (15: 490, 492) 193
Ogle *v.* Vanc, L. R. 2 Q. B. 272 337
Ohio Life Ins. & T. Co. *v.* Debolt, 57 U. S. 16 How. 416 (14: 997) 614
Oliver *v.* Platt, 44 U. S. 3 How. 333, 412 (11: 622, 658) 311
O'Reilly *v.* Edrington, 96 U. S. 724, 726 (24: 659) 496
O'Reilly *v.* Morse, 56 U. S. 15 How. 62, 112 (14: 601, 623) 989, 1002
Osborn *v.* Bank of U. S. 22 U. S. 9 Wheat. 738, 857, 858 (6: 204, 232) 223, 227, 231, 410
v. Nicholson, 80 U. S. 13 Wall. 654 (20: 689) 613
Osborne, S. S. The, 105 U. S. 447 (26: 1065) 663
Osgood *v.* Nelson, L. R. 5 H. L. Cas. 636 407
Osiander *v.* Commonwealth, 3 Leigh, 780 87

P.

Pacific R. R. Co. *v.* Missouri P. R. Co., 111 U. S. 505, 506 (28: 498, 499) 181, 821
Pacific Railroad Removal Cases, 115 U. S. 1, 18 (29: 319, 325) 416
Paddock *v.* Commercial Ins. Co., 104 Mass. 521, 531 668
v. Franklin Ins. Co., 11 Pick. 227 506
Page *v.* Bank of Alexandria, 20 U. S. 7 Wheat. 35 (5: 390) 525
v. Johnson, 1 D. Chip. 338 525
Paine *v.* Central Vermont R. R. Co., 118 U. S. 152, 158 (30: 193, 195) .. 337
Palmer *v.* Marston, 81 U. S. 14 Wall. 10 (20: 826) 614, 678
v. Yager, 20 Wis. 91 311
Palmyra, The, 25 U. S. 12 Wheat. 1, 12, 14, 15 (6: 531, 534, 535) 740, 747
Paradise *v.* Farmers & M. Bank, 5 La. Ann. 710 379
Parker, *Ex parte*, 120 U. S. 737 (30: 818) 122
v. Simonds, 8 Met. 205 805
Parker & W. Co. *v.* Yale Clock Co., 123 U. S. 87 (31: 100) .286, 479, 762, 812
Parkersburg & O. Trans. Co. *v.* Parkersburg, 107 U. S. 691, 700 (27: 584, 587) 215, 632
Parks, *Ex parte*, 93 U. S. 18 (23: 787) ... 223
v. Booth, 102 U. S. 96, 106 (26: 54, 58) 672
v. Turner, 53 U. S. 12 How. 39 (13: 883) 525
Parmelee *v.* Lawrence, 78 U. S. 11 Wall. 36, 39 (20: 48, 49) 689
Parsons *v.* Robinson, 122 U. S. 112 (30: 1122 74
Pasley *v.* Freeman, 3 T. R. 57 681
Passaic Bridge Cases, 3 Wall, 782, 793 (16:799, App.) 632, 634
Passenger Cases, 48 U. S. 7 How. 283 (12: 702) 709
Patapsco Ins. Co *v.* Coulter, 28 U. S. 3 Pet. 237 (7:665) 66
Patterson *v.* Kentucky, 97 U. S. 501, 505 (24:1115, 1117) 212, 717
v. Stephenson, 77 Mo. 331 331
Paul *v.* Virginia, 75 U. S. 8 Wall. 168 (19: 357) 652
Pearson *v.* Yewdall, 95 U. S. 294, 296 (24: 436, 437) 86
Peck *v.* Jenness, 48 U. S. 7 How. 612, 625 (12:841, 846) 409
Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164, 178 (24:97, 98) 843
Pekin *v.* Brereton, 67 Ill. 478 641
v. Winkel, 77 Ill. 56 641
Pelton *v.* Farmin, 18 Wis. 222 312
Pence *v.* Croan, 51 Ind. 336 193
Penn *v.* Butler, 4 U. S. 4 Dall. 354 (1:864) 777

Pennock *v.* Dialogue, 27 U. S. 2 Pet. 1 (7: 327) 560
Pennsylvania *v.* Wheeling & B. Bridge Co., 54 U. S. 13 How. 518 (14: 249) 799
Pennsylvania Canal Co. *v.* Kunkel, 33 Leg. Int. 339 731
Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 12 (24:711) 652
People *v.* Brooklyn, 4 N. Y. 427 766
v. Flagg, 46 N. Y. 405 766
v. Keyser, 28 N. Y. 226 777
v. Lambier, 5 Denio, 9 548
v. N. Y. Fire Comrs., 72 N. Y. 445 407
v. Tax Comrs., 71 U. S. 4 Wall. 244 (18:344) 693
People's Savings Bank *v.* Bates, 120 U. S. 556 (30:754) 193
Perkins *v.* Nashua Card, etc. Co., 2 Fed. Rep. 451–454 143
Permoli *v.* First Municipality of N. O., 44 U. S. 3 How. 589, 600 (11:739) 152, 632
Pervear *v.* Commonwealth, 72 U. S. 5 Wall. 475, 479 (18:608, 609) 86, 212
Peters *v.* Bowman, 98 U. S. 56, 60 (25:91, 92) 311
v. Phœnix Ins. Co., 3 Serg. & R. 25 506
Philadelphia Fire Asso. *v.* New York, 119 U. S. 110, 120 (30:342, 347) 653, 678, 686
Philadelphia, W. & B. R. R. Co. *v.* Havre de Grace Steam Towboat Co., 64 U. S. 23 How. 209 (16:433) 798
v. Howard, 54 U. S. 13 How. 307 (14:157) 483
Phillips *v.* Bistoli, 2 Barn. & C. 511 841
v. Stone Mountain, 61 Ga. 386 406
Philp *v.* Nock, 84 U. S. 17 Wall. 460 (21: 679) 666
Phœnix Ins. Co. *v.* Erie & W. Trans. Co., 117 U. S. 325 (29:879) 66
Phœnix L. Ins. Co. *v.* Raddin, 120 U. S. 183, 196 (30:644, 648) 261
Piatt *v.* McCullough, 1 McLean, 69, 74 776
Pickford *v.* Grand Junction R. Co., 12 Mees. & W. 766 484
Pierce *v.* New Hampshire, 46 U. S. 5 How. 504, 557, 578 (12:256, 280, 289) 720
Pierson *v.* Eagle Screw Co., 3 Story, 402 ..... 559, 562
Pinkham *v.* Mattox, 58 N. H. 604 841
Piqua Branch of State Bank *v.* Knoop, 57 U. S. 16 How. 369 (14:977) 614
Pitts *v.* Hall, 2 Blatchf. 229 559
Pittsburg & Ft. W. & C. R. Co. *v.* Reich, 101 Ill. 157 641
Planters Bank *v.* Union Bank, 83 U. S. 16 Wall. 483, 497 (21:473, 479) 613
Poindexter *v.* Greenhow, 114 U. S. 270, 287 (29:185, 191) 223, 226, 227, 232
Polk *v.* Wendal, 13 U. S. 9 Cranch, 87, 99 (3:665, 669) 18 U. S. 5 Wheat. 303 (5:94) 189, 438, 847, 850
Pollard *v.* Hagan, 44 U. S. 3 How. 212, 229, 230 (11:565, 573, 574) 152, 632
Pomace Holder Co. *v.* Ferguson, 119 U. S. 335, 338 (30:406, 408) 354
Poole *v.* Fleeger, 36 U. S. 11 Pet. 185, 209 (9:680, 690) 55
Post *v.* Supervisors, 105 U. S. 667, 691 (26: 1204, 1218) 75, 798
Potts *v.* United States, 125 U. S. 173 (31: 661) 662
Pound *v.* Turck, 95 U. S. 459 (24:525) 632
Presser *v.* Illinois, 116 U. S. 252, 265 (29: 615, 619) 86
Price *v.* Worwood, 4 Hurl. & N. 512 187
Priest *v.* Cummings, 16 Wend. 617, 631; 20 Wend. 338, 349 158
v. Watkins, 2 Hill, 225 776
Prigg *v.* Adams, 2 Salk. 674; Carthew, 274 409
Providence Bank *v.* Billings, 29 U. S. 4 Pet. 514, 560, 563 (7:939, 955, 956) 233, 653, 767
Providence Sav. Inst. *v.* Boston, 101 Mass. 575 693
Provident Sav Inst. *v.* Jersey City, 113 U. S. 506, 514 (28:1102, 1105) 766
Pruner *v.* Brisbin, 98 Pa. 203 731
Pumpelly *v.* Green Bay Co., 80 U. S. 13 Wall. 166, 168 (20:557) 212, 640
Putnam *v.* Day, 89 U. S. 22 Wall. 60 (22: 764) 631

Q.

Quinby *v.* Conlan, 104 U. S. 420, 425 (26: 800, 802) 123

R.

Railroad Co. *v.* Husen, 95 U. S. 465, 469, 471 (24:527, 529, 530) 709, 715
v. Richmond, 86 U. S. 19 Wall. 584 (22:173) 706
Railroad Companies *v.* Schutte, 103 U. S. 118 (26:327) 522
Raisby, The, 10 P. D. 114 79
Rand *v.* Hubbard, 4 Met. 252, 257 776
Rathbone *v.* Hooney, 58 N. Y. 463, 467 312
Ray *v.* Law, 7 U. S. 3 Cranch, 179 (2:404) 74
Read *v.* Boston & A. R. R. Co., 1 New Eng. Rep. 390; 140 Mass. 199 798
Rector *v.* Ashley, 73 U. S. 6 Wall. 142 (18: 733) 614
Reed, *Ex parte*, 100 U. S. 13 (25:538) 466
Reed *v.* Gardner, 84 U. S. 17 Wall. 409 (21:665) 260
Reg. *v.* Saddlers' Co., 10 H. L. Cas. 404 407
Reichert *v.* Felps, 73 U. S. 6 Wall. 160 (18: 849) 189, 850, 847
Remick *v.* Sandford, 120 Mass. 309, 316 342
Rex *v.* Turner, 5 Maule & S. 206 187
Reynolds *v.* Iron Silver Mining Co., 116 U. S. 687 (29:774) 847, 848, 851
v. United States, 98 U. S. 145, 156 (25:244, 247) 90
Rhea *v.* Rhenner, 26 U. S. 1 Pet. 105 (7: 72) 159
Rhinelander *v.* Pennsylvania Ins. Co., 8 U. S. 4 Cranch, 29 (2:540) 67
Rhode Island *v.* Mass., 37 U. S. 12 Pet. 657, 748, 749 (9:1233, 1270) 55, 63
Rice *v.* Minnesota & N. W. R. R. Co., 66 U. S. 1 Black, 380 (17:153) 736
v. United States, 21 Ct. Cl. 419 395
Richards *v.* Todd, 127 Mass. 167, 172 668
Rigney *v.* Chicago, 102 Ill. 64, 74, 80 ..... 640, 641
Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263 484
Robbins *v.* Chicago, 71 U. S. 4 Wall. 657, 678 (18:427, 430) 201

Robbins *v.* Shelby Co. Taxing Dist., 120 U. S. 489, 493 (30:694, 696)..711, 715
Roberts *v.* Chicago, 26 Ill. 249..... 640
v. Wood, 38 Wis. 60..... 312
Robertson *v.* Cease, 97 U. S. 646 (24:1057) 820
Robinson *v.* Elliott, 89 U. S. 22 Wall. 513, 520 (22:758, 761)..... 193
v. Minor, 51 U. S. 10 How. 627, 643 (13:568, 574)..... 60
Rodd *v.* Heartt, 84 U. S. 17 Wall. 357 (21: 627)..... 383
Rogers *v.* Rogers, 3 Paige, 379..... 401
Roop *v.* Brubacker, 1 Rawle, 304..... 168
Root *v.* Lake Shore & M. S. R. Co., 105 U. S. 189, 202, 203, 214, 215 (26: 975, 980, 984) 667, 668
Rouse *v.* Ins. Co., 3 Wall. Jr. 367..... 506
Rowland, *Ex parte*, 104 U. S. 604 (28: 861) 223, 409
Rubber Co. *v.* Goodyear, 76 U. S. 9 Wall. 788 (19:566)..... 666
Rugg *v.* Haines, 1 MacArth. Pat. Cas. 420, 562
Ruggles *v.* Illinois, 108 U. S. 526 (27: 812) 843
Russell & E. Mfg. Co. *v.* Mallory, 10 Blatchf. 140..... 561
Ryan *v.* Bindley, 68 U. S. 1 Wall. 66 (17: 559)..... 798

S.

Sadler *v.* Hoover, 48 U. S. 7 How. 646 (12: 855)..... 193
Sage *v.* Iowa Cent. R. R. Co., 96 U. S. 712, 714 (24: 641, 643) 496
v. Memphis & L. R. R. R. Co., 125 U. S. 361 (31: 694).....831, 837
St. Clair *v.* Cox, 106 U. S. 350 (27: 222)... 652
St. Louis, I. M. & S. R. Co. *v.* Vickers, 122 U. S. 360 (30: 116) 139
St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636, 647 (26: 875, 879).....123, 847
St. Tammany Water Works Co. *v.* New Orleans Water Works Co., 120 U. S. 64 (30: 563) 612
Salacia, The, 2 Hagg. Adm. 262, 265 79
Sampson *v.* Smiley, 80 U. S. 13 Wall. 91 (20: 489) 122
Sanders *v.* Logan, 2 Fish. Pat. Cas. 167 .. 561
Sands *v.* Manistee River Imp. Co., 123 U. S. 288 (31: 149) 632, 633
Sanford *v.* McLean, 3 Paige, 117, 122.... 542
San Francisco *v.* Lawton, 18 Cal. 465.... 311
Sargent *v.* Hall Safe & L. Co., 114 U. S. 63 (29: 67)..... 274
v. Helton, 115 U. S. 348 (29: 412).. 409
v. Seagrave, 2 Curt. 553..... 559
Saull *v.* Browne, L. R. 10 Ch. 64..... 406
Saunders *v.* Gould, 29 U. S. 4 Pet. 392 (7: 897) 193
Savary *v.* Lauth, 1 MacArth. Pat. Cas. 691, 563
Schoolher *v.* Hutchins, 66 Tex. 324..... 628
Schrader *v.* Decker, 9 Pa. 14..... 158
Schuchardt *v.* Allen, 68 U. S. 1 Wall. 359, 369 (17: 642, 646)..... 505
Schulenberg *v.* Harriman, 88 U. S. 21 Wall. 44 (22: 551)..... 385
Sears *v.* Hardy, 120 Mass. 529 401
Seibert *v.* Lewis, 122 U. S. 284 (30: 1161) 230
Sexton *v.* Henderson, 45 Iowa, 160..... 311
Seymour *v.* McCormick, 57 U. S. 16 How. 480, 489 (14: 1024, 1028)...559, 666
v. Osborne, 78 U. S. 11 Wall. 516 (20: 33) 105
Shaw *v.* Cooper, 32 U. S. 7 Pet. 292 (8: 689).....144, 560
v. Little Rock & Ft. S. R. Co., 100 U. S. 605, 611 (25: 757, 758) .. 137
Shawneetown *v.* Mason, 82 Ill. 338..... 641
Shelton *v.* Van Kleeck, 106 U. S. 532 (27: 269) 631
Shepard *v.* Carrigan, 116 U. S. 593 (29: 723)..... 274
Shepherd *v.* Pressey, 32 N. H. 56..... 341
Shepley *v.* Cowan, 91 U. S. 330, 340 (23: 424, 427, 428) 122, 123, 430
Sheridan *v.* Colvin, 78 Ill. 237..... 407
Sherlock *v.* Alling, 93 U. S. 99, 102 (23: 819, 820) 510, 716
Sherman *v.* Buick, 93 U. S. 209 (23: 849) 847, 850
Shields *v.* Barrow, 58 U. S. 17 How. 130, 139 (15: 158, 160) 401
v. Shiff, 36 La. Ann. 645..... 447
Shindler *v.* Houston, 1 N. Y. 261; 49 Am. Dec. 316..... 341
Shinn *v.* Budd, 14 N. J. Eq. 234..... 542
Short *v.* Nooner, 16 Kan. 220..... 312
Siebold, *Ex parte*, 100 U. S. 371 (25: 717) 223
Siemens *v.* Sellers, 123 U. S. 276 (30: 153) 1002
Silliman *v.* Hudson River Bridge Co., 66 U. S. 1 Black, 562 (17: 81)..... 192
Silsby *v.* Foote, 55 U. S. 14 How. 218 (14: 394) 505
v. Foote, 61 U. S. 20 How. 378, 387 (15: 953, 956) 672
Silver *v.* Ladd, 74 U. S. 7 Wall. 219, 228 (19: 138, 141).....123, 430
Simmons *v.* Taylor, 23 Fed. Rep. 849.... 74
v. Wagner, 101 U. S. 260 (25: 910) 850
Simpson *v.* London & N. W. R. Co., L. R. 1 Q. B. Div. 274..... 483
Sims *v.* Everhardt, 102 U. S. 300 (26: 87) 158
Sinking Fund Cases, 99 U. S. 718 (25: 501) 210
Sinnot *v.* Davenport, 63 U. S. 22 How. 227 (16: 243) 512
Sioux City & P. R. R. Co. *v.* Washington County, 3 Neb. 30, 41..... 407
Skillern *v.* May, 10 U. S. 6 Cranch, 267 (3: 220) 204
Smelting Co. Cases, 104 U. S. 636 (26: 875); 106 U. S. 447 (27: 226) 851
Smith *v.* Alabama, 124 U. S. 465 (31: 508) 720
v. Corporation of Washington, 61 U. S. 20 How. 135 (15: 858).. 640
v. Dillingham, 33 Me. 384..... 805
v. Eames, 3 Scam. 81..... 87
v. Gettinger, 3 Ga. 140..... 379
v. Lorillard, 10 Johns. 356..... 444
v. Maryland, 59 U. S. 18 How. 71, 76 (15: 269, 271) 86
v. U. S., 94 U. S. 97 (24: 32) 854
Smythe *v.* Fiske, 90 U. S. 23 Wall. 374 (23: 47) 645
Snow, *Re*, 120 U. S. 274 (30: 658)..... 175
Snow *v.* Lake Shore & M. S. R. Co., 121 U. S. 617 (30: 1004) 274
Snyder *v.* U. S., 112 U. S. 216 (28: 697) 740, 741
Soon Hing *v.* Crowley, 113 U. S. 703 (28: 1145) 654
Sparhawk *v.* Sparhawk, 116 Mass. 315.. 658
Spear *v.* Belson, 1 MacArth. Pat. Cas. 699, 563
Speidel *v.* Henrici, 120 U. S. 387 (30: 719) 399
Spencer *v.* Lapsley, 61 U. S. 20 How. 264 (15: 902) 851

Spies v. Illinois, 123 U. S. 131, 166, 181 (31: 80, 86, 91)....408, 456, 457, 537
Spink v. Francis, 19 Fed. Rep. 670; 20 Fed. Rep. 567..... 406
Sprague v. Smith & G. Mfg. Co., 12 Fed. Rep. 721.....143, 147
Springer v. Bartle, 46 Iowa, 688..... 311
Spurck v. Crook, 19 Ill. 415..... 168
Squire v. Western Union Tel. Co., 98 Mass. 232..... 484
Stack v. East St. Louis, 85 Ill. 378..... 641
Stagg v. Green, 47 Mo. 500..... 776
Stanton v. Metropolitan R. Co., 14 Allen, 485..... 796
Starbuck v. New Eng. Mar. Ins. Co., 19 Pick. 198..... 506
Starr v. Pease, 8 Conn. 541..... 658
State v. Ellington, 7 Ired. 61 87
v. Fox, 1 Dutch. 566 87
v. Fry, 4 Mo. 120, 138..... 658
v. Marshall, 36 Mo. 400..... 458
v. Meeker, 19 Neb. 444, 448..... 407
v. Mobile, 5 Port. (Ala.) 279, 294 .. 214
Morris Canal & Banking Co. v. Haight, 7 Vroom, 471..... 549
v. Oleson, 15 Neb. 247..... 407
v. Parker, 34 N. J. L. 71..... 477
v. Sheldon, 10 Neb. 452, 456....407, 409
State Bank v. St. Louis R. F. Co., 122 U. S. 21 (30: 1121)..... 193
State Freight Tax Case, 82 U. S. 15 Wall. 232, 271, 275 (21: 146, 160, 161) 705, 706, 715
Steel v. St. Louis Smelting & Ref. Co., 106 U. S. 447 (27: 226)..... 847
Steines v. Franklin County, 81 U. S. 14 Wall. 15, 21 (20: 846, 848)..611, 614
Stephens v. People, 38 Mich. 739, 741... 87
Stetson v. Chicago & E. R. Co., 75 Ill. 74 640
Stevens v. Hughes, 3 Watts & S. 465 728
v. Paterson & N. R. R. Co., 5 Vroom, 532.....549, 552
v. Tuite, 104 Mass. 328..... 805
Stevenson v. Texas & P. R. Co., 105 U. S. 703 (26: 1215)..... 312
v. Williams, 86 U. S. 19 Wall. 572 (22: 162).....613, 678
Stewart v. Dunham, 115 U. S. 61 (29: 329) 192, 193
Stockton v. Baltimore & N. Y. R. Co., 32 Fed. Rep. 9, 14..... 652
Stockton v. Bishop, 45 U. S. 4 How. 155, 167 (11: 918, 923) 740
Stockwell v. Brewer, 59 Me. 286 477
Stoddard v. Chambers, 43 U. S. 2 How. 284, 317 (11: 269, 282).....847, 850
Stokes v. People, 53 N. Y. 164, 172..... 87
Stone v. Fairburg, P. & N. W. R. Co., 68 Ill. 394 640
v. Farmers Loan & Trust Co., 116 U. S. 307 (29: 636)..... 843
v. Illinois Cent. R. R. Co., 116 U. S. 347 (29: 650)..... 843
v. Miss., 101 U. S. 814, 816 (25: 1079) 211, 213, 718
v. New Orleans & N. E. R. R. Co., 116 U. S. 352 (29: 651) 843
v. Wisconsin, 94 U. S. 181 (24: 102) 843
Story v. Livingston, 38 U. S. 13 Pet. 359, 375 (10: 200, 208) 401
Strobe v. Downer, 13 Wis. 10,..... 311
Strong v. Carrier, 17 Conn. 319, ... 268
v. Strong, 9 Cush. 560, 576..... 168
Strother v. Lucas, 31 U. S. 6 Pet. 763 (8: 573) 786
v. Lucas, 37 U. S. 12 Pet. 410, 428 (9: 1114, 1137).....56, 439
Stryker v. Crane, 123 U. S. 527 (31: 194) 203, 236, 269
v. Polk County, 22 Iowa, 131..... 198
Stuart v. La Salle Co., 83 Ill. 341..... 406
v. Palmer, 74 N. Y. 183.....766, 768
Suess v. Noble, 31 Fed. Rep. 855..... 406
Suffolk Co. v. Hayden, 70 U. S. 3 Wall. 315 (18: 76) 666
Sullivan v. Portland & K. R. R. Co., 94 U. S. 811 (24: 326)..... 399
Summers v. Bromley, 28 Mich. 125..... 311
Suppiger v. Garrels, 20 Bradw. 625..... 542
Sutter v. Robinson, 119 U. S. 530 (30: 492) 274
Swaine T. & Mfg. Co. v. Ladd, 102 U. S. 408 (26: 184) 812
Sweigart v. Richards, 8 Pa. 436 731
Swift v. Barnes, 16 Pick. 194 ..... 804, 805
v. Crocker, 21 Pick. 241 379
v. Tyson, 41 U. S. 16 Pet. 1 (10: 865)..... 512, 798

T.

Tapley v. Goodsell, 122 Mass. 176, 182.. 571
Tappen v. Gray, 3 Edw. Ch. 450..... 406
Tarver v. Keach, 82 U. S. 15 Wall. 67 (21: 82)..... 613
Taylor v. Brown, 9 U. S. 5 Cranch, 249 (3: 92)..... 111
v. Morton, 2 Curtis, 454, 459..... 388
v. Wakefield, 6 El. & Bl. 765..... 343
Teal v. Walker, 111 U. S. 242, 250 (28: 415, 418)..... 160, 698
Terrell v. Allison, 88 U. S. 21 Wall. 289 (22: 634)..... 312
Thames, The, 81 U. S. 14 Wall. 98 (20: 804) 290
Thatcher Heating Co. v. Burtis, 121 U. S. 286 (30: 942)..... 354
Therasson v. Hickok, 37 Vt. 464..... 401
Thomas v. Spofford, 46 Me. 408..... 805
Thompson v. Central Ohio R. R. Co., 73 U. S. 6 Wall. 134 (18: 765) ... 405
v. Dean, 74 U. S. 7 Wall. 342, 345 (19: 94, 95)..... 74
v. Maxwell, 95 U. S. 397 (24: 483) 631
v. Western Union Tel. Co., 64 Wis. 531..... 484
v. Whitman, 85 U. S. 18 Wall. 457, 467 (21: 897, 901)..... 409
Thomson v. Union Pac. R. R. Co., 76 U. S. 9 Wall. 579 (19: 792)..... 794
v. Wooster, 114 U. S. 104, 111 (29: 105, 107)..... 313, 668
Thorington v. Smith, 75 U. S. 8 Wall. 1 (19: 361)..... 613
Thornton v. Carson, 11 U. S. 7 Cranch, 596, 601 (3: 451, 452)..... 336
Tilghman v. Mitchell, 2 Fish. Pat. Cas. 518..... 664
v. Mitchell, 9 Blatchf. 1, 18; 4 Fish. Pat. Cas. 599, 615..... 664
v. Proctor, 102 U. S. 708, 722, 724, 725 (26: 279, 285, 286)... 664, 989
v. Werk, 2 Fish. Pat. Cas. 229... 664
Toledo, W. & W. R. Co. v. Morrison, 71 Ill. 616 640

Toleman *v.* Portbury, L. R. 5 Q. B. 288 187
Tomkinson *v.* Staight, 17 C. B. 697 343
Tomlinson *v.* Collins, 20 Conn. 364 381
Tornado, The, 109 U. S. 110, 117 (27: 874, 877) 79, 663
Towns *v.* Wentworth, 11 Moore P. C. 526 295
Townsend *v.* Greeley, 72 U. S. 5 Wall. 326, 335 (18: 547, 549) 430
v. Hargraves, 118 Mass. 325 343
Transportation Co. *v.* Chicago, 99 U. S. 642 (25: 338) 213
Tremolo Patent, 90 U. S. 23 Wall. 518 (23: 97) 667
Trenouth *v.* San Francisco, 100 U. S. 251 253 (25: 626, 627) 555, 852
True *v.* International Tel. Co., 60 Me. 9 484
Tuck *v.* Downing, 76 Ill. 71 681
v. Moses, 58 Me. 461, 477 806
Tucker *v.* Zimmerman, 61 Ga. 601 401
Turner *v.* Hawkeye Tel. Co., 41 Iowa, 458 484
v. Maryland, 107 U. S. 38, 55 (27: 370, 376) 708
v. Smith, 81 U. S. 14 Wall. 553 (20: 724) 311
v. Turner, 15 Jur. 218 406
Twenty Per Cent Cases, 87 U. S. 20 Wall. 179, 181 (22: 339) 423
Twitchell *v.* Commonwealth, 74 U. S. 7 Wall. 321 (19: 223, 224) 80, 85, 86
Two Hundred Chests of Tea, 22 U. S. 9 Wheat. 438 (6: 129) 645
Tyler *v.* Hamersley, 44 Conn. 419, 422 406

U.

Ulrich *v.* People, 39 Mich. 245 87
Union Pac. R. R. Co. *v.* McShane, 89 U. S. 22 Wall. 444 (22: 747) 386
v. Peniston, 85 U. S. 18 Wall. 5 (21: 787) 793
Union Trust Co., *v.* Illinois Midland R. Co., 117 U. S. 434, 458 (29: 963, 971) 698, 831, 837
v. Morrison, 125 U. S. 591 (31:825) 837
v. Souther, 107 U. S. 591 (27: 488) 831, 837
U. S. *v.* Abattoir Place, 106 U. S. 160 (27: 128) 472
v. Armejo, (18 U. S. L. ed. 247) 293
v. Arredondo, 31 U. S. 6 Pet. 691 (8: 547) 56, 488
v. Bailey, 34 U. S. 9 Pet. 267 (9: 124) 193
v. Briggs, 46 U. S. 5. How. 208 (12: 119) 193
v. Carll, 105 U. S. 611 (26: 1135) 518
v. Castant, 53 U. S. 12 How. 437 (13: 1056) 61
v. City Bank, 60 U. S. 19 How. 385 (15:662) 193
v. Clarke, 33 U. S. 8 Pet. 436, 445 (8: 1001, 1004) 55
v. Crosby, 11 U. S. 7 Cranch, 115 (3: 287) 346
v. Cruikshank, 92 U. S. 542, 552 (23: 588, 591) 86, 518
v. Curry, 47 U. S. 6 How. 106 (12: 363) 497
v. D'Aguirre, 68 U. S. 1 Wall. 311 (17: 595) 748
U. S. *v.* D'Auterive, 51 U. S. 10 How. 609 (13: 560) 61
v. 90 Demijohns of Rum, 4 Woods, 637, 639 741, 743
v. Dewitt, 76 U. S. 9 Wall. 41 (19: 593) 212
v. Driscoll, 96 U. S. 421 (24: 847) 423
v. Fisher, 109 U. S. 143 (27: 885) 423
v. Flint, 4 Sawy. 83 758
v. Fox, 94 U. S. 315 (24: 192) 346
v. Germaine, 99 U. S. 508 (25: 482) 464, 536
v. Great Falls Mfg. Co., 112 U. S. 645, 656 (28: 846, 850) 528, 532
v. Hartwell, 73 U. S. 6 Wall. 385 (18: 830) 536
v. Hess, 124 U. S. 483 (31: 516) 741
v. Hill, 120 U. S. 169 (30: 627) 275
v. Hough, 103 U. S. 71 (26: 305) 505
v. Hughes, 52 U. S. 11 How. 552 (13: 809) 750
v. Jones, 59 U. S. 18 How. 96 (15: 276) 395
v. Jones, 119 U. S. 477 (30: 440) 533
v. Klein, 80 U. S. 13 Wall. 145 (20: 525) 533
v. Langston, 118 U. S. 389, 394 (30: 164, 165) 128
v. Lee, 106 U. S. 196, 213, 215 (27: 171, 179, 180) 228, 232
v. Lippitt, 100 U. S. 668, 669 (25: 749) 130
v. Lynde, 78 U. S. 11 Wall. 632 (20: 230) 61, 173
v. McDougall, 121 U. S. 89 (30: 861) 130
v. McDowell, 8 U.S. 4 Cranch, 316 (2: 632) 276
v. McLean, 95 U. S. 750 (24: 579) 329
v. Martin, 94 U. S, 400 (24: 128) 423
v. Minor, 114 U. S. 233, 241, 243 (29: 110, 113, 114) 185, 750
v. Moore, 95 U. S. 760 (24: 588) 396
v. Morgan, 52 U. S. 11 How. 154, 158 (13: 643, 645) 260
v. Mouat, 124 U. S. 303 (31: 463) 466, 536
v. New Orleans, 98 U. S. 381, 392 (25: 225) 612, 767
v. Northway, 120 U. S. 327 (30: 664) 193
v. Percheman, 32 U. S. 7 Pet. 51 86-89 (8: 604, 618) 56
v. Phila. & N. Orleans, 52 U. S. 11 How. 609 (13: 834) 61
v. Philbrick, 120 U. S. 52, 59 (30: 559, 561) 148, 396
v. Reid, 53 U. S. 2 How. 361 (13: 1023) 793
v. Repentigny, 72 U. S. 5 Wall. 211 (18: 627) 386
v. Reynes, 50 U. S. 9 How. 127 (13: 74) 61
v. Ross, 92 U. S. 281 (23: 707) 439
v. Schlesinger, 120 U. S. 109 (30: 607) 491
v. Simmons, 96 U. S. 360 (24: 819) 518
v. Southern Col. Coal & Town Co., 18 Fed. Rep. 273 185
v. Stone, 39 U. S. 14 Pet. 524, 525 (10: 572) 423
v. Stone, 69 U. S. 2 Wall. 525 (17: 765) 750

U. S. v. Symonds, 120 U. S. 46, 50 (30: 557, 558)..... 824
v. The Ethan Allen, 3 Am. Law. Rev. 372..... 582
v. Three Parcels of Embroidery, 3 Ware, 75..... 740, 742
v. Throckmorton, 98 U. S. 61, 70 (25: 93, 96)..... 750, 758
U. S. Cartridge Co. v. Union Met. Cartridge Co., 112 U. S. 624, 644 (28: 828, 834)..... 274
U. S. Tel. Co. v. Wenger, 55 Pa. 262 ... 484
University v. People, 99 U. S. 309 (25: 387)..... 614
Updegraff v. Crans, 47 Pa. 103..... 406

V.

Van Antwerp, *Re*, 56 N. Y. 261..... 767
Van Brocklin v. Tennessee, 117 U. S. 151, 159 (29: 845)..... 152
Vance v. Burbank, 101 U. S. 514, 521 (25: 929, 931)..... 123, 661
Van Wyck v. McIntosh, 14 N. Y. 439.. 786
Veazie Bank v. Fenno, 75 U. S. 8 Wall. 533, 548 (19: 482, 487)..... 767
Vicksburg & M. R. R. Co. v. O'Brien, 119 U. S. 103 (30: 300)..... 505
v. Putnam, 118 U. S. 545 (30: 257) 139
Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665 (29: 770)..... 614
Vigel v. Hopp, 104 U. S. 441 (26: 765) 418, 680
Virginia, *Ex parte*, 100 U. S. 339 (25: 676) 223
Vogel's Succession, 20 La. Ann. 81..... 776

W.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572 (30: 244, 249).. 215, 710, 843
Wade v. Doyle, 17 Fla. 522 53
v. Kalbfleisch, 58 N. Y. 282..... 659
Wakeman v. Grover, 4 Paige, 33..... 401
Walker v. Sauvinet, 92 U. S. 90 (23: 678) 86
Wallamet Iron Bridge Co. v. Hatch, 9 Sawy. 643..... 631
Walling v. Michigan, 116 U. S. 446, 455 (29: 691, 694).... 211, 710, 715, 718
Waples v. Hays, 108 U. S. 6 (27: 632)... 447
Warner v. Norton, 61 U. S. 20 How. 448 (15: 950)..... 193
Warren v. Van Brunt, 86 U. S. 19 Wall. 646 (22: 219) 122
Wartman v. Breed, 117 Mass. 18..... 341
Washington, A. & G. Packet Co. v. Sickles, 70 U. S. 19 Wall. 611, 617 (21: 203, 204)..... 666
Washington Ice Co. v. Webster, 62 Me. 341; 68 Me. 449..... 801
Waters v. Merchants' Louisville Ins. Co., 36 U. S. 11 Pet. 224 (9:696).. 66
Waters Peirce Oil Co. v. Little Rock, 39 Ark. 412..... 406
Waterville v. Van Slyke, 116 U. S. 699, 704 (29: 772, 774)..... 193, 194
Watrous v. McGrew, 16 Tex. 509, 513... 789
Watson v. Jones, 80 U. S. 13 Wall. 679, 719 (20: 666, 672)..... 409
v. Taylor, 88 U. S. 21 Wall. 378 (22: 576)..... 193
Watt v. Starke, 101 U. S. 247 (25: 826).. 283
Wayman v. Southard, 23 U. S. 10 Wheat. 1 (6: 253)..... 242
Webster v. Cooper, 51 U. S. 10 How. 54 (13: 325)..... 193, 423
v. Reid, 52 U. S. 11 How. 437, 459 (13: 761, 770)..... 87
Webster Loom Co. v. Higgins, 105 U. S. 580, 586 (26: 1177, 1179)..... 990
Wedgwood v. Hart, 2 Jur. N. S. 288.... 187
Weeth v. New England Mortgage S. Co., 106 U. S. 605 (27: 99)..... 192
Weimer v Bunbury, 30 Mich. 201..... 769
Weismer v. Douglas, 64 N. Y. 91..... 767
Welsh v. St. Louis, 73 Mo. 71..... 458
Welton v. Missouri, 91 U. S. 275-282 (23: 347-350)..... 215, 715
West v. Mayor of N. Y., 10 Paige, 539.. 406
Western Pacific R. R. Co. v. U. S., 108 U. S. 510 (27: 806)..... 190
Western Union Tel. Co. v. Texas, 105 U. S. 460 (26: 1067)..... 793
West of England & S. W. Dist. Bank v. Murch, L. R. 23 Ch. Div. 138 778
Wheaton v. Peters, 33 U. S. 8 Pet. 591 (8: 1055)..... 799, 812
Wheeling Bridge Case, 54 U. S. 13 How. 518 (14: 249)..... 634
White v. Cannon, 73 U. S. 6 Wall. 443 (18: 923)..... 123
v. Dunbar, 119 U. S. 47 (30: 303).. 274
v. Hart, 80 U. S. 13 Wall. 646 (20: 685)..... 614
v. Miller, 71 N. Y. 133..... 483
v. Turk, 37 U. S. 12 Pet. 238 (9: 1069)..... 193
Whiting v. Bank of U. S. 38 U. S. 13 Pet. 6, 15 (10: 33, 37) 74, 631
Whitney v. Wright, 15 Wend. 171...444, 445
Wickersham v. Singer, 1 MacArthur's Pat. Cas. 645..... 563
Wilcox v. Hunt, 38 U. S. 13 Pet. 378 (10: 209)..... 798
v. Jackson, 38 U. S. 13 Pet. 498, 509, 511 (10: 264, 269, 270) ... 409, 847, 850
Wilcoxon v. Annesley, 23 Ind. 285..... 268
Wiley v. Prince, 21 Tex. 637..... 158
Wilkinson v. Green, 34 Mich. 221, 223 312
v. Nebraska, 123 U. S. 286 (31:152) 279
Willard v. Presbury, 81 U. S. 14 Wall. 676 (20: 719)..... 767
Willing v. Baine, 3 P. Wms. 113..... 295
Williams v. Baker, 71 Pa. 476.....158, 159
v. Baker, 84 U. S. 17 Wall. 144, 153 (21: 561, 622).....195, 199, 203
v. Bruffy, 96 U. S. 176, 183 (24: 716, 717)..... 612
v. Heath, 22 Iowa, 519..... 311
v. Suffolk Ins. Co., 3 Sumn. 276.. 67
Williamsport Nat. Bank v. Knapp, 119 U. S. 357 (30: 446)..... 193
Willis v. Thompson, 93 Ind. 62..... 193
Wilmington & W. R. Co. v. King, 91 U. S. 3 (23: 186)..... 613
Wilson, *Ex parte*, 114 U. S. 417 (29: 89) 409, 563
Wilson v. Barnum, 49 U. S. 8 How. 258 (12: 1070)..... 192
v. Blackbird Creek Marsh Co., 27 U. S. 2 Pet. 245, 250 (7: 412, 414).....632, 719
v. Blair, 119 U. S. 387 (30: 441)... 315
v. City Bank, 84 U. S. 17 Wall. 473 (21: 723)..... 563
v. Deen, 121 U. S. 525 (30: 980).. 414

Wilson *v.* Lancashire & Y. R.Co., 9 C. B. N. S. 632 484
v. Palmer, 18 Tex. 592, 595 444
v. Sandford, 51 U. S. 10 How. 99 (13:344) 686
Windsor *v.* McVeigh, 93 U. S. 274, 277 (23: 914, 915) 442
Winona & St. P. R. R. Co. *v.* Blake, 94 U. S. 180 (24: 99) 843
Winslow *v.* Minnesota & P. R. Co., 4 Minn. 316 401
Wirth *v.* Branson, 98 U. S. 118, 121 (25: 86, 87) 430
Withers *v.* Buckley, 61 U. S. 20 How. 84, 91 (15: 816, 819) 86
Wolcott *v.* Des Moines Nav. & R. R. Co., 72 U. S. 5 Wall. 681 (18: 689) 195, 197, 201, 236
v. Heath, 78 Ill. 433 252
Wolff *v.* New Orleans, 103 U. S. 358, 367 (26: 395, 399) 233
Wollensak *v.* Reiher, 115 U. S. 96 (29: 350) 762
Wolsey *v.* Chapman, 101 U. S. 755 (27: 915) 195
Woodbury *v.* Northy, 3 Me. 85 168
Woodruff *v.* Trapnall, 51 U. S. 10 How. 190, 207 (13: 383, 390) 233
Woodworth *v.* Blair, 112 U. S. 8 (28:615) 312
Worthington *v.* Mason, 101 U. S. 149, 152 (25: 848, 849) 260, 505
Wright *v.* Roseberry, 121 U. S. 488, 501 (30: 1039, 1042) 72, 851

Y.

Yale Lock Mfg. Co. *v.* Sargent, 117 U. S. 373 (29:950) 364
Yeaton *v.* Lynn, 30 U. S. 5 Pet. 224, 229 (8: 105, 106) 777
Yick Wo *v.* Hopkins, 118 U. S. 356 (30: 220) 211, 654
York & C. R. R. Co. *v.* Myers, 59 U. S. 18 How. 246 (15: 380) 336
Yosemite Valley Case, 82 U. S. 15 Wall. 77 (21:82) 852
Young *v.* Duvall, 109 U. S. 573, 577 (27: 1036, 1038) 159

Z.

Zeigler *v.* Hopkins, 117 U. S. 683, 689 (29: 1019, 1021) 314

ACTS, TREATIES AND PROCLAMATIONS.

1763, Treaty, between Spain and Great Britain 56
1783, Treaty of peace with Great Britain 56
1787, July 13 (1 Stat. at L. 52) For Government of Northwest Territory .. 682
1788, June 20, Reserving lands to satisfy claims of ancient settlers 850
1789, Sept. 24 (1 Stat. at L. 92, § 34) Judiciary 798
1789, Sept. 24, ch. 20, § 25 (1 Stat. at L. 86) Judiciary Act 611, 612
1789, Sept. 25, ch. 20 (1 Stat. at L. 91) Judiciary Act 740
1789, Sept. 25, ch. 20, § 25 (1 Stat. at L. 86) Judiciary Act 678
1789, Sept. 28 (Judiciary) 416
1789, Sept. 29 (1 Stat. at L. 93) Judiciary 750
1791, Feb. 4 (1 Stat. at L. 189) Admitting Kentucky into the Union 684
1793, Feb. 18, ch. 8 (1 Stat. at L. 305) Enrolling and licensing vessels 512, 518
1795, Oct. 27 (4 Stat. at L. 157) Treaty with Spain 56, 58, 61
1799, March 2, ch. 22 (1 Stat. at L. 627) To regulate the collection of duties on imports 742
1800, Treaty, "St. Ildefonso" (Between France and Spain) 61
1802, April 24, Treaty with Georgia 57
1802, June 16 (7 Stat. at L. 68) Treaty with Creek Indians 57
1803, Treaty with France, ceding Louisiana 61
1804, March 26 (2 Stat. at L. 287) For the Government of Louisiana 61
1805, Nov. 14 (7 Stat. at L. 96) Treaty with Creek Indians 57
1807, March 2, ch. 21 (2 Stat. at L. 424) To extend time for locating Virginia land warrants, etc. 110
1811, Feb. 20 (2 Stat. at L. 641, Ch. 21) To form Const. and State Governments for Territory of Orleans 71
1814, Aug. 9 (7 Stat. at L. 120) Treaty with Creek Indians 57
1817, March 3, ch. 45, § 2 (3 Stat. at L. 366) To provide for settlement of public accounts 395
1819, (5 Stat. at L. 743) Treaty with Spain, ceding Fla. 58, 63, 173, 174, 438
1819, March 3, ch. 98 (3 Stat. at L. 526) To correct errors in entries at land offices 429
1824, May 24, ch. 138 (4 Stat. at L. 31) For correcting errors in land office entries 429
1824, May 26, ch. 173, § 2 (4 Stat. at L. 52) To test validity of land claims in Mo. and Ark. 497
1825, March 3 (4 Stat. at L. 125) To extend the time for the settlement of private land claims in Florida, etc. 174
1826, May 4, ch. 31 (4 Stat. at L. 157) Fixing boundary line between Ga. and Fla. 58
1826, May 20 (4 Stat. at L. 189) To extend time for locating Virginia land warrants 111
1828, May 24, ch. 96 (4 Stat. at L. 301) For correcting errors in land office entries 429
1832, May 31, ch. 112 (4 Stat. at L. 520) To quiet possessions, etc., in Dist. Columbia 158
1832, July 3, ch. 162 (4 Stat. at L. 559) For reissue of patents 104
1832, July 9, ch. 180 (4 Stat. at L. 565) To adjust private land claims in Missouri 848

ACTS, TREATIES AND PROCLAMATIONS, CONTINUED.

1835, March 3 (4 Stat. at L. 753) To regulate pay of navy officers 148
1836, April 20 (5 Stat. at L. 10) Organizing Territory Wisconsin 656
1836, July 4 (5 Stat. at L. 119, 123, 124) To promote the progress of useful arts 558, 564, 666, 686
1836, July 4, § 7 (5 Stat. at L. 125) Relating to patents 155, 161, 162, 163
1836, July 4, ch. 357 (5 Stat. at L. 122) Issuing new patent 104, 106
1836, July 4, ch. 361 (5 Stat. at L. 126) Confirming claims to lands in Missouri 848
1838, April 20, ch. 57, § 4 (5 Stat. at L. 227) For quieting possessions, etc., in District of Columbia 158
1838, July 7 (5 Stat. at L. 262) To extend time for locating Virginia land warrants 110, 111
1839, March 3, ch. 88, § 7 (5 Stat. at L. 354) To promote the progress of useful arts 558, 559, 561, 562, 563, 564
1839, March 3 (5 Stat. at L. 354) Relating to patents 155, 156, 161, 162
1841, Aug. 19 (5 Stat. at L. 449) To extend time locating Virginia land warrants 110
1841, Sept. 4, ch. 16, § 10 (5 Stat. at L. 455) Preemption Act 184, 189
1842, Aug. 23, ch. 188 (5 Stat. at L. 518) To establish U. S. judicial courts 740
1842, Aug. 30, ch. 270 (5 Stat. at L. 564) To provide for revenue from imports 167, 168
1844, May 23, ch. 17 (5 Stat. at L. 657) For relief of citizens of towns upon public lands 555
1844, May 31, ch. 31 (5 Stat. at L. 658) To amend Judiciary Act 1789 276
1845, March 3, ch. 48, § 7 (5 Stat. at L. 742, 743) Admitting Iowa and Fla. 198, 861
1846, Aug. 6 (9 Stat. at L. 59) For the safe keeping, etc., of the public revenue 534, 535, 536
1848, July 4 (9 Stat. at L. 922) Treaty of Guadalupe Hidalgo 590, 591
1848, Aug. 14 (9 Stat. at L. ch. 177, § 4) Creating Territory of Oregon 656, 658, 659, 660
1848, Aug. 14, ch. 177, § 14 (9 Stat. at L. 323) Establishing Territorial Government in Oregon 487
1850, Sept. 9, § 3 (9 Stat. at L. 452) Admitting California into the Union 633
1850, Sept. 27 (9 Stat. at L. 496) Creating Office Surveyor-Gen. in Oregon 654, 660, 661
1850, Sept. 27 (9 Stat. at L. 496, §§ 4, 6, 7) Oregon Donation Act 487, 489
1850, Sept. 28 (9 Stat. at L. 519) To reclaim swamp lands in Arkansas 54, 71, 72, 575, 852
1851, March 3, ch. 38 (9 Stat. at L. 630) To regulate appraisement of imported merchandise 167
1851, March 3, ch. 41 (9 Stat. at L. 631) To settle private land claims in California 497, 555, 590, 751, 846
1852, Aug. 30 (10 Stat. at L. 68, 64) For the safety of passengers on steam vessels 584
1853, Feb. 14, ch. 69 (10 Stat. at L. 158) Amending Oregon Donation Act 488, 489
1853, March 3 (10 Stat. at L. 205) For the survey of public lands in California 555
1853, May 30 (10 Stat. at L. 277) Organizing Territory of Kansas 656
1854, March 28, ch. 30 (10 Stat. at L. 270) To extend warehousing system 814
1854, May 30 (10 Stat. at L. 277) Organizing Territory Nebraska 656
1854, Aug. 5 (10 Stat. at L. 588) Post Office appropriations 331, 332
1855, Feb. 24 (10 Stat. at L. 612, § 1) Establishing Court of Claims 129
1855, Feb. 28, ch. 127 (10 Stat. at L. 616) To promote the efficiency of the navy 663
1855, March 2 (10 Stat. at L. 634, ch. 147) To relieve purchasers of swamp lands 71, 72
1855, March 3 (10 Stat. at L. 701) Extending time for surveying military lands in Va. 110
1855, March 3 (10 Stat. at L. 720) To regulate the carriage of passengers on steamers and other vessels 582, 583, 584, 586
1856, May 15, ch. 28 (11 Stat. at L. 9) Granting lands to Iowa to aid in building railroads 196
1856, Aug. 18 (11 Stat. at L. 52, 54) Consular and Diplomatic Appropriation Act 127
1856, Aug. 18 (11 Stat. at L. 118) Relating to real estate sales in District of Columbia 450, 454
1857, Jan. 16, ch. 12 (11 Stat. at L. 154) To promote the efficiency of the navy 663
1859, Feb. 14 (11 Stat. at L. 383) Admitting Oregon into the Union 630, 631, 632, 633
1860, June 21 (12 Stat. at L. 71) To confirm land claims in New Mexico 114, 120
1860, June 22, § 11 (12 Stat. at L. 85) To adjust private land claims 172, 173, 174
1861, March 2, § 16 (12 Stat. at L. 246) To promote the progress of useful arts 155, 156
1861, Aug. 5, ch. 45, § 13 (12 Stat. at L. 292) To provide for increased revenue from imports 71, 72
1862, March 2, Joint Resolution (12 Stat. at L. 251) relinquishing title to lands to State of Iowa 196, 197
1862, June 2 (12 Stat. at L. 410) For the survey of land grants or claims 754
1862, July 1, Proclamation of President 394
1862, July 1, ch. 119, §§ 81, 82 (12 Stat. at L. 432) To provide internal revenue 302
1862, July 1, ch. 120 (12 Stat. at L. 489, 492) To aid in constructing railroad and telegraph lines 386, 845, 846, 849
1862, July 2, ch. 130 (12 Stat. at L. 503) Donating public lands to States and Territories 428
1862, July 16, ch. 183 (12 Stat. at L. 583) Grading line officers in navy 825

ACTS, TREATIES AND PROCLAMATIONS, CONTINUED.

1862, July 17, ch. 195 (12 Stat. at L. 589) Confiscation Act.....447, 448
1863, March 3, ch. 92, § 5 (12 Stat. at L. 765, 766) Relating to Court of Claims.....130, 422
1863, March 3, ch. 97 (12 Stat. at L. 772) Granting Kansas lands for constructing railroads and telegraphs 849
1863, March 3, ch. 104, § 3 (12 Stat. at L. 798), Granting lands for military road 134
1863, March 3, ch. 116 (12 Stat. at L. 808) Granting preemption to purchasers on Soscol Ranch, Cal..... 852
1863, March 13 (12 Stat. at L. 820) For collection of captured and abandoned property..... 894
1864, June 3, ch. 106 (13 Stat. at L. 116) National Currency Act..... 570
1864, June 3 (13 Stat. at L. 111) Nat. Bank Act.....96, 97, 263
1864, June 25, ch. 144 (13 Stat. at L. 184) Donating public lands to Oregon 489
1864, June 30, ch. 173, § 122 (13 Stat. at L. 284) To provide Internal Revenue, etc..... 139
1864, June 30, § 121 (13 Stat. at L. 284) To provide internal revenue, etc..... 303
1864, June 30, ch. 173, § 120 (13 Stat. at L. 283) To provide internal revenue, etc..... 302
1864, July 1, ch. 194, § 5 (13 Stat. at L. 332) For the settlement of land titles in California 556, 754
1864, July 1 (13 Stat. at L. 335) Fixing compensation of postmasters ..331, 332
1864, July 1, ch. 205, § 1 (13 Stat. at L. 343) For the disposal of coal lands in the public domain.....189, 190
1864, July 2 (13 Stat. at L. 365) Incorporating Northern Pac. R. R. Co... 386
1864, July 2, ch. 220 (13 Stat. at L. 373) To increase facilities for telegraph communications..... 845
1864, July 2 (13 Stat. at L. 375) To provide for the collection of captured and abandoned property.....394, 395
1864, July 2 (13 Stat. at L. 358) To aid in the construction of a R. R. and Tel. line from Mo. Riv. to Pac. Ocean 849
1864, July 4, ch. 240 (13 Stat. at L. 381) To restrict jurisdiction Court of Claims and pay for Army stores and supplies..... 822
1865, March 3, ch. 107 (13 Stat. at L. 529) For the disposal of coal lands and town property in the public domain 189
1866, March 17, ch. 19 (14 Stat. at L. 9) Relating to Court of Claims..... 533
1866, June 15 (14 Stat. at L. 66) Authorizing the carriage of freights, etc., by railroad companies..... 706
1866, July 13, ch. 184 (14 Stat. at L. 138) Internal revenue.....139, 303
1866, July 24, ch. 230 (14 Stat. at L. 221) To aid in the construction of telegraphs.....652, 792, 793, 795
1866, July 25 (14 Stat. at L. 244) Authorizing the construction of certain bridges.....706, 733, 734, 735, 736
1866, July 28, § 14 (14 Stat. at L. 331) For protection of revenue... 73
1867, Feb. 5, ch. 28, § 2 (14 Stat. at L. 386) Amending Judiciary Act..611, 678
1867, March 2 (14 Stat. at L. 544) For adjusting private land claims..... 172
1867, March 2, ch. 196 (14 Stat. at L. 558) For the removal of causes.....204, 205
1867, March 2 (14 Stat. at L. 561) To provide increased revenue..... 644
1867, Oct. 24, Treaty U. S. and Dominican Republic (15 Stat. at L. 475)..387, 388
1868, March 31, Joint resolution (15 Stat. at L. 251)..... 396
1868, July 23, ch. 69 (15 Stat. at L. 260) For protection of revenue..... 73
1868, June 25, ch. 71, §§ 1, 7 (15 Stat. at L. 75, 76) Providing for appeals from Court of Claims.....129, 130, 422
1869, Feb. 25, ch. 47 (15 Stat. at L. 275) To confirm land claims in New Mexico.....115, 116, 120
1869, April 10, ch. 23, § 1 (16 Stat. at L. 45) Rights of married women's property in District of Columbia.. 157
1870, Feb. 2, ch. 13 (16 Stat. at L. 64) For erecting bridge in Oregon..... 630, 633
1870, April 28, Joint Resolution (16 Stat. at L. 373, 663) Relating to land claims in New Mexico..... 115
1870, May 6, ch. 93 (16 Stat. at L. 121) Making Iowa River a public highway 134
1870, July 8 (16 Stat. at L. 201) Relating to patents..... 563
1870, July 8, ch. 230 (16 Stat. at L. 205) Issue of new patents..... 104, 106
1870, July 8, ch. 230, § 59 (16 Stat. at L., 201, 207) To revise and amend statutes relating to patents.....155, 162, 163, 666, 672
1870, July 14, §§ 15, 21 (16 Stat. at L. 260, 264) To reduce internal taxes..... 302, 303, 644, 645
1870, July 15 (16 Stat. at L. 315-320) Army appropriation 475
1870, July 15, ch. 295, § 312 (16 Stat. at L. 330, 334) Naval appropriation 140, 824, 825
1871, Jan. 30, Joint Resolution (16 Stat. at L. 592) Declaring meaning of Act July 14, 1870 ..... 644, 645
1871, Feb. 18 (16 Stat. at L. 416) ceding military lands to Ohio.108, 110, 111, 112
1871, March 3, ch. 122, § 22 (16 Stat. at L. 573, 579) Incorporating Texas Pac. R. R. Co..... 305, 384, 385
1872, April 9 (To settle titles to lands between Ga. & Fla.)..... 54, 60
1872, May 2 (17 Stat. at L. 59) To aid in constructing Tex. & Pac. R. R. Co. 305
1872, June 1, ch. 255 (17 Stat. at L. 196, 197) To further the administration of justice.....241, 242, 746
1872, June 6 (17 Stat. at L. 231) To reduce duties on imports and to reduce internal taxation..... 644
1872, June 8 (17 Stat. at L. 283) To revise, etc. statutes relating to Post Office Department..... 331

ACTS, TREATIES AND PROCLAMATIONS, CONTINUED.

1873, March 3, ch. 269, § 2 (17 Stat. at L. 603) To require national banks to restore their capital, etc..... 570
1873, March, 3, ch. 279 (17 Stat. at L. 607) To provide for the sale of coal lands..... 189
1874, June 11 (18 Stat. at L. 66) Consular & diplomatic appropriations....127, 128
1874, June 16 (18 Stat. at L. 72) Army Appropriation Act..... 464, 465
1874, June 20, ch. 337 (18 Stat. at L. 116) For the government of the District of Columbia..... 527
1874, June 20, § 21 (18 Stat. at L. 190) For the government of the District of Columbia..... 493, 494
1874, June 22, ch. 391 (18 Stat. at L. 186) To amend the custom revenue laws.....740, 741, 743, 745, 746
1875, Feb. 16, ch. 77 (18 Stat. at L. 315) To facilitate the disposal of causes in Sup. Ct. U. S..... 79, 177
1875, Feb. 18 (18 Stat. at L. 322) Consular & Diplomatic Appropriation 127
1875, Feb. 18, ch. 80 (18 Stat. at L. 316, 320) To amend errors and omissions in U. S. Rev. Stat..... 570
1875, March 3, ch. 137 (18 Stat. at L. 470) To determine jurisdiction of U. S. Circuit Courts etc..... 69, 99, 72, 153, 279, 281, 333, 381, 556, 631, 645, 845
1875, June 3, Treaty with Hawaiian Islands (19 Stat. at L. 625)..... 387
1876, July 31, ch. 246 (19 Stat. at L. 121) Appropriations for sundry civil expenses.....384, 385, 386
1876, Aug. 15, Treaty with Denmark (11 Stat. at L. 719)..... 387
1876, Aug. 15, ch. 288 (19 Stat. at L. 170) Consular and diplomatic appropriations..... 127
1877, Feb. 26, ch. 65 (19 Stat. at L. 233) Consular and diplomatic appropriations..... 127
1877, Feb. 27, ch. 69 (19 Stat. at L. 250) To perfect the revision of U. S. Stat. 584, 585, 586
1878, June 4, ch. 155 (20 Stat. at L. 91, 93, 98) Consular and diplomatic appropriations..... 128
1879, Jan. 27, chap. 28 (20 Stat. at L, 268) Consular and diplomatic appropriations..... 128
1879, Sept. 24 (1 Stat. at L. 79) Judiciary Act..... 72
1880, May 14 (21 Stat. at L. 133, 135) Consular and diplomatic appropriations..... 128
1880, May 27, ch. 105 §§ 2, 4 (21 Stat. at L. 142) To construe Act Feb. 18, 1871.....109, 110, 111, 112
1881, Feb. 24 (21 Stat. at L.) Consular and diplomatic appropriations..... 128
1882, May 6, ch. 126 (22 Stat. at L. 58) To execute treaty with Chinese 592, 593, 594, 598
1882, July 1 (22 Stat. at L. 128, 129, 131) Consular and diplomatic appropriation 128
1882, July 12, ch. 290, § 4 (22 Stat. at L. 168) To extend corporate existence of national banks..... 571
1882, July 15 (22 Stat. at L. 168) To increase water supply of city of Washington.... 528, 529, 530, 532, 538
1882, Aug. 7 (22 Stat. at L. 348) Relating to land warrants in Virginia Military District..... 110, 113
1882, Aug. 7 (22 Stat. at L. 734) For relief of Julia A. Nutt.....821, 822
1883, March 3, ch. 97 (22 Stat. at L. 473) Making appropriations for naval service..... 140, 148, 466, 824, 825
1883, March 3, ch. 119 (22 Stat. at L. 487) Relating to postmasters 330
1883, March 3, ch. 121 (22 Stat. at L. 488) To reduce internal revenue taxation..... 763
1883, March 3 (22 Stat. at L. 494, §§ 6, 10) To reduce internal revenue taxation.....813, 814, 815
1883, March 3, ch. 121, (22 Stat. at L. 509, 510) To reduce internal revenue, etc.....170, 673, 674, 675
1883, March 3, § 11 (22 Stat. at L. 525) To reduce internal revenue..... 389
1884, May 1 (23 Stat. at L. 17) To provide for urgent deficiencies in appropriations 758
1884, July 5 (23 Stat. at L. 552) For the allowance of certain claims reported by Secretary of Treasury....822, 823
1884, July 5, ch. 222 (23 Stat. at L. 115) Relating to Chinese Treaty stipulations..... 594, 596, 598
1884, July 7, ch. 333 (23 Stat. at L. 227) Consular and diplomatic appropriations..... 128
1885, Feb. 25, ch. 150 (23 Stat. at L. 322) Consular and diplomatic appropriations..... 128
1885, March 3, ch. 355, § 2 (23 Stat. at L. 443) Regulating appeals from supreme courts.....278, 314, 449
1886, April 17 (14 Stat. at L. 33, 38) Making appropriations for naval service..... 148
1886, June 12, ch. 114 (14 Stat. L. 60) To amend postal laws..... 331
1887, March 3 (22 Stat. at L. 424) Consular and diplomatic appropriations..... 128
1887, March 3, ch. 359, §§ 9, 12 (24 Stat. at L. 507) Relating to suits against U. S. Govt..... 422
1887, March 3, ch. 378 (24 Stat. at L. 552) Relating to jurisdiction of circuit courts.....68, 69, 153, 279
1887, Mar. 3, ch. 376 (24 Stat. at L. 556) To provide for the adjustment of land grants..... 852

OPINIONS OF ATTORNEYS-GENERAL.

15 Ops. Attys-Gen., 94, 208..... 116, 117, 121

UNITED STATES REVISED STATUTES.

Rev. Stat. secs. 286, 269, 277 395
Rev. Stat. sec. 346 749
Rev. Stat. sec. 629 ..... 576, 577
Rev. Stat. sec. 629, cl. 9 686
Rev. Stat. sec. 639 204
Rev. Stat. sec. 650 69
Rev. Stat. sec. 698 69
Rev. Stat. sec. 699 686
Rev. Stat. secs. 699, 823, 828 276
Rev. Stat. secs. 708, 999 496
Rev. Stat. secs. 707, 1059, 1063 423
Rev. Stat. sec. 709 ... 54, 85, 456, 612, 678, 709
Rev. Stat. sec. 711, cl. 5 686
Rev. Stat. sec. 721 798
Rev. Stat. sec. 736 570
Rev. Stat. sec. 798 461
Rev. Stat. sec. 914 ..... 241, 242
Rev. Stat. sec. 915 571
Rev. Stat. sec. 916 242
Rev. Stat. sec. 953 746
Rev. Stat. sec. 954 740
Rev. Stat. sec. 997 261
Rev. Stat. sec. 999 689
Rev. Stat. sec. 1000 497
Rev. Stat. sec. 1007 234
Rev. Stat. sec. 1025 517
Rev. Stat. sec. 1063–1065 ..... 129, 130
Rev. Stat. sec. 1069 ..... 129, 130
Rev. Stat. secs. 1378, 1386, 1387, 1388 ... 465
Rev. Stat. secs. 1449, 1450, 1451, 1452, 1453, 1454, 1598 661
Rev. Stat. sec. 1556 ..... 140, 824
Rev. Stat. secs. 1588, 1594 663
Rev. Stat. secs. 1594, 1588 662
Rev. Stat. sec. 1690 127
Rev. Stat. secs. 2258, 2847 189
Rev. Stat. secs. 2820, 2333 ..... 468, 470
Rev. Stat. secs. 2369, 2370, 2372 429
Rev. Stat. sec. 2447 117
Rev. Stat. sec. 2499 ..... 645, 675
Rev. Stat. secs. 2499, 2502, 2503, 2513 ... 763
Rev. Stat. sec. 2502 170
Rev. Stat. sec. 2504 495
Rev. Stat. secs. 2504, 2875, 2876, 2971 ... 814
Rev. Stat. sec. 2634 535
Rev. Stat. secs. 2830, 2864 745
Rev. Stat. secs. 2872, 2874, 3802 738
Rev. Stat. sec. 2900 ..... 165, 167
Rev. Stat. sec. 2901 ..... 168, 170
Rev. Stat. secs. 2902, 2906, 2922, 2929, 2930, 2931, 2949, 3011 167
Rev. Stat. secs. 2931, 3011 494
Rev. Stat. secs. 3011, 2869 491
Rev. Stat. secs. 3220, 1092 ..... 472, 473
Rev. Stat. sec. 3639 ..... 535, 536
Rev. Stat. secs. 4252, 4253 ..... 581, 582, 584
Rev. Stat. secs. 4252–4289, 4278–4280 ... 706
Rev. Stat. secs. 4258, 4255, 4266, 4264, 4270 586
Rev. Stat. secs. 4255, 4264, 4266, 2774, 3088 585
Rev. Stat. secs. 4259, 4270, 4268, 4262 ... 582
Rev. Stat. secs. 4283–4289 177
Rev. Stat. secs. 4886, 4920 162
Rev. Stat. sec. 4887 155
Rev. Stat. sec. 4916 ..... 104, 105, 106
Rev. Stat. secs. 4917, 4922 286
Rev. Stat. sec. 4919 666
Rev. Stat. sec. 4921 672
Rev. Stat. sec. 4965 ..... 577, 578
Rev. Stat. sec. 5219 694
Rev. Stat. sec. 5242 ..... 570, 571
Rev. Stat. sec. 5258 706
Rev. Stat. secs. 5263, 5269 ..... 792, 794
Rev. Stat. sec. 5480 174
Rev. Stat. sec. 5490 ..... 534, 535

STATE CONSTITUTIONS.

Const. of Arkansas 620, 624
Arkansas, 1868 ..... 624, 613
Arkansas, 1874 ..... 843, 844
Connecticut 658
Georgia, 1868 ..... 613, 614
Illinois, 1848, Art. 13, sec. 11 ... 640, 641
Illinois, 1870 ..... 640, 641
Illinois, 1870, Art. 11, Sec. 10 830
Iowa, Art. 1, Sec. 4 844
Kansas 208, 211
Louisiana, 1868, Art. 127 613
Const. of Louisiana, 1879, Art. 258 .. 611, 613, 615
Massachusetts 658, 698
Missouri 456, 457, 658
New Jersey, Art. 4, sec. 7, ¶ 4 ... 551
New York, Art. 1, Sec. 7 .. 766, 768, 769
North Carolina 62
Pennsylvania, 1776, 1790 657
Rhode Island 798
Virginia 62
Wisconsin 212

UNITED STATES CONSTITUTION.

Art. 1, sec. 8 277
Art. 1, sec. 8, cl. 3 652
Art. 1, sec. 9, pt. 6 396
Art. 1, sec. 10 ..... 218, 220, 556, 612, 708
Art. 4, sec. 2 ..... 652, 653
Art. 4, sec. 2, cl. 1 651
Art. 5, Amendments 854
Amendment 4th, Sec. 1 ..... 652, 653, 654
5th 409
6th 409
11th 223, 224, 229, 229, 230
14th 208, 209, 211, 213, 409, 693, 766, 768, 769
14th, Arts. 4, 5, 6, 14 ..... 86, 87

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1887.

Vol. 123.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1887,

AND REPORTED HEREIN,

VOL. 123,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. [123 U. S.]	Title.	Here in.
1	Colfax v. Groover	51
	" "	53
	" "	54
	" "	55
	" "	56
	" "	57
	" "	58
	" "	59
	" "	60
	" "	61
	" "	62
	" "	63
	United States v. Louisiana	69
	" " "	70
	" " "	71
	" " "	72
	" " "	73
	United States v. Alabama	73
	United States v. Mississippi	73
	The Excelsior	75
	" "	76
	" "	77
	" "	78
	" "	79
	Burlington, C. R. & N. R. Co. v. Simmons	73
	" "	74
	Morey v. Lockhart	68
	" "	69
	Gilson v. Dayton	74
	" "	75
	Henderson v. Louisville & N. R. R.	92
	" " "	93
	" " "	94
	Sun Insurance Co. v. Kountz Line	79
	" " " "	80
	Orient Insurance Co. v. Adams	63
	" " "	65
	" " "	66
	" " "	67
	Tufts v. Tufts	91
	" "	93

Off. Rep. [123 U. S.]	Title.	Here in.
79	Davis v. Key	78–81
	" "	81–82
	" "	82
81	Davenport Bank v. Davenport Bd. of Equalization	84–85
	" " "	85–86
	" " "	87
87	Parker & Whipple Co. v. Yale Clock Co.	88
	" " "	88–91
	" " "	91–94
	" " "	94–97
	" " "	97–100
	" " "	100–103
	" " "	103–104
105	Bell v. Bank of Kasson	105–107
	" " "	108–110
	" " "	110–112
115	United States v. Philadelphia & R. R. R. Co.	114–116
	" " "	116–117
	" " "	117
	Coon v. Flagg	118–119
	" "	119–122
	" "	122–125
	" "	125–128
	" "	128–131
131	Spies v. Illinois	131–143
	" "	143–155
	" "	155–168
	" "	168–171
	" "	171–174
	" "	174–177
	" "	177–180
	" "	180–182
182	Mathews v. United States	182–184
	" " "	184–186
186	United States v. Mullan	186–187
	" " "	188–189
189	Craig v. Leitensdorfer	189–190
	" "	190–193

Off. Rep. 122 U. S.	Title.	Here in.
192–196	Craig v. Leisendorfer	116
196–199	" "	117
199–200	" "	118
202–205	" "	120
205–209	" "	121
209–211	" "	122
211–214	" "	123
214	" "	124
215	State of Missouri, *ex rel.* Harshman, v. Winterbottom	124
215–217	" " "	125
217–222	" " "	126
222	" " "	127
222	Hoard v. Chesapeake & O. Railway	130
223–225	" " "	131
225–227	" " "	132
227	Finn v. United States	128
227–230	" " "	129
230–233	" " "	130
233	Richter v. Jerome	132
234	" "	133
234–237	" "	134
237–240	" "	135
240–242	" "	136
242–247	" "	137
247–249	" "	138
249–250	Smith & Griggs Mfg. Co. v. Sprague	141
250–254	" " "	142
254–256	" " "	143
256–259	" " "	144
259–262	" " "	145
262–265	" " "	146
265–267	" " "	147
267	Andrews v. Hovey	160
268–270	" "	161
270–273	" "	162
273–276	" "	163
276	Stinson's Admr. v. Sellers,	153
276–278	" " "	154
278–284	" " "	155
284–286	" " "	156
286	Wilkinson v. Nebraska	152
287–288	" "	153
288	Sands v. Manistee River Imp. Co.	149
289–290	" " "	151
290–297	" " "	152
297	Ruggles v. Manistee River Imp. Co.	152
297	Hitz v. Jenks	156
298–300	" "	157
300–303	" "	158
303–306	" "	159
306–307	" "	160
307	Colorado Coal & Iron Co. v. United States	182
308–310	" " "	184
310–314	" " "	185
314–317	" " "	186
317–320	" " "	187
320–323	" " "	188
323–326	" " "	189
326–328	" " "	190
329	Dewey v. West Fairmont Gas Coal Co.	179
331–332	" " "	180
332–334	" " "	181
335	United States v. Morant	171
335–338	" " "	172
338–342	" " "	173

Off. Rep. 122 U. S.	Title.	Here in.
343–345	United States v. Morant	174
345	United States v. Allen	147
347–349	" " "	148
349	The Maggie J. Smith v. Walker v. Dun	175
350–352	" "	177
353–356	" "	178
356	Oelbermann v. Merritt	164
357–359	" "	165
359–362	" "	166
363–365	" "	167
365–368	" "	169
368–369	" "	168
369	Mussin v. Cadwalader	169
370–372	" "	170
372–373	*In Re* Henry	124
373–375	" "	175
375	Cox v. Western Land & Cattle Co.	176
375–376	" " "	179
376	Lancaster v. Keeler	250
376–379	" "	250
379–381	" "	340
387–388	" "	341
388–391	" "	342
391	" "	343
392–396	White v. Barber	340
396–398	" "	344
396–399	" "	345
399–402	" "	346
402–405	" "	347
405–408	" "	348
408–411	" "	349
411–414	" "	350
414–417	" "	351
417–419	" "	352
419–422	" "	353
422–425	" "	354
425	" "	355
426	Jewell v. Knight	190
432–433	" "	190
433–435	" "	191
435–436	" "	194
436	Smith v. Craft	207
440–442	" "	208
443	*In Re* Ayers " Scott " McCabe	218
444–448	" "	217
448–451	" "	218
451–454	" "	219
454–457	" "	220
457–458	" "	221
485–488	" "	222
488–491	" "	224
491–494	" "	225
494–497	" "	226
497–498	" "	227
499–502	" "	228
502–505	" "	229
505–508	" "	230
508–511	" "	231
511–514	" "	232
514–516	" "	233
516	Natal v. Louisiana	235
517–518	" "	234
519	Benitos v. Hampton	260
519–521	" "	261
521–522	Le Sassier v. Kennedy	262
522–524	" "	263
524	New York, L. E. & W. R. R. Co. v. Madison	236

Oct. Rep. 125 U. S.	Title.	Here in.
[illegible]–637	New York, L. E. & W. R. R. Co. v. Madison	193
637	Snyder v. Goodnow	194
[illegible]	" "	195
[illegible]	" "	196
[illegible]	" "	197
[illegible]	" "	198
[illegible]	" "	199
[illegible]	Chapman v. Goodnow's Admr.	235
[illegible]	" "	236
[illegible]	" "	237
[illegible]	" "	238
[illegible]	Litchfield v. Goodnow's Admr.	199
[illegible]	" "	201
[illegible]	" "	202
[illegible]	Des Moines Nav. & R. R. Co. v. Iowa Homestead Co.	202
[illegible]	" "	203
[illegible]	" "	204
[illegible]	" "	205
[illegible]	Plumb v. Goodnow's Admr.	268
[illegible]	" "	269
[illegible]	Lacombe v. Forstall's Sons	255
[illegible]	" "	256
[illegible]	" "	257
[illegible]	" "	258
[illegible]	Teal v. Billy	263
[illegible]	" "	264
[illegible]	" "	265
[illegible]	" "	266
[illegible]	" "	267
[illegible]	Bates v. Albany Stove Co.	284
[illegible]	" "	285
[illegible]	" "	286
[illegible]	" "	287
[illegible]	Crawford v. Heysinger	269
[illegible]	" "	270
[illegible]	" "	271
[illegible]	" "	272
[illegible]	" "	273
[illegible]	" "	274
[illegible]	" "	275
[illegible]	Wilson v. Biddle	280
[illegible]	" "	281
[illegible]	" "	282
[illegible]	" "	283
[illegible]	" "	284
[illegible]	Jacksonport v. Johnson	277
[illegible]	" "	278
[illegible]	Beal v. Davenport	279
[illegible]	" "	280
[illegible]	Mugler v. Kansas / Kansas v. Ziebold	205
[illegible]	" "	207
[illegible]	" "	208
659–662	Mugler v. Kansas / Kansas v. Ziebold	209
662–665	" "	210
665–668	" "	211
668–671	" "	213
671–674	" "	213
674–677	" "	214
677–678	" "	215
679	Sherman v. Grinnell	216
679–680	" "	278
681–682	United States v. Hill	279
682–685	" "	275
685–686	" "	276
687	Texas & P. R. Co. v. Marler	277
688–689	" "	303
689–692	" "	304
692–695	" "	305
695–698	" "	306
698–701	" "	307
701–702	" "	308
702–708	Robison v. Portland Orphan Asylum	309
709–706	" "	291
706–709	" "	294
709–710	" "	295
710–711	Northern Pacific R. R. Co. v. Mares	296
711–712	" "	297
713–716	" "	299
716–718	" "	300
718–721	" "	301
722–723	Marquette, H. & O. R. R. Co., v. United States	302
723–724	" "	303
725–726	Radford v. Folsom	293
726–727	" "	293
727–728	North Penn. R. R. Co. v. Commercial Bank	287
728–733	" "	288
733	" "	289
733–736	" "	290
736–739	" "	291
739–741	Ætna Life Ins. Co. v. Davey	315
741–744	" "	316
744–745	" "	317
745	Talkington v. Dumbleton	313
745–746	" "	314
746–747	" "	315
747–748	Hefner v. Northwestern L. Ins. Co.	309
748–749	" "	310
749–752	" "	311
752–755	" "	312
755–757	" "	313

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1887.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are enclosed in brackets.]

ANDREW J. COFFEE, *Plff. in Err.*,
v.
JAMES M. GROOVER ET AL.

(See S. C. Reporter's ed. 1-31.)

Grants of land by government de facto—*disputed boundary between Georgia and Florida—history of.*

*1. Grants of land made by a government, in territory over which it exercises political jurisdiction *de facto*, but which does not rightfully belong to it, are invalid as against the government to which the territory rightfully belongs.

2. Where a disputed boundary between two States is adjusted and settled, grants previously made, by either State, of lands claimed by it, and over which it exercised political jurisdiction, but which, on the adjustment of the boundary, are found to be within the territory of the other State, are void unless confirmed by the latter State; and such confirmation cannot affect the titles of the same lands previously granted by the latter State itself.

3. The boundary between Georgia and Florida was long in dispute; Georgia claiming to a line called Watson's line, and exercising political jurisdiction, and making grants of land to that line; whilst Florida claimed to a line called McNeil's line, further north than Watson's. Upon running the true line, as finally agreed upon by the two States, it was found to be further north than McNeil's line: *Held* (1) that the grant made by Georgia of the land in dispute, which was south of McNeil's line, though made whilst Georgia exercised the powers of government *de facto* over the territory there, was nevertheless void; (2) that the confirmation by Florida of the grants made by Georgia, did not invalidate or disturb the grant of the land in dispute previously made by itself.

The history of the Florida boundary stated.

[No. 24.]

Argued and submitted April 20, 1887. Decided October 17, 1887.

ERROR to the Supreme Court of the State of Florida. *Reversed.*

Reported below, 20 Fla. 61. See also 19 Fla.

The history and facts of the case appear in the opinion of the court.

Mr. **Angus Paterson,** for plaintiff in error:

Head notes by *Mr. Justice* BRADLEY.

The principal question involved in this case is the boundary between the States of Georgia and Florida, and as to the title of lands in the State of Florida. The dividing line between the States of Georgia and Florida was at a very early period recognized as a line running due east from the junction of the Flint and Chattahoochee Rivers to the head of the Saint Mary's River.

Hodgkiss, Stat. Laws Ga. 83; Code of Ga. 1881-7, § 21; Thomp. Dig. Fla. 4, also 584; Const. Fla. 1868, art. 1; Bright. Dig. U. S. Laws, § 2.

The line was not permanently marked until A. D. 1859. This was done by B. F. Whitner on the part of Florida and G. J. Orr, on the part of Georgia, and was called the Whitner & Orr line, being the furthest north of all the lines.

There was also a line marked by McNeil which has been noticed by both States. The State Legislature of Florida ratified all grants made by the State of Georgia that might fall south of the Whitner & Orr line, provided they did not come south of the McNeil line.

Laws Fla. 1859, chap. 1017.

There is a neighborhood line still further south called the Watson line; but it is not found in the statutes of either State, and is only referred to in the Act of Congress passed to quiet titles along the line, which the United States had not conveyed.

U. S. Stat. at L. 1872, p. 52, chap. 451.

There are none of these Acts that give the State of Georgia the right to grant the land in controversy, or to make a valid deed. This land lies not only south of the Whitner & Orr line, but also south of the McNeil line and was a part of the land ceded by Spain, A. D. 1819, and the United States had the right to grant this land to the State of Florida or otherwise. The Whitner & Orr line is now the acknowledged line between the States of Georgia and Florida, so established and fixed by the States themselves.

Laws Fla. 1859, chap. 1017; 1861, Resolution

No. 16; McClelland, Dig. pp. 952, §§ 8,11; Code Ga. 1861, pp. 6, 7, §§ 17, 21.

It is the right of independent Nations to establish and fix disputed boundaries between their respective territories, and this right belongs to the several States of the American Union with one exception, by the consent of Congress, and persons claiming land under grants from the States are subject to the conditions of the compact made by the States.

Poole v. *Fleeger*, 36 U. S. 11 Pet. 185 (9:680); *Rhode Island* v. *Mass.* 37 U. S. 12 Pet. 657 (9: 1233); *Garcia* v. *Lee*, Id. 511 (9: 1176).

The land in controversy was patented by the United States to Florida A. D. 1850.

Certificate of Hugh A. Corley, Commissioner of Lands and Immigration.

This certificate is evidence and of the same force that the patent itself would be.

Laws Fla. 1875, chap. 2063.

The land had previously been surveyed and as soon as it came into market was entered by McCall & Stripling.

Certificate of D. Eagan, Comr. of L. and I. Laws Fla. 1875, chap. 2063.

But they received no deed, only a certificate which they afterwards transferred to the plaintiff in appeal who procured a deed to himself from the State, and is therefore entitled to the land, having a perfect chain of titles from the United States Government to himself.

The defendants claim title through the State of Georgia by grants issued in 1842.

The land in controversy belonged to Spain until 1819 when it was purchased by the United States, and Georgia had no more right to convey this land after it became the property of the United States than she had when it belonged to Spain, and even claiming it for a long time does not give title by occupancy. No Statute of Limitations will run against the government.

Ang. Lim. §§ 84, 87; *U. S.* v. *Hoar*, 2 Mason, 312.

It was conceded by Floridians that the McNeil line was the boundary between the two States, as that line had been recognized by the the States, although not adopted. But they have never conceded that Georgia had a right to come south of the McNeil line. The Watson line was a private line drawn by some individual which cut off a large piece from Florida. And if Georgia has a right to this strip of land, for the same reason she might have taken all of the State of Florida.

The land in controversy is a part of Florida, proved by the plaintiff in error and admitted by the defendant in error. It has been conveyed by the United States and a patent issued therefor.

The line fixed by the States of Florida and Georgia and ratified by Congress is north of all the lines. This line was ratified by Congress in 1872.

See Act of Congress, Stat. at L. 1872, p. 52, chap. 461.

There is no dispute as to where the boundary line is, or as to the location of the land in controversy; it is admitted to be in Florida, and south of the McNeil line; therefore a patent from the United States Government to that land is superior to all others.

This case was determined by the Circuit Court of the United States in 1876.

The suit was brought by A. J. Coffee against Mary J. Groover, executor of Charles E. Groover, and she had full power by the will to represent the estate.

And the state court had no right to try this cause because the United States court had jurisdiction of the whole matter.

Evans v. *Percifull*, 5 Ark. 428; *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 340 (7: 170); also 27 U. S. 2 Pet. 169 (7: 385).

The first judgment in this cause was for the plaintiff in error, by the Circuit Court of the State of Florida, in and for Jefferson County, and the Supreme Court of Florida committed an error in reversing said judgment.

See *Groover* v. *Coffee*, 19 Fla. 64.

It was afterwards tried in the Circuit Court for Jefferson County and the verdict and judgment given for the Groovers, and on appeal taken to the supreme court, this last judgment was affirmed, which plaintiff in error claims to be erroneous.

Coffee v. *Groover*, 20 Fla. 61.

Messrs. S. Pasco and *C. W. Stevens*, for defendants in error:

Florida expressly withheld her lands in this disputed territory from the market until the settlement of the boundary line between the two States.

Stat. Fla. chap. 168; Sess. 3, p. 23; chap. 924; Sess. 9, p. 58.

The register had no power under the state law to make the bargain with McCall & Stripling at the time he issued his certificate to them. Later, while attempting to settle the boundary question, and before she parted with her title, she confirmed the Georgia grants to the Watson line in the occupying claimants. This was doubtless intended to be and was an inducement to Georgia to make the final settlement, which was not favorable to her.

Stat. Fla. chap. 1017; adjourned Sess. 9, p. 28.

This court will not entertain jurisdiction, if the judgment of the state court can be sustained by some proposition in the record, of which it has exclusive jurisdiction.

Rector v. *Ashley*, 73 U. S. 6 Wall. 142 (18: 753).

The land in controversy was never in fact a part of the State of Florida until the Orr and Whitner line, which lies north of both the McNeil and Watson lines was agreed upon by the two States as the boundary line, and this agreement became effective by the implied ratification of Congress in 1872.

19 Fla. 81; Acts 42d Cong. Sess. 2, p. 52, chap. XCI.

Georgia settled the questions between her and the General Government as to the public lands within her borders, by the solemn agreement April 24, 1802, by which she ceded to the United States her territory west of the Chattahoochee River, and the government, among other things, agreed to extinguish for the benefit of Georgia the Indian claims to lands within her remaining territory. This was accomplished by different treaties with the Indians. The one which included the land in dispute was made at Fort Jackson, August 9, 1814, by General A. Jackson with the Creeks. The territory then acquired by the legislative action of Georgia became Irwin County in 1818, and from it

Thomas, Brooks and other Counties were set off in later years. At this time Florida was a Spanish Province. Her northern boundary had never been established. Its terminal points only through this section were defined.

1 Laws U. S. 488, 490; 2 Charters and Consts. of U. S. 1049, 1052; Acts 5th Cong. Sess. 2; 6th Cong. Sess. 1; Treaty, 1 Laws of U. S. 700; Lamar's Compilation of Georgia Laws, 416; 1 Charters and Const. pp. 308, 313. 8 Stat. at L. 138.

The survey attached to each grant to James Groover in the record of this case shows that Georgia was in possession of the land here claimed as a part of her County of Irwin, July 2, 1820, and that her surveying party was then laying it off into lots preparatory to its sale. This was prior to the ratification of the Treaty between the United States and Spain, which resulted in the purchase of Florida.

Spain ratified this Treaty October 24, 1820, and the United States, February 19, 1821.

Thomp. Dig. 568.

The testimony and contemporaneous history show that during this period Georgia exercised her jurisdiction and sovereignty over the territory south of the boundary line, as since established, as far as the southern boundary of the land herein disputed, which is the Watson line. Under these circumstances the grants were made by a government *de facto*, and, we think, *de jure*, until she relinquishes her right, and as such they are valid, and the rights so acquired are respected and sacred.

U. S. v. *Arredondo*, 31 U. S. 6 Pet. 712 (8: 555); *U. S.* v. *Clarke*, 33 U. S. 8 Pet. 436, 445 (8: 1001, 1004); *Delassus* v. *U. S.* 34 U. S. 9 Pet. 133 (9: 77); *Smith* v. *U. S.* 35 U. S. 10 Pet. 330 (9: 443); *Mayor, Etc. of N. O.* v. *U. S.* Id. 712 (9: 592); *Poole* v. *Fleeger*, 36 U. S. 11 Pet. 185, 209 (9: 680, 690); *Rhode Island* v. *Mass.* 37 U. S. 12 Pet. 657, 748 (9: 1233, 1270); *Johnson* v. *M'Intosh*, 21 U. S. 8 Wheat. 589 (5: 692); *Henderson* v. *Poindexter*, 25 U. S. 12 Wheat. 535 (6: 719); *De La Croix* v. *Chamberlain*, Id. 600 (6: 742); *Rhode Island* v. *Mass.* 45 U. S. 4 How. 591, 639 (11: 1116, 1137) 19 Fla. 61, 80.

Such was the decision of the Supreme Court of Florida. The Congress acted in this spirit in ratifying the agreement between the States by yielding all claim of the government to the lands between the McNeil and Watson lines to the Georgia grantees, and the McNeil line is now omitted from the Georgia maps. And in 1860 Congress arranged for a settlement of all property rights growing out of the unadjusted boundary between the two States whenever the boundary line should be finally surveyed and confirmed.

Acts 42d Cong. Sess. 2, p. 52, chap. XCI; 2 Bright, Dig. 401.

In view of the fact that the Supreme Court of Florida has twice carefully examined and discussed the points as here presented, and has cited many authorities in support of the conclusions reached, it is not deemed necessary to do more than cite some of the authorities bearing upon the case, and ask that this court consider the cases in 19 and 20 Florida, and the citations there, which may not be included in this brief.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an action of ejectment for 97 acres of land in Madison County, Florida, situated near the boundary line between that State and Georgia. The plaintiffs were James M. Groover and others, heirs at law of Charles A. Groover, and now defendants in error; the defendant was Andrew J. Coffee, the present plaintiff in error. Judgment was first rendered by the court of first instance in favor of the defendant below; but being reversed by the Supreme Court of Florida, a new trial was had and judgment was given for the plaintiffs, and affirmed by the supreme court. The last judgment of the supreme court is brought here for review on two grounds: first, that the matter in controversy had been tried and determined by the Circuit Court of the United States for the Northern District of Florida, in favor of the defendant Coffee, in a suit between him and the executrix of Charles A. Groover, the ancestor under whom the plaintiffs claim title; secondly, on the ground that the defendant's title to the land in controversy was claimed by him under a grant made by the United States to the State of Florida, and by the State of Florida to the defendant, which title was set aside by the state court in favor of the plaintiff's title derived under a conflicting grant from the State of Georgia.

The first ground of error is not raised on the record in such a manner as to avail the defendant. The matter of defense involved therein was set up by two pleas: first, a plea of former recovery; and, secondly, a plea to the jurisdiction of the court. These pleas were overruled on demurrer, but for what reason is not stated. The Supreme Court of Florida, however, in its opinion, very properly says: "In ejectment all legal defenses may be made under the plea of not guilty, and the special denials mentioned in the statute. McClelland's Dig. 481. Special pleas of matter affecting the legal title, or in estoppel, only encumber the record and tend to embarrassment. *Wade* v. *Doyle*, 17 Fla. 522; *Neal* v. *Spooner*, 20 Fla. 38. They should be struck out by the court *sua sponte*, or on motion, or on demurrer, because they are not proper pleas; but a judgment sustaining a demurrer will not preclude proof, on the trial, of the facts so improperly pleaded." The pleas being overruled, no attempt was made, on the trial, to set up the defense by proof of the former judgment relied on. This branch of the case, therefore, may be laid out of view.

The second ground for reversal is stated in duplicate form in the assignment of errors, as follows, to wit:

1. "In the record and proceedings aforesaid there is manifest error, to wit: That the Supreme Court of the State of Florida in the above stated cause decided that a grant for land issued by the State of Georgia is superior to a patent issued by the United States for the same land, the said land being situate within the territorial limits of the State of Florida."

2. "There is manifest error in this; to wit, that the Supreme Court of the State of Florida in the above stated cause, by the record aforesaid it appears, held that the plaintiff in error should be ousted from certain lands embraced

within the territory of the State of Florida, he holding title through the State of Florida derived from the United States, and that the defendants in error should be put in possession, they claiming under a grant issued by the State of Georgia."

By section 709 of the Revised Statutes, where the decision of the state court is against a title claimed under the Constitution, or any treaty or statute of, or a commission held, or authority exercised under, the United States, this court has jurisdiction to review the decision. We think it will sufficiently appear from the facts of the present case, and the points of law arising thereon, that it satisfies the conditions of the section. The title claimed by the defendant rested, not only on a grant of the United States, but on a delimitation of territory under a Treaty between the United States and Spain.

The case is one of conflicting grants of the same land lying near the boundary line between Georgia and Florida. The fact that the land in controversy was covered by both grants was settled by the jury. It is conceded to lie within the bounds of Florida according to the line recently agreed upon by the two States.

The occasion of conflicting grants being made was the uncertain location, at the time, of the true boundary line referred to, and the fact that Georgia claimed one line and the United States and Florida claimed another.

The plaintiffs, to maintain their title to the land in dispute, gave in evidence on the trial two patents from the State of Georgia to one James Groover, each bearing date the 1st day of January, 1842; one for 226$\frac{4}{10}$ acres of land, described as situate in the fifteenth district of Irwin County, Georgia, and known and distinguished in the plan of said district by the number 199, and having the shape, form and marks shown by a plat annexed; the other patent being for 250$\frac{4}{10}$ acres of land, situate in the same district and county, known and distinguished by the number 200, and having the shape, form and marks shown by a plat annexed. The plats showed that the two lots joined each other east and west, and that they were both bounded on the south by a common line called on the plats "*Florida line;*" and it was testified that the line thus marked on the plats was a line known as the "Watson line." Mesne conveyances were then given in evidence showing that said lots were conveyed by James Groover to Thomas A. Groover by deed dated December 31, 1855; and by Thomas A. Groover to Charles A. Groover by deed dated July 8, 1860; and it was further shown that Charles A. Groover died in 1866, and that the plaintiffs were his heirs at law. Evidence was also given tending to show that the said patentee and grantees respectively had possession of said lands under and in conformity with their said titles until the plaintiffs were ousted by the defendant in 1876.

Evidence was further given to show that another line, called the "McNeil line," ran about 14 chains north of the Watson line and parallel thereto, and that the land in controversy lay between the said two lines, having the Watson line on the south and the McNeil line on the north. Also, that a third line, called the "Orr and Whitner line," ran still farther north than either of the aforesaid lines, which Orr and Whitner line was conceded to be the boundary line between the States of Georgia and Florida, as recently fixed by mutual agreement between the two States, by certain laws and resolutions of their respective Legislatures, confirmed by Act of Congress.

The plaintiffs also introduced evidence tending to show that the Watson line was formerly considered the state line between Georgia and Florida; that Georgians worked the Georgia roads to the Watson line, and Floridians worked the Florida roads to that line; that as far back as one of the witnesses could remember, he being for many years a lawyer and judge in one of the border counties of Georgia, that State had claimed and exercised jurisdiction to the Watson line, until the Orr and Whitner line was agreed upon as the boundary between the two States; that the people living north of the Watson line did jury duty and voted in Georgia; that the wills of people dying there were probated in the Georgia courts, and their estates were administered upon in those courts; that the Georgia courts took jurisdiction of offenses committed as far south as the Watson line, and tried cases in which people living there were interested; that the officers of the Georgia courts executed writs as far south as that line; that persons were tried in Georgia for offenses committed between that line and the Orr and Whitner line. And, on the other hand, as correctly stated by the Supreme Court of Florida in its opinion, there is nothing in the record, nor in the history of the government of the Territory or of the State of Florida, showing that the authorities of the latter exercised any of the powers of government north of the Watson line prior to the said settlement of the boundary between the two States.

The defendant, to maintain the issue on his part, gave in evidence, first, a certified copy of a patent from the United States to the State of Florida, bearing date July 6, 1857, issued under and in pursuance of the Act approved September 28, 1850, known as the Act for granting to certain States the "swamp and overflowed lands" therein; by which patent there was granted to said State, as swamp and overflowed lands, certain designated fractional sections of land, amongst others "the whole of fractional section 29," in township 3 north, range 9 east; which fractional section was proved to be bounded on the north by McNeil's line, and to include the land in controversy. The defendant also produced in evidence a certificate of sale issued by the register of public lands for the State of Florida to one McCall and one Stripling for said fractional section 29, and other land named in said patent, which certificate bore date September 2, 1857, and acknowledged the receipt of $100 in cash, and of certain bonds for the remainder of the purchase money of said lands, as provided by the land laws of Florida. The defendant further gave in evidence a deed from McCall and Stripling to himself, bearing date November 12, 1858, conveying to him all the lands included in said certificate of sale, with a covenant that they were free from incumbrances; also a deed of grant and conveyance of the same lands to the defendant from the Trustees of the Internal Improvement Fund of the State of Florida—the proper authority for that purpose—which last deed bore date September 12, 1874. The defendant, being sworn as

a witness, testified that McCall and Stripling paid all the purchase money for the lands to the State; but that the certificate was lost, and he, the defendant, afterwards made proof of it, and had the trustees of the Improvement Fund make him a deed; but that the original receipt had since been found. He also testified that he had lived near the Georgia line for over forty years and never heard of the Watson line until about ten or twelve years ago. He worked the public roads up to the McNeil line, and the Georgians worked their roads down to the McNeil line and no further; that the McNeil line was understood by citizens living near the line in both States to be the boundary line between the two States.

The defendant also gave in evidence the testimony of one Lanier, county surveyor of Madison County, Florida, who testified that he had surveyed the lands in controversy, and gave it as his opinion that the plats of land annexed to the plaintiffs' grants did not cover the said land, not having marks thereon for ponds, swamps and streams which he found on the premises; that the Watson line at the place in controversy runs through a large swamp not shown in said plats; that, until the establishment of the Orr and Whitner line, the McNeil line was always considered as the boundary line between Georgia and Florida; that he had frequently surveyed on the Georgia line, and always surveyed to the McNeil line; that he never heard of the Watson line until the controversy that led to this suit.

The court charged the jury that if they believed from the evidence that the State of Georgia, anterior to the year 1842, considered the land in controversy within her territorial limits, and incorporated within one of her counties, over which the authorities of said State exercised the usual powers of government; and that in 1842 the Governor of Georgia granted the identical lands in controversy to James Groover; and that said James Groover conveyed the same lands to Thomas A. Groover in 1855; and that said Thomas A. Groover conveyed the same lands to Charles A. Groover in 1860; and that said Charles A. Groover was dead, and that the plaintiffs were his heirs—then they must find for the plaintiffs; but that if the evidence failed to induce the jury to believe that the lands sued for were the same as those described in the said grants and conveyances; or that the Georgia grants included the lands to the Watson line, they must find for the defendant.

Under this charge the jury found for the plaintiffs, thus establishing the fact that Georgia, anterior to 1842, did claim jurisdiction to the Watson line, and that the lands in controversy adjoining that line were included in the grant of Georgia to James Groover in 1842.

The Supreme Court of Florida sustained the charge of the court below, it being in accordance with its own opinion given when the case was first before it, as reported in 19 Fla. 64. The position assumed is that grants in a disputed territory, by a government exercising therein sovereign jurisdiction *de facto*, are valid and to be sustained, notwithstanding that, by a subsequent settlement of boundaries, the disputed territory is conceded to the other contesting sovereign. Georgia, undoubtedly, at the time of the grant to James Groover, exercised the powers of government *de facto* over the territory in which the land in controversy was situated; and it is assumed by the Supreme Court of Florida that the boundary line subsequently agreed upon, by which said land was conceded to lie in the State of Florida, was a mere arbitrary line, adopted by way of compromise, and was never acknowledged to be the true legal line established by previous treaties and laws. The argument is, that, whatever may be the law with regard to grants made by a government clearly beyond its lawful boundaries and jurisdiction, it is certain that grants made within its jurisdiction, being lawful when made, are not invalidated by a subsequent cession of the territory to another sovereign; because, in such case, the rights of sovereignty only, and not those of private property, are changed. It is then assumed that, in cases of disputed boundary, where a line is finally fixed by compromise, the portions of territory previously possessed by either of the contracting parties, and conceded by the adopted line to the other, are to be regarded and treated as ceded territory, and not as territory that always really belonged to the sovereign who gets it by the compromise. The Supreme Court of Florida, speaking of the decision of the lower court, which it affirmed, says: "What they did decide was, that grants by a government *de facto* of parts of a disputed territory in its possession are valid against the State which had the right; *De La Croix* v. *Chamberlain*, 24 U. S. 12 Wheat. 600 [6:742]; and that, when a territory is acquired by treaty, cession, or conquest, the rights of the inhabitants to property are respected and sacred. *Rhode Island* v. *Mass.* 37 U. S. 12 Pet. 657, 749 [9:1233, 1270]; 45 U. S. 4 How. 591, 639 [11:1116, 1187]; *U. S.* v. *Clarke*, 33 U. S. 8 Pet. 436, 445 [8:1001, 1004]. And the principle applies to the States of this Union. *Poole* v. *Fleeger*, 36 U. S. 11 Pet. 185, 209 [9: 680, 690]. In the latter case, the court says, p. 210 [690]: 'Although, in the compact, Walker's line is agreed to be in future the boundary between the two States, it is not so established as having been *for the past* the true and rightful boundary.' We decided this to be the rule in the present case when it was before us on the former appeal (19 Fla. *supra*), and the cause was tried the second time under the influence of the opinion and judgment of this court. We find no reason for modifying that judgment, and the error assigned is not sustained. *Coffee* v. *Groover*, 20 Fla. 64, 81.

Whether the view of the case thus taken by the Supreme Court of Florida is the correct one, regard being had not only to the facts found by the jury, but also to the Treaties and Acts of the Federal Government, as well as of Georgia, in regard to the line in question; and whether the rule of law relied on by the court is a sound one, and rightly applicable to the case in hand, are the questions to be determined.

It is no doubt the received doctrine, that in cases of ceded or conquered territory, the rights of private property in lands are respected. Grants made by the former government, being rightful when made, are not usually disturbed. Allegiance is transferred from one government to the other without any subversion of prop-

erty. This doctrine has been laid down very broadly on several occasions by this court,—particularly in cases arising upon grants of land made by the Spanish and other goverments in Louisiana and Florida before those countries were ceded to the United States. It is true that the property rights of the people, in those cases, were protected by stipulations in the treaties of cession, as is usual in such treaties; but the court took broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and not upon the private property of individuals which had been segregated from the public domain before the cession. This principle is asserted in the cases of *U. S.* v. *Arredondo*, 31 U. S. 6 Pet. 691 [8: 547]; *U. S.* v. *Percheman*, 32 U. S. 7 Pet. 51, 86-89 [8: 604, 618]; *Delassus* v. *U. S.* 34 U. S. 9 Pet. 117 [9: 71]; *Strother* v. *Lucas*, 37 U. S. 12 Pet. 428 [9: 1114]; *Doe* v. *Eslava*, 50 U. S. 9 How. 443 [13: 209]; *Jones* v. *McMasters*, 61 U. S. 20 How. 17 [15: 809]; and *Leitensdorfer* v. *Webb*, Id. 176 [15: 891]. In *U. S.* v. *Percheman*, *Chief Justice* Marshall said: "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of Nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private roperty should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an Act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change." 7 Pet. 86, 87 [8: 617].

But whilst this is the acknowledged rule in cases of ceded, and even conquered territory, with regard to titles acquired from a former sovereign who had undoubted right to create them, it does not apply (as we shall see) to cases of disputed boundary, in relation to titles created by a sovereign in possession, but not rightfully so. In the latter case, when the true boundary is ascertained, or adjusted by agreement, grants made by either sovereign beyond the limits of his rightful territory, whether he had possession, or not (unless confirmed by proper stipulations), fail for want of title in the grantor. This is the general rule. Circumstances may possibly exist which would make valid the grants of a government *de facto*; as, for example, where they contravene no other rights. Grants of public domain made by Napoleon as sovereign *de facto* of France, may have had a more solid basis of legality than similar grants made by him as sovereign *de facto* of a Prussian Province, derogatory to the rights of the Government and King of Prussia.

As the case before us depends upon a disputed boundary between two States, it cannot be properly understood or determined without adverting to the historical facts connected with that boundary. Some of these are referred to by the Supreme Court of Florida in its opinion, but several others are necessary to be stated in order to show the circumstances under which the boundary between Georgia and Florida was finally settled, and to determine whether the assumption of the court, that the territory containing the land in controversy was ceded by Georgia to Florida, is well founded. The case, if it can be avoided, ought not to be decided upon a narrow selection of facts which might determine the question one way, before one jury, to-day, and another way, before another jury, to-morrow; but upon a broad view of all the historical events which relate to this boundary line. We shall proceed, therefore, to review these events as far as they have come to our knowledge from public documents.

In early colonial times, there were always mutual complaints of encroachment between the British Provinces and the Spanish Province of Florida, sometimes resulting in military conflicts; and no boundary was ever settled between them. The difficulty was finally removed by the Treaty of 1763, by which Florida was ceded to Great Britain. See Treaty, arts. VII, XX, 1 Chalmers, 473, 479. Soon after this event, on the 7th of October, 1763, King Geo. III, by proclamation, erected governments in the newly acquired Territories of Canada and the Floridas, and established the boundaries of the latter as follows, to wit: "The government of East Florida, bounded to the westward by the Gulf of Mexico and the Apalachicola River: *to the northward by a line drawn from that part of said river where the Chattahoochee and Flint Rivers meet to the source of the St. Mary's River*, and by the course of the said river to the Atlantic Ocean." West Florida was bounded north by the parallel of 31° north latitude, from the Mississippi to the Chattahoochee River. See Proclamation in Amer. State Papers; 1 Pub. Lands, 36; and 1 Bioren's Laws, U. S. 443. On January 20, 1764, the Province of Georgia was limited to the north of the line thus prescribed for Florida. 1 Bioren's Laws, 448-9.

The above defined line, from the junction of the Chattahoochee and Flint Rivers to the source of the St. Mary's has from 1763 to the present time been the recognized boundary line between Georgia and Florida. The land in controversy is situated about midway between its extremities.

By the definitive Treaty of peace with Great Britain in 1783 the line above described was adopted as the southern boundary line of the United States, and the Floridas were at the same time, by another Treaty, ceded to Spain. See Treaties and Conventions, 315; 2 Chalmers, 232, Treaties of 1783. By the Treaty of October 27, 1795, between the United States and Spain, this boundary was confirmed, and it was provided that a commissioner and a surveyor should be appointed by each party to meet at Natchez within six months from the ratification of the Treaty, and proceed to run and mark the boundary line, and make plats and keep journals of their proceedings, which should be considered as part of the Treaty. Our govern-

ment appointed Andrew Ellicott, Esq., as commissioner, in May, 1796, and a surveyor, to assist him, and they proceeded to Natchez, and after much procrastination on the part of the Spanish authorities, a Captain Stephen Minor was appointed on the part of Spain, and the joint commissioners of the two countries, in 1796 and 1799, ran and marked the boundary line from the Mississippi to the Chattahoochee, and determined the geographical position of the junction of the Chattahoochee and Flint Rivers to be in N. latitude 30° 42′ 8″ and W. longitude 84° 53′ 15″. The hostility of the Creek Indians prevented them from running the line east of the Chattahoochee; but they sailed around the coast of Florida, and up the River St. Mary's, and fixed upon the eastern terminus of the straight line prescribed in the Treaties, at the head of the St. Mary's, where it issues from the Okefenoke Swamp, and erected a mound of earth to designate the spot. This was in February, 1800. The mound is still in existence, and is called Ellicott's Mound, and appears on all the principal maps of that part of the country. The commissioners, supposing that the true head of the river was located in the swamp, agreed that it should be considered as distant two miles northeast from the mound, and that in running the boundary line from the Chattahoochee it should be run to the north of the mound, and not nearer to it than one mile. The point fixed upon as the head of the St. Mary's was determined by observations to be in N. latitude 30° 21′ 39½″, W. longitude 82° 15′ 45″. The distance by straight line, or great circle, from the junction of the Chattahoochee and Flint Rivers to the head of the St. Mary's, was calculated at 155$\frac{4}{10}$ miles, and the initial course for running the line from each terminus, was given, with the proper corrections to be made at intervals in order to follow the great circle. The commissioners signed a joint report of their proceedings, and transmitted the same to their respective governments. All these particulars are set forth in Mr. Ellicott's journal, and are matters of public history. See Ellicott's Journal; Phila. 1803.

It thus appears that, by authority of the United States and Spain, the termini of the line in question were fixed and settled in February, 1800. It only remained for any competent surveyor to follow the directions of the commissioners in order to trace the actual boundary line on the ground.

The country in the region traversed by this line was occupied, in the early part of the century, by the nation of Creek Indians, and there was no immediate demand for having it run and marked. And as, under the Constitution, no State could enter into a treaty with the Indians, it became the interest of Georgia to make some arrangement with the Government of the United States to take measures for the gradual removal of Indian occupancy. A convention was accordingly entered into between Georgia and the United States, on the 24th of April, 1802, by which the former ceded to the latter all her territory between the Chattahoochee and the Mississippi Rivers, and the United States ceded to Georgia all their right to any public lands south of Tennessee and the Carolinas, and east of the Chattahoochee, not within the proper boundaries of any State; and agreed to extinguish the Indian title within the State of Georgia as early as could be peaceably done. See Agreement, 1 Bioren's L. 488. In pursuance of this agreement the title of the Creek Nation was extinguished throughout most of the southern part of the State by the Treaties made with the Nation in 1802, 1805 and 1814. 7 Stat. at L. 68, 96, 120.

The State being now desirous of disposing of her lands and introducing settlers thereon, naturally turned her attention to the question of the true location of the boundary line between her own territory and that of the Spanish Province of Florida. Some person, professing to be better posted than others as to the topography of the country about the head of St. Mary's River, asserted that the commissioners, Ellicott and Minor, in seeking its source, had ascended the wrong branch, namely, the north branch; whereas the true St. Mary's, or main stream, came from the west and took its source many miles further south than the point fixed upon by them. The Legislature of Georgia took up the matter, and in December, 1818, the Senate passed a resolution requesting the Governor to appoint proper persons to proceed, without delay, to ascertain the true head of St. Mary's River; and if it should appear that the mound thrown up by Ellicott and Minor was not at the place set forth in the Treaty with Spain, that they make a special report of the facts, and that the Governor communicate the same to the President of the United States, with a request that the lines might be run agreeably to the true intent and meaning of the Treaty. Exec. Doc. No. 77, Sess. 1, 23d Cong. pp. 11, 86.

In pursuance of this request the Governor appointed three eminent engineers, Generals Floyd, Thompson and Blackspear, to make the examination suggested, and immediately, by a letter dated February 17, 1819, communicated the fact to the Executive Government at Washington. The engineers made a careful reconnoissance of the country about the head streams of the St. Mary's, accompanied by the person who had made the supposed discovery, and became satisfied that his information was at fault, and reported that, after a careful examination, they found the head of the river to agree with the report made by Mr. Ellicott. This result was also communicated to the Executive at Washington; and thus ended, for the time being, the claim on the part of Georgia to have the eastern terminus of the boundary line readjusted and changed. Soon after this proceeding, in 1819, the State employed one J. C. Watson to run and mark the line. This is the origin of the line called Watson's line; and to this line the State laid out its counties and townships, surveyed its public lands, and made grants to settlers. But it nowhere appears that this line ran to Ellicott's mound, or near to it; on the contrary, it would seem from other conceded facts, that it ran considerably south of it. As we have already seen, the lands in controversy in the present case adjoin this line, being situated on the north side of it.

Florida was ceded to the United States in 1819, and possession of the territory was taken by Gen. Jackson in July, 1821. In 1825, the Surveyor-General of the Government for the Territory of Florida, preparatory to a survey of the public lands therein, caused the bound-

ary line between Georgia and Florida to be run out and marked by D. F. McNeil, a deputy surveyor, and the line so run was called *McNeil's line*. At the point in controversy, which (as before said) is about midway between the two extremities of the straight line called for by the Treaty, it ran, according to the testimony, 14 chains to the north of Watson's line; but how near it approached Ellicott's mound at the eastern extremity does not appear. The government surveys in Florida were made to bound on this line; and, of course, overlapped, more or less, the Georgia surveys and grants extending to Watson's line.

The State of Georgia, about this period, perhaps in consequence of the location of McNeil's line, by a communication of her Governor to the Government of the United States, requested that joint measures should be undertaken for a mutual and final settlement of the boundary. The matter being referred to Congress, an Act was passed on the 4th of May, 1826, by which the President was authorized, in conjunction with the constituted authorities of the State of Georgia, to cause to be run and distinctly marked the line dividing the Territory of Florida from the State of Georgia, from the junction of the Rivers Chattahoochee and Flint, to the head of St. Mary's River; and for that purpose, to appoint a commissioner or surveyor, or both; "*Provided*, that the line so to be run and marked shall be run straight from the junction of said Rivers Chattahoochee and Flint, to the point designated as the head of St. Mary's River by the commissioners appointed under the third article of the Treaty (with Spain), made October 27, 1795." 4 Stat. at L. 157. This Act, it will be seen, adopted the eastern terminus of the line as settled by Ellicott and Minor.

The President thereupon appointed ex-Governor Thomas M. Randolph, of Virginia, as commissioner under the Act, and the Executive of Georgia appointed Thomas Spalding; and the commissioners entered upon their joint duties in February, 1827, and appointed John McBride as their common surveyor. They continued their operations for over two months, but the Georgia commissioner having, as he supposed, notwithstanding the report of the commissioners of 1819, discovered that the western branch of the St. Mary's River was the largest and longest stream, and, therefore, the true river, the Governor of the State suddenly brought the survey to a close by recalling the assent of Georgia and withdrawing the powers of her commissioner. Exec. Doc. 77, Sess. 1, 23d Cong. pp. 31, 97.

From this time onward, for many years, a controversy was carried on between Georgia, on the one side, and the United States and Florida, on the other, with regard to this boundary line; Georgia contending that the line should be run to Lake Randolph, the head of the western or southern branch of the St. Mary's, and the United States and Florida contending that it should run to the head of the northern branch, as settled and determined by the commissioners, Ellicott and Minor, under the Treaty. Id. and Exec. Doc. 152, Sess. 1, 23d Cong.

In 1845, Florida was admitted into the Union as a State, embracing all the territories of East and West Florida, as ceded by Spain to the United States by the Treaty of 1819. 5 Stat. at L. 743. Renewed efforts were soon afterwards made by Florida and Georgia to effect a settlement of the boundary, but without success.

In 1850 the State of Florida filed a bill in this court against the State of Georgia, to procure a determination of the controversy. In December Term, 1854, the Attorney-General was allowed to intervene on the part of the United States. *Florida* v. *Georgia*, 58 U. S. 17 How. 478 [15:181]. Evidence was taken by the parties, but in consequence of the war, and the final settlement of the controversy by mutual agreement, the cause was never brought to a hearing.

In 1857 the Governors of the two States had a conference which resulted in an agreement by which Georgia relinquished her pretensions to have the eastern terminus of the line changed, and the termini fixed by the commissioners, Ellicott and Minor, were substantially adopted. The following resolutions and enactments of the Legislatures of the two States will show the course of the negotiation, and the terms of the arrangement finally concluded between them.

On the 24th of December, 1857, the following resolution was adopted by the Legislature of Georgia, to wit:

"*Whereas*, in the matter of controversy now pending in the Supreme Court of the United States, between the State of Florida and the State of Georgia, touching the boundary line of the two States, we deem it of much importance that this protracted and expensive litigation should cease; and *whereas*, with a view to the settlement of the question, a negotiation has been progressing between the late Executives of the aforesaid States, the result of which was an agreement to adopt the terminal points of the present recognized line as the true terminal points of the boundary line, to be resurveyed, corrected and marked, provided it is shown by either party that the present line is incorrect, the agreement aforesaid being made subject to the ratification of the Legislatures of the two States:

"*Resolved* 1, That we do hereby ratify the action of the late Executive of this State, in accepting the proposition of the Governor of Florida, to adopt the terminal points of the present recognized line as the true terminal points of the boundary line, and will regard, adopt and act upon the present line, as run and recognized between those points, as the settled boundary of the two States, or will so recognize and adopt any other line between those points which may be ascertained and established on a resurvey and remarking of the boundary, provided said boundary correction is made by virtue of law, and by joint action of the States aforesaid.

"2. *Be it further resolved by the authority aforesaid*, That should it be deemed essential or important by either State to have the boundary line between the terminal points of the present recognized boundary resurveyed and remarked, the Governor of this State is hereby authorized to appoint a competent surveyor, to join any such surveyor appointed on the part of Florida, to run out and mark distinctly such a line from one to the other terminal point herein indicated, to be known as the line and settled bound-

ary between the two States, the surveyor on the part of Georgia to be paid such compensation as may be determined on by the present or any future Legislature.

"3. *And be it further resolved*, That the Governor of this State shall, so soon as the same shall have passed both branches of the present General Assembly, transmit a certified copy to the Governor of Florida.

"Approved December 24, 1857."

This Resolution was responded to by the Legislature of Florida on the 12th of January, 1859, by passing a resolution in precisely the same terms, *mutatis mutandis;* and on the 15th of the same month an Act was passed by the Legislature of Florida for bringing into market, as soon as the line should be settled, all state lands bordering thereon, that had not been disposed of, giving to the occupants, whose right was not disputed, five months to purchase the lands occupied by them at their appraised valuation.

As one, or both, of the parties desired to have a resurvey made between the terminal points, the State of Georgia appointed George F. Orr, and the State of Florida B. F. Whitner, surveyors, to run and mark the line accordingly. They commenced their work in 1859, and it is referred to in the subsequent Acts and Resolutions.

An Act was passed by the Legislature of Georgia on the 16th of December, 1859, referring to the fact that the joint surveyors were running their first trial line, and agreeing to adopt it as conclusive, if Florida would do the same; *provided* that, on the eastern terminus, it did not depart exceeding one fourth of a mile from Ellicott's mound; but that if it was not accepted by Florida, and if, therefore, a new line would have to be run so as to get a straight line from the mouth of Flint River to Ellicott's mound, that then, the line thus designated and marked by the surveyors should be the permanent boundary between the two States. The Act also proposed the passage of laws to quiet the titles of *bona fide* holders of lands under grants of either Georgia or the United States. The response made by the Legislature or Florida to this proposition was the passage of an Act on the 22d of December, 1859, substantially adopting the proposition made by Georgia declaring "That the line now being run by B. F. Whitner, Jr., on the part of Florida, and G. J. Orr, on the part of Georgia, be and the same is hereby recognized and declared to be the permanent boundary line between the two States, so soon as the same shall be permanently marked by said surveyors: *Provided*, that said line, at its eastern terminus, does not depart from, or miss, Ellicott's mound more than one fourth of a mile or 20 chains; and declaring, secondly, "that the titles of *bona fide* holders of land under any grant from the State of Georgia, which land may fall within this State by the foregoing line, are hereby confirmed and conveyed to said holders, so far as any right may accrue to this State: *Provided*, nothing herein shall apply to lands to which citizens of this State may claim title south of what is known as the McNeil line."

It turned out that the line run by Orr and Whitner ran even farther north than the McNeil line; but it came within the stipulated distance from Ellicott's mound; namely, within a quarter of a mile—in fact, within 37 links, or less than 25 feet,—north of the mound. See Code of Georgia, 1868, § 19. This was more favorable to Georgia than the line agreed on by Ellicott and Minor, which was to run at least one mile north of the mound.

On the 14th of December, 1860, the Legislature of Georgia, probably considering that its last proposition was not fully accepted, passed a resolution, directing the Governor to reopen negotiations with the authorities of Florida in regard to the boundary line, and to urge its adjustment so as to protect the rights of citizenship and the titles of lands held under grants from Georgia; and, if practicable, so as to retain and keep the fractional lots sold by Georgia within the jurisdiction of the State. In response to this Resolution, the Legislature of Florida, on the 8th of February, 1861, passed the following Resolution, to wit: "*Whereas*, [by] an Act approved by the Governor 22d December, 1859, it was by the General Assembly enacted that the line then being run by B. F. Whitner, Jr., on the part of Florida, [and] G. J. Orr, on the part of Georgia, should be, and was thereby, recognized and declared to be the permanent boundary line between the States of Georgia and Florida as soon as the same should be permanently marked by said surveyors: *Provided*, the said line at its eastern terminus did not depart from or miss Ellicott's mound more than one fourth of a mile, or 20 chains; *and whereas*, the said line has been run and marked by said surveyors on the part of the two States, the eastern terminus of which, so run and marked, is within the distance prescribed in said proviso: Therefore, *Resolved*, That the line run and marked by B. F. Whitner, Jr., on the part of Florida; and G. J. Orr, on the part of Georgia, be, and the same is hereby declared to be, the permanent boundary line between the two States of Georgia and Florida, and that the Governor be, and he is hereby, requested to issue his proclamation that the said line, so run and marked, has been and is declared to be the permanent boundary line between the two States: *Provided*, the State of Georgia shall have on its part declared the said line to be the boundary between that State and Florida. *Be it further resolved*, That the Governor be requested to forward a copy of these resolutions to the Governor of Georgia, with a request that similar steps be taken by Georgia, so that the question of boundary may be finally settled." Bush's Digest, 103; McClelland's do. 952.

By a long and argumentative Resolution, passed by the Legislature of Georgia on the 11th of December, 1861, after stating the respective positions taken by the two States, it was proposed as follows: "The General Assembly, to avoid further dispute, proposes to her sister State, Florida, that what is denominated the Watson line (which will leave in the limits of this State the fractional lots of land heretofore sold under an Act of her Legislature) shall be adopted as the boundary line. The settlement upon this basis will not interfere with the rights of citizenship, as claimed by the citizens of either State." Florida made no answer to this proposition.

Finally, by a Resolution passed on the 18th

of December, 1866, the Legislature of Georgia, referring to the Act of 16th December, 1859, and recognizing the fact that the Orr and Whitner line, as run, did not depart exceeding one fourth of a mile from Ellicott's mound, and referring also to the action of the Florida Legislature of February 8, 1861, adopted the Orr and Whitner line as "the permanent boundary line between the States of Georgia and Florida." And this agreement, thus finally arrived at by the two States, was recognized and confirmed by an Act of Congress approved April 9, 1872, entitled "An Act to Settle and Quiet the Title to Lands Along the Line Between the States of Georgia and Florida," by which it was declared "that the titles to all lands lying south of the line dividing the States of Georgia and Florida, known as the Orr and Whitner line, lately established as the true boundary between said States, and north of the line run by Georgia, known as the Watson line, being all the lands lying between said lines, be, and the same are hereby, confirmed, so far as the United States has title thereto, in the present owners deriving titles from the State of Georgia."

This historical review is sufficient, it seems to us, to show that the agreement come to by the two States was not in fact, and cannot be construed as, a cession of territory on the part of Georgia. It was simply the correction of the boundary line. Georgia had inadvertently extended her jurisdiction to a line run by her surveyor too far south. The agreement recited in the Resolution of December 24, 1857, "to adopt the terminal points of the present recognized line as the true terminal points of the boundary line," carried out by a resurvey of such line from one of its terminal points to a point sufficiently near the other to satisfy both parties, must be construed to be the carrying out of an intent to settle and establish the true line between the two States, and not an intent to adopt a line different from the true one, with a cession of the territory cut off by it. Two lines had been contended for. Florida and the United States contended for the line established by the joint commission under the Treaty with Spain; Georgia, for a different line, having a widely different terminus at its eastern extremity. Each claimed that its line was the true one. Georgia finally yielded the point, and accepted the commissioners' line. This was tantamount to an acknowledgment that it was the true line. We do not say that the result would have been different if the parties had adopted a compromise line—as, for example, the Watson line, which was proposed by Georgia. When a boundary is in dispute the adoption of a line by compromise may be considered as an agreement that the adopted line is the true line, or that it shall be considered as the true line. Where territories are coterminous, they must have a common boundary. That boundary, whether ascertained by astronomical observations, or discovery of old monuments, or mutual agreement of the parties, is to be regarded and treated as if it had always been known as the true line. The present case, at all events, can only be regarded as one in which the boundary line finally agreed to was always the true line, even though, and even when, a different line (Watson's) was temporarily adopted by Georgia, and acquiesced in by Florida.

Then what becomes of the titles granted by Georgia outside of that line, or south of it? She had no title there herself. Could she confer title by the mere exercise *de facto* of jurisdiction and government there—such exercise being in derogation of the successive rights of Spain, the United States, and Florida? What authority can be found to justify such a pretension? It is the common usage, it is true, in mutual adjustments of disputed boundaries, to stipulate that private titles shall not be disturbed. Such stipulations are dictated by a humane consideration for those who have innocently invested their fortunes on the faith of the good title of their government. In the present case, as we have seen, the titles granted by Georgia were confirmed both by Florida and by the United States, so far as either had any right or title to be affected. But those confirmations cannot avail the plaintiffs in the present case; for the United States had parted with all their interest in the lands in controversy, by a grant to Florida in July, 1857; and Florida had disposed of all her interest therein by a regular sale in September of the same year. Neither the United States nor Florida, therefore, had any interest remaining, when the confirmatory Acts were passed, which they could transfer by release or confirmation, or in any other mode.

The case, then, stands upon the original validity of the Georgia grants; and the question may well be asked, how does a landholder who obtains title from a sovereign that has none, stand in any better position than one who obtains title from an individual that has none? Georgia had no title to the land. Previous and subsequent historical events abundantly show this. Her grants have nothing to rest on but her actual possession of the disputed territory and her exercise of government *de facto* therein. The question is, whether this is sufficient.

The general subject is not a new one in the jurisprudence of this court. Before the Treaty of amity, and limits made with Spain in 1795, that government had claimed and occupied, as a part of West Florida, a large extent of country on the east side of the Mississippi, to the north of north latitude 31°—including a a large portion of the present State of Mississippi. This claim was based on an extension of the Province of West Florida to the northward by the Government of Great Britain prior to the Revolutionary War.* It was abandoned by the Treaty referred to, and the parallel of 31° was adopted as the boundary line between the territories of the United States and those of Spain. But prior to that Treaty the Spanish authorities had made grants of land in the territory referred to. This court invariably held those grants, not confirmed by our government, to be invalid, on the ground that the territory did not belong to Spain, though she occupied it and claimed to own it. This point is decided in *Henderson* v. *Poindexter*, 25 U. S. 12 Wheat. 530 [6:718]; followed by *Hickey* v. *Stewart*, 44 U. S. 3 How. 750 [11:814]; *Robinson* v. *Minor*, 51 U. S. 10 How. 627 [13:568];

*See 1 Bioren's Laws U. S., pp. 449-453; Pitkin's Hist. U. S. vol. 2, pp. 434-6.

and other cases. In *Henderson* v. *Poindexter's Lessee, Chief Justice* Marshall carefully examined the question of the right of Spain to the territory, and showed that it was untenable, and strenuously argued that the Treaty of 1795 was an acknowledgment on the part of Spain that she had no such right;—or, why did she give it up? The idea of a grant deriving any validity from national occupancy, and government *de facto* over the territory, was not even hinted at, although Mr. Webster and Mr. Coxe argued the cause for the party claiming under the Spanish grant. The view taken by this court on the subject was accurately expressed by *Mr. Justice* McLean, in delivering the opinion in *Robinson* v. *Minor*, 51 U. S. 10 How. 648 [13:574], where he says: "The Treaty with Spain established [*i. e.* settled] a disputed boundary; there was no cession of territory. The jurisdiction exercised by Spain over the country north of the 31st degree of north latitude was not claimed or occupied by force of arms against an adversary power; but it was a naked possession, under a misapprehension of right. In such a case, Georgia, within whose sovereignty the country was situated, was not bound to recognize the grants or other evidence of title by the Spanish Government."

The same view was taken by the court with regard to the grants made by Spain in the disputed territory of West Florida after the cession of Louisiana to the United States in 1803. Spain had held possession of Louisiana and the Floridas; but, by the secret Treaty of St. Ildefonso, made in 1800, had ceded Louisiana to France, "with the same extent that it now has in the hands of Spain, and that it had when France possessed it;" and, in 1803, France ceded it to the United States in the same terms. But as formerly possessed by France, Louisiana included West Florida as far as to the River Perdido, and our government claimed to the same extent. Spain, with a good deal of plausibility, contended that West Florida, extending from the Mississippi to the Perdido, was held as a distinct province by Great Britain prior to 1783, and was not embraced in the cession, and refused to surrender it, and kept possession of it in the exercise of full sovereignty until 1810, when the United States took forcible possession of it. Here was another case of disputed boundary. The United States claimed the River Perdido; Spain, the Rivers Mississippi and Iberville, as the true boundary between Louisiana and the Floridas; and the latter was in possession of the disputed territory, exercising all the powers of government therein from 1803 to 1810. During this period the Spanish governors made many grants of land in the territory, which often came before this court for adjudication; and the decision was invariably against their validity.

The first case in which the question arose was that of *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253 [7:415], in which the grant was made in 1804, for land in the District of Feliciana, east of the Mississippi. The principal questions argued were, first, the true interpretation of the Treaties of 1800 and 1803, as to what territory was ceded to the United States; and, secondly, the effect of the confirmation of Spanish grants contained in the Treaty of 1819. Mr. Coxe, it is true, took the ground that the acts of a sovereign power over territory it has ceded are lawful until possession has been transferred, and, therefore, that the grants of Spain whilst still in possession and exercising the powers of government *de facto* should be held to be valid. Mr. Webster, who was on the same side with Mr. Coxe, did not allude to this argument, and the court took no notice of it, but placed its decision on the ground that, by the true construction of the Treaties, Louisiana included West Florida to the Perdido, and, therefore, that the territory in question did not belong to Spain when the grant was made, and so the grant was invalid; but that if this were not a clear proposition (and the court admitted that it was a question of doubtful construction) the judiciary would nevertheless follow the action of the political department of the government, charged with the management of its foreign affairs, which had always contended for the line of the Perdido, and had finally taken full possession of the country.

The case of *Foster* v. *Neilson* was followed in the subsequent cases of *Garcia* v. *Lee*, 37 U. S. 12 Pet. 511 [9:1176]; *U. S.* v. *Reynes*, 50 U. S. 9 How. 127 [13:74]; *U. S.* v. *D'Auterive*, 51 U. S. 10 How. 609 [13:560]; *U. S.* v. *Phila. & N. Orleans*, 52 U. S. 11 How. 609 [13:834]; *Montault* v. *U. S.* 53 U. S. 12 How. 47 [13:887]; *U. S.* v. *Castant*, Id. 437 [13:1056]; all of which are referred to, and the history of the controversy is given, in *U. S.* v. *Lynde*, 78 U. S. 11 Wall. 632 [20:280].

It may, however, be said that the decision in these cases was controlled by the Act of Congress approved March 26, 1804, 2 Stat. at L. 287, the fourteenth section of which declared void all grants for lands within the territories ceded by the French Republic to the United States by the Treaty of 30th April, 1803, the title whereof was, at the date of the Treaty of St. Ildefonso, in the crown, government or nation of Spain; saving, however, the titles of actual settlers, acquired before December 20, 1803.

It is doubtless true that this Act did have a controlling influence in the cases referred to; but the court discussed the question upon general principles also, and no hint is dropped that the existence of a goverment *de facto* would have any influence on the decision.

In *Garcia* v. *Lee, Chief Justice* Taney expressly argues that, in a case of disputed boundary, titles must stand or fall with the right of the government creating them. His language is: "Indeed, when it is once admitted that the boundary line, according to the American construction of the Treaty, is to be treated as the true one in the courts of the United States, it would seem to follow, as a necessary consequence, that the grant now before the court, which was made by the Spanish authorities within the limit of the territory which then belonged to the United States, must be null and void; unless it has been confirmed by the United States by treaty or otherwise. It is obvious that one Nation cannot grant away the territory of another; and if a proposition so evident needed confirmation, it will be found in the case of *Poole* v. *Fleeger* [*supra*]. In that case there had been a disputed boundary between two States, and the parties claimed the same land under grants from different States. The boundary line had been ascertained by compact between

the States after the grants were made. And in deciding between the claimants in that case the court said: 'In this view of the matter it is perfectly clear that the grants made by North Carolina and Tennessee, under which the defendant claimed, were not rightfully made, because they were originally beyond her territorial boundary; and that the grant under which the claimants claim was rightfully made, because it was within the territorial boundary of Virginia.' And again, 'If the States of North Carolina and Tennessee could not rightfully grant the land in question, and the States of Virginia and Kentucky could, the invalidity of the grants of the former arises, not from any violation of the obligation of the grant, but from an intrinsic defect of title in the States.'"

The case of *Poole* v. *Fleeger*, quoted by *Chief Justice* Taney, is much to the purpose. The northern boundary of North Carolina (including Tennessee) was fixed by the charter of 1665, and by the Constitutions of that State and Virginia, adopted in 1776, on the parallel of 36° 30′ north latitude. In 1779 an attempted survey of the line was made by commissioners of the two States, who failed to agree; but a line run by Dr. Walker, one of the commissioners, was practically used as the boundary of jurisdiction. It was afterwards found to be too far north by several miles, and a line was run on the true parallel by Professor Matthews, of Transylvania University. Tennessee laid out her counties and exercised all sovereign jurisdiction up to the Walker line, and both North Carolina and Tennessee made grants of land up to that line and north of the true parallel. On the other hand, Kentucky made grants south of that line and up to Matthews' line. In 1820, Kentucky and Tennessee agreed to adopt Walker's line as the boundary of the two States; but it was stipulated that all private rights and interests of land between the two lines, theretofore derived from either State, should be considered as rightfully emanating therefrom; but all vacant and unappropriated lands within those limits were declared to belong to Kentucky and subject to her disposal. No provision was made for cases of conflicting grants of the same land made by Virginia or Kentucky, on one side, and by North Carolina or Tennessee, on the other. The case before the court was one of that kind, the plaintiffs claiming under a Virginia warrant and a grant made by Kentucky in pursuance thereof, in 1796; the defendants claiming the same land under North Carolina grants made in 1786, 1792, 1797, and Tennessee grants of subsequent years; and the lands in controversy being situated between the two lines before mentioned. This court held that the parallel of 36° 30′ was always the true line until altered by agreement of the two States in 1820, and that the grants made by North Carolina and Tennessee, north of that line, were void, and that the Virginia and Kentucky grants were good, notwithstanding the actual occupation of the disputed territory by Tennessee. The adoption of Walker's line in 1820 was held to have changed the true and original boundary only for the purpose of future jurisdiction. Evidence of the previous exercise of jurisdiction by Tennessee up to Walker's line was not allowed to affect the question of title; although the defendants proved that North Carolina and Tennessee had claimed to Walker's line as the true line from the time it was run to the time of the Treaty or agreement of 1820; that the county lines of Tennessee were Walker's line on the north; that in her legislative, judicial and military capacity, Tennessee always claimed possession and acted up to said line as the northern boundary of the State; that process was executed, criminal acts were punished, taxes were paid, militia was enrolled, and all other acts done in subordination to the laws and government of Tennessee up to that line; and corresponding jurisdiction was exercised by Kentucky to the same line on the other side.

Here was a case of mistaken boundary, and when the error was discovered, the States concerned agreed to adopt it as the permanent political boundary for the future, conceding, on both sides, that it was not the true original boundary. *Mr. Justice* Story, delivering the opinion of the court, said: "Although, in the compact, Walker's line is agreed to be in future the boundary between the two States, it is not so established as having been for the past the true and rightful boundary; on the contrary, the compact admits the fact to be the other way. While the compact cedes to Tennessee the jurisdiction up to Walker's line, it cedes to Kentucky all the unappropriated lands north of the latitude of 36° 30′ north." Then, after further remarks of the same purport, follows the passage quoted by *Chief Justice* Taney, to the effect that the grants of North Carolina and Tennessee were not rightfully made, because they were originally beyond their territorial boundary.

The case of *Poole* v. *Fleeger* covers the case now under consideration. It was a case of disputed boundary, and Tennessee exercised sovereign jurisdiction *de facto* up to a certain line (Walker's) which she claimed to be the true boundary line, and made grants of land to that line, just as Georgia did in the present case to Watson's line. Walker's line, like Watson's, was found not to be the true line, and the grants made by Tennessee were found to be for lands in territory belonging to Kentucky; just as the grants of Georgia, next to Watson's line, were found to be for lands in the territory belonging to the United States and Florida. This court decided that the Tennessee grants were void, notwithstanding the exercise of sovereign jurisdiction *de facto* by that State over the territory in dispute, when the grants were made. If that decision was correct, the grant made by Georgia of the land in controversy must be held to be invalid for the same reason. The only difference between the cases is that Kentucky and Tennessee adopted the erroneous line as their permanent boundary, though recognizing the fact that it was not the true original line; whilst in the present case, Georgia and Florida adopted the nearest practicable approach to the true line as their permanent boundary. This difference does not affect the question, except to make the present case the stronger of the two.

The only authority cited by the Supreme Court of Florida for the proposition that a government *de facto* can make a valid grant is a *dictum* of *Mr. Justice* Baldwin, in delivering the opinion of the court in the case of *Rhode*

Island v. *Mass.* 37 U. S. 12 Pet. 748 [9:1270]. The question there was, whether the people whose lands would be affected by the change of state line involved in that case ought to be made parties to the suit. *Justice* Baldwin says: "It is said that the people inhabiting the disputed territory ought to be made parties, as their rights are affected. It might with the same reason be objected that a treaty or compact, settling boundary, required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void, as the authority to make it was derived from the legislative power only. The same objection was overruled in *Penn* v. *Baltimore;* and in *Poole* v. *Fleeger*, this court declared that an agreement between States, consented to by Congress, bound the citizens of each State." Thus far, the reasoning of the court was unanswerable. Settlements of boundary belong to the sovereign power, and cannot be questioned by individuals. But the learned Justice proceeds to lay down what he supposes to be two principles of the law of Nations, which were entirely unnecessary to the decision of the question of parties which he was considering. He says: "There are two principles of the law of Nations, which would protect them [private citizens] in their property: (1) That grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the State which had the right; *De La Croix* v. *Chamberlain*, 25 U. S. 12 Wheat. 600, 601 [6:742]; (2) That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred. *Johnson* v. *M'Intosh*, 21 U. S. 8 Wheat. 589 [5: 692]," etc. This is the passage quoted and relied on by the Supreme Court of Florida.

The second of these propositions is in accordance with what we have already stated to be the received rule of international law; but the first is opposed to the cases which we have already cited in relation to Spanish grants in Mississippi and West Florida, and to the case of *Poole* v. *Fleeger*. As to the authority referred to (12 Wheat. 600, 601), it is a mere *dictum* of *Mr. Justice* Trimble in *De la Croix* v. *Chamberlain*, clearly inconsistent with the decision made at the same term in *Henderson* v. *Poindexter's Lessee*, and with all the subsequent decisions above referred to, and as *Mr. Justice* Catron, in a manuscript note upon this part of *Justice* Baldwin's opinion, justly remarks, "no such question was raised in that case, and *Poole* v. *Fleeger* is certainly to the contrary."

We think that the decision of the Supreme Court of Florida is erroneous in deciding against the title of the plaintiff in error. That title is claimed under a grant from the United States, of land acquired by Treaty with Spain, identified as such by the former Treaty of limits and the proceedings of the commissioners appointed to carry out that Treaty. The decision of the Supreme Court of Florida, in effect, is, either that the land was not embraced in the Treaty of cession, or, if it was, that the possession of Georgia gave a superior right. We think it clear that the land was embraced in the Treaty, and that the possession of Georgia did not give a superior right. The judgment is therefore reversed, and the cause remanded, with instructions to proceed according to law, in conformity with this opinion.

A point was made in the brief of counsel for defendants in error which was not raised in the courts below, and cannot, as now presented, be properly passed upon by us; namely, that the register had no power under the state law to make the bargain with McCall and Stripling for the sale of the land, at the time he issued his certificate to them. This is a question of state law, and involves an issue of fact, and, if deemed important, may be raised on a new trial of the cause, which will necessarily be awarded as a consequence of the reversal of the judgment.

Judgment reversed.

ORIENT MUTUAL INSURANCE COMPANY, *Plff. in Err.*,

v.

JOHN S. ADAMS ET AL.

(See S. C. Reporter's ed. 67-76.)

Marine policies—misconduct of master—loss by derangement of mud valve—right of abandonment—rule as to.

1. In marine policies, a loss, whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it may have been occasioned remotely by the negligence of the master and mariners.

2. The misconduct of the master unless affected by fraud or design will not defeat a recovery on the policy.

3. A loss which was the consequence of the derangement of the mud valve of a vessel, where such derangement was not the proximate cause of the loss, is not within the exception in the policy that the insurance company should be free of all claim for loss or damage occasioned by the derangement or breaking of the engine or machinery or any consequence resulting therefrom.

4. Where the contract of insurance provided that there should be no abandonment of the vessel unless it was impracticable to recover and repair it, and unless the damage amounted to 50 per cent of the agreed value, the right to abandon is to be determined from the facts as they existed on the day of abandonment.

5. If the facts present a case of extreme hazard and of probable expense exceeding half the value of the ship, the insured may abandon, although it should happen that she was afterwards recovered at a less expense.

[No. 23.]

Argued April 13, 1887. Decided Oct. 24, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania. *Affirmed.*

The defendants in error, as insured, sued the plaintiff in error, as insurer, in the circuit court, on a policy of marine insurance on the steamboat Alice, to recover for a total loss, and recovered judgment in the circuit court.

The questions in the case are:

1. Whether the loss, which was caused by the misconduct of the insured, is within the provisions of the policy.

2. Whether the loss is within the express exceptions of the policy.

3. Whether, if there was a loss, for which the insurer is liable, the insured had the right to abandon for a constructive total loss.

4. Whether certain evidence was improperly excluded.

The further facts are fully stated in the opinion.

Mr. **James Lowndes,** for plaintiff in error:

I. The loss was directly due to the misconduct of the insured himself, and was therefore not a loss insured against. There is no dispute about the facts that Adams, the co-owner, ordered The Alice to be let go when she had not sufficient steam in her boiler, and that the damage resulted from that act of the assured.

"The insured is never to be indemnified against his own act, nor against any loss caused by his own personal misconduct."

Parsons, Mar. Law, 11, 210; Arnould, Mar. Ins. 670.

Misconduct or gross negligence on the part of the assured, although falling short of fraud or design, discharges the insurer.

Smith, Merc. Law, 469; *Hollingsworth* v. *Brodrick*, 7 Ad. & El. 40, 470; May, Ins. 495-6; Beach, Contrib. Neg. 401; Arnould, Mar. Ins. 667, 669; *Thompson* v. *Hopper*, 6 El. & Bl. 946; *Siordet* v. *Hall*, 4 Bing. 607; *Pipon* v. *Cope*, 1 Campb. 434; *Law* v. *Hollingsworth*, 7 T.R. 160; *Bell* v. *Carstairs*, 14 East. 374; 1 Emerigon, CXII, p. 429; *Tanner* v. *Bennett*, Ryan & M. 182; *American Ins. Co.* v. *Ogden*, 20 Wend. 287; *Chandler* v. *Worcester Mut. Fire Ins. Co.* 8 Cush. 338, per Shaw, *C. J.*; *Williams* v. *New England Mut. M. Ins. Co.* 3 Cliff. 244; *The Titania*, 19 Fed. Rep. 101; *Hazard* v. *New England M. Ins. Co.* 1 Sumn. 218. See also *Hackfield* v. *The Costa Rica*, 5 Ins. Jour. 396.

II. The court erred in refusing to rule that the damage was within the express exceptions of the policy.

III. There was no such partial loss as under the contract authorized an abandonment for a constructive total loss.

Hall v. *Franklin Ins. Co.* 9 Pick. 466; *Commonwealth Ins. Co.* v. *Chase*, 20 Pick. 142; *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 191; *Wood* v. *Ins. Co.* 6 Mass. 479; *Sewall* v. *U. S. Ins. Co.* 11 Pick. 90; *Peele* v. *Suffolk Ins. Co.* 7 Pick. 254; *Ins. Co.* v. *Packet Co.* 7 Ins. Law Jour. 557.

Unseaworthiness during a voyage is strong proof of unseaworthiness at its beginning.

Cort v. *Delaware Ins. Co.* 2 Wash. C. C. 375.

Messrs. Isaac Vanvoorhis and **D. T. Watson,** for defendants in error:

A loss the proximate cause of which is a peril insured against is a loss within the policy, although the remote cause may be negligence of the masters or mariners.

Patapsco Ins. Co. v. *Coulter*, 28 U. S. 3 Pet. 222 (7: 659); *Waters* v. *Merchants Louisville Ins. Co.* 36 U. S. 11 Pet. 218 (9: 694); *Columbia Ins. Co.* v. *Lawrence*, 35 U. S. 10 Pet. 517 (9: 517); *General Mut. Ins. Co.* v. *Sherwood*, 55 U. S. 14 How. 361 (14: 455); *American Ins. Co.* v. *Insley*, 7 Pa. 230; *Nelson* v. *Suffolk Ins. Co.* 8 Cush. 496; *Howard F. Ins. Co.* v. *Norwich & N. Y. Trans. Co.* 79 U.S. 12 Wall. 199 (20: 378).

The act of the captain or crew which would release the insurer is not mere negligence or carelessness, but it must amount to fraud or design.

Patapsco Ins. Co. v. *Coulter, supra; Phœnix Ins. Co.* v. *Erie & W. Trans. Co.* 117 U. S. 323 (29: 873); *Catlin* v. *Springfield F. Ins. Co.* 1 Sumn. 434; *Williams* v. *Suffolk Ins. Co.* 3 Sumn. 276.

In the latest case where this question was considered, that of the *Phœnix Ins. Co.* v. *Erie & W. Trans. Co. supra*, this court assumed the correctness of that rule, and there cited approvingly the case of the *North British & M. Ins. Co.* v. *London, L. & G. Ins. Co.* L. R. 5 Ch. Div. 569, 584.

"Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim *respondeat superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself."

Phœnix F. Ins. Co. v. *Cochran*, 51 Pa. 152; *Johnson* v. *Berkshire Mut. F. Ins. Co.* 4 Allen, 388; *Theobald* v. *R. P. Assur. Co.* 10 Exch. 45; Phillips, Ins. 599, § 1846.

In *Levi* v. *New Orleans Ins. Asso.* 2 Woods, 64, *Mr. Justice* Woods said: "It is the settled rule that negligence and carelessness are insured against, while misconduct, which is a violation of definite law, a forbidden act, is never insured against."

Flanders, Fire Ins. 2d ed. 553; *Citizens Ins. Co.* v. *Marsh*, 41 Pa. 386; *Johnson* v. *Berkshire Mut. F. Ins. Co.* and *Phœnix F. Ins. Co.* v. *Cochran, supra; Chandler* v. *Worcester Mut. F. Ins. Co.* 3 Cush. 328; *Goodman* v. *Harvey*, 4 Ad. & El. 870.

In the *Columbia Ins. Co.* v. *Lawrence*, 35 U. S. 10 Pet. 507 (9: 512) *Judge* Story says: "In England the point was completely settled in *Busk* v. *Royal Exchange Assur. Co.* 2 Barn. & Ald. 83, upon the general ground that *causa proxima, et non remota spectatur;* and therefore that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. The same doctrine was afterwards affirmed in *Walker* v. *Maitland*, 5 Barn. & Ald. 171, and *Bishop* v. *Pentland*, 7 Barn. & C. 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of the *Patapsco Ins. Co.* v. *Coulter*, 28 U. S. 3 Pet. 222 (7: 659).

See also *St. John* v. *Ins. Co.* 1 Duer, 371; *Hynds* v. *Schenectady County Mut. Ins. Co.* 16 Barb. 119; *Gates* v. *Madison County Mut. Ins. Co.* 5 N. Y. 469; *Catlin* v. *Springfield F. Ins. Co.* 1 Sumn. 434; *Mathews* v. *Howard Ins. Co.* 13 Barb. 234; *Citizens Ins. Co.* v. *Marsh*, 41 Pa. 386.

The distinction is between negligence of all degrees—slight, ordinary or gross—on the one hand, and misconduct, or fraud or design on the other.

Patapsco Ins. Co. v. *Coulter, supra.*

"Losses that are attributable to any of the perils insured against, though occasioned by the negligence or misconduct of the agents of the assured, not amounting in the latter to barratry, are covered by an ordinary policy."

2 Arnould, Ins. 758-765.

Nothing but criminal negligence, that is, "so gross as to be clearly fraudulent," will relieve the insurer.

3 Kent, Com. *307, 11th ed.; May, Ins. §§ 409-411; *N. Y. Cent. R. R. Co.* v. *Lockwood*, 84 U.S. 17 Wall. 382 (21: 641).

In *Jonides* v. *Universal M. Ins. Co.* 14 C. B. N. S. 288, the phrase construed was "free from all consequences of liabilities." It was held to mean the proximate, not the remote consequences.

A point not made or argued in the court below will not be considered here.

Wilson v. *McNamee*, 102 U. S. 574 (26: 235); *Belt* v. *Meagher*, 104 U. S. 279 (26: 735); *Clark* v. *Fredericks*, 105 U. S. 4 (26: 938); *Marion Bank* v. *Fulton Bank*, 69 U. S. 2 Wall. 254 (17:787).

The rulings of the court below are fully sustained by the American authorities.

Bradlie v. *Maryland Ins. Co.* 37 U. S. 12 Pet. 307 (9: 1131).

The cases of *Rhinelander* v. *Pennsylvania Ins. Co.* 8 U. S. 4 Cranch, 29 (2: 540); and *Marshall* v. *Delaware Ins. Co.* Id. 202 (2: 596) are different affirmations of our rule; and those of *Bainbridge* v. *Nielson*, 10 East, 329; *Patterson* v. *Ritchis*, 4 Maule & S. 394, and *M'Iver* v. *Henderson*, Id. 584, of the English rule.

"The facts as they exist at the time when notice of abandonment is given must be such as to justify it."

2 Arnould, Ins. 987; 3 Kent. Com. star pp. 321, 323, 324, and cases cited; *Peele* v. *Merchants Ins. Co.* 3 Mason, 27.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a judgment against the Orient Mutual Insurance Company of New York upon a policy whereby that Company insured the defendants in error in the sum of $5,000, on the steamer Alice, of the agreed valuation of $27,000, against perils "of the seas, lakes, rivers, canals, fires, and jettisons that should come to the damage of said vessel or any part thereof."

The policy provided, among other things, that the Company should be free from all claim for loss or damage "arising from or caused by * * * barratry, * * * or occasioned by the bursting of boilers, the collapsing of flues, explosion of gunpowder, the derangement or breaking the engine or machinery, or any consequence resulting therefrom, unless the same be caused by unavoidable external violence;" that there should be "no abandonment as for a total loss on account of said vessel grounding or being otherwise detained, or in consequence of any loss or damage, unless the injury sustained be equivalent to 50 per centum of the agreed value in this policy; that the aforesaid vessel is, and shall be at all times during the continuance of this policy, tight and sound, sufficiently found in tackle and appurtenance thereto, competently provided with masters, officers, and crew, and in all things and means for the safe employment thereof;" and that "in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of said vessel are impracticable, nor sell the wreck, or any portion thereof, without the consent of the Company."

The insured sued as for a total loss arising from one of the perils specified in the policy.

The Company pleaded *non assumpsit* and payment, with leave to give in evidence the matters set forth in its affidavit of defense, which was adopted as a special plea. Those matters will sufficiently appear from the facts which will now be stated.

According to the bill of exceptions, there was evidence in behalf of the plaintiffs tending to show that, without willfulness or design on the part of her captain, the vessel was carried, April 28, 1880—before the expiration of the policy—over the falls of the Ohio River, at Louisville, Kentucky, and sunk, receiving damage in a sum equal to 50 per centum of her agreed value; and that on the 18th of May, 1880, it being apparently impracticable to float her off and repair her, the vessel was abandoned to the insurers as a total loss, and the sum due under the policy demanded.

The evidence introduced by the Company tended to establish these facts: The master of The Alice was C. F. Adams, one of the assured, and a son of the other plaintiff. Before the sailing of the vessel he had the reputation of being a "drinking" man, and of that fact his father was informed. On her arrival at Louisville, on the morning of April 28, 1880, the master gave the usual signal (which was transmitted to the engineer) that he had no present need of the engines. The joint of the mud valve was out of order, threatening damage to the freight, and making repairs necessary. The steam was thereupon blown off in order to make repairs. The captain, coming on board, saw that repairs were going on, and knew that the mud valve connected with the boiler needed repairs. The work of repairing made it necessary to blow off steam. The captain subsequently went on deck, and, without making inquiry of the engineer as to the condition of the steam or receiving any notice from him that steam was ready, tapped his bell at about 8.30 A. M. as a signal to let go the boat. At that time there was not sufficient steam to propel the vessel. It is the custom of the river for the master, before giving the order to let go, to inquire of the engineer as to the condition of the steam, and await his reply that the steam is ready before giving the order to let go. At the time of the accident the vessel was in a position to be carried over the falls, if she was let go without steam on. Upon being let go she was carried by the current down the river and over the falls, and, striking a pier, was badly damaged; in consequence of which she sunk soon thereafter below the bridge in about eighteen feet of water.

There was, also, evidence in behalf of the Company, tending to show that the vessel was but slightly injured, and, in the spring of 1881, was floated and removed from the place at which she sunk, and put in the condition in which she was before sinking, for a sum little less than $6,000; that when she was raised, the plaintiffs refused to pay the expense thereof; that after May 18, 1880, the plaintiffs sold her furniture and apparel without the Company's consent, and that on or about the 28th of April, 1880, they put her into the possession of the Cincinnati Underwriters' Wrecking Company, which thereafter had the right of possession until the vessel was seized by the United States Marshal under process, in December, 1880, upon maritime liens.

To further maintain the issues on its behalf, the defendant—the bill of exceptions states—produced in evidence an exemplification of the

record of a certain cause, entitled "*Cincinnati Underwriters' Company* against *The Steamer Alice*," etc., in the United States District Court for the District of Kentucky, as tending to show that after the 18th May, 1880, the claimants, by the answers and petitions in that suit, claimed to be the owners of the vessel, her furniture, and apparel; that The Alice was subject to maritime liens, in a considerable sum, existing on the 18th of May, 1880; that she was sold under a decree to satisfy the same, the plaintiffs receiving a part of the proceeds of sale; that the plaintiffs admitted that she was slightly damaged, and they had refused, after she was raised, to pay the expense of raising her.

Thereupon the plaintiffs offered evidence tending to show that "it was the custom of the river that the engineer should give notice to the captain before exhausting steam, and that it was not the custom for the captain to have notice from the engineer that steam was ready before giving the order to let go."

The plaintiffs, in further reply, offered to prove by the plaintiff, C. F. Adams, "that the steamer, at the time of loss, was insured in seven companies for a total insurance of $18,000, and, after the notice of abandonment, six of them, representing an insurance of $13,000, settled with the insured, and, as part of the settlement, released to the latter all interest in the steamer as she lay; that after the Marshal's sale of the boat, the plaintiffs claimed to own the $\frac{1}{18}$ of the proceeds of sale, and that when the claim for the entire proceeds was made it was as to form, under the advice of counsel; but the plaintiffs did not intend thereby to waive the abandonment theretofore made, or to keep as against the Orient Insurance Company, the $\frac{5}{18}$ of the proceeds of sale." This was offered as bearing upon the question of waiver of abandonment of The Alice; to which offer the defendant objected; but the objection was overruled and the testimony of the witness admitted. The defendant excepted to the overruling of the objection and to the admission of the testimony.

The first assignment of error relates to the instructions upon the general question whether the insured, by anything done or omitted to be done, had defeated their right to recover on the policy. The court at the request of the plaintiffs, and against the objections of the Company, instructed the jury that "where a loss under a policy of insurance, such as the one in suit, happens from the perils of the river, it is not a defense to the insurance company that the remote cause of loss was the negligence of the insured or his agents;" and that "the mere fault or negligence of the captain of the vessel by which The Alice was drifted into the current and drawn over the falls, will not constitute a defense for the Company, unless the jury should be satisfied that the captain acted fraudulently or willfully, with design in so doing." The theory of the defense was disclosed by the request to instruct the jury that if they "are satisfied from the evidence that the accident and loss was caused by the misconduct of Captain Charles F. Adams, that then the plaintiff cannot recover." This request was denied, but the court said to the jury: "This is true if the jury is satisfied that the conduct of the captain is properly characterized. If he designedly or recklessly exposed the vessel to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of misconduct such as would relieve the defendant from liability; but if the proximate cause of the loss was the stranding of the vessel, this was covered by the policy, and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employés."

We not perceive anything in these instructions of which the Insurance Company can rightfully complain. The court proceeded upon the ground that, if the efficient, and, therefore, proximate cause of the loss was a peril of the river, the Company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining, before giving the signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling. In *Columbia Ins. Co.* v. *Lawrence*, 35 U. S. 10 Pet. 517 [9:516], which was a case of insurance against fire on land, the court said that "A loss by fire, occasioned by the mere fault or negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the general ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies." In the subsequent case of *Waters* v. *Merchants' Louisville Ins. Co.* 36 U. S. 11 Pet. 224 [9:696], it was said, in reference to the case of *Columbia Ins. Co.* v. *Lawrence*, that "The court then thought that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners." To the same effect are *Patapsco Ins. Co.* v. *Coulter*, 28 U. S. 3 Pet. 237 [7:665]; *General Mut. Ins. Co.* v. *Sherwood*, 55 U. S. 14 How. 352 [14:452], and *Phœnix Ins. Co.* v. *Erie & W. Trans. Co.* 117 U. S. 325 [29:879].

But it is insisted that the court should have granted the request of the Company to the effect that it was not liable if the accident and loss were caused by the "misconduct" of the master. Had that request been granted, in the form asked, the jury might have supposed that the Company was relieved from liability if the master was chargeable with what is sometimes described as gross negligence as distinguished from simple negligence. Hence the court properly said, in effect, that the misconduct of the master, unless affected by fraud or design, would not defeat a recovery on the policy. The principle upon which the court below acted was that expressed by *Chief Justice* Gibson in *American Ins. Co.* v. *Insley*, 7 Pa. 229, when he said that "Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim *respondeat superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts

with fidelity, is answerable neither for his servants nor for himself." *Williams* v. *Suffolk Ins. Co.* 3 Sumn. 276.

The next assignment of error is that the court erred in ruling that the loss was not within the express exceptions of the policy. The specification, under this assignment is, that the loss was the consequence of the derangement of the mud valve, and, therefore, within the exception that the Company should be free of all claim for loss or damage occasioned by "the derangement or breaking of the engine or machinery, or any consequence resulting therefrom." The "consequence" here referred to is an immediate or proximate, not a remote consequence. Even if the mud valve is a part of the machinery of the vessel, within the meaning of the policy, its derangement cannot be said to have been the proximate cause of the loss. So far as the bills of exception show, the repairs of the mud valve had been completed before the order was given to let the vessel go.

It is also contended that the court erred in its instructions as to the abandonment of the vessel by the plaintiffs. The court told the jury, in substance, that the assured were entitled to abandon the vessel if, on May 18, 1880, it was impracticable to recover and repair it, and if the damage from the perils of the river amounted to 50 per cent of the agreed value; that the right to abandon was to be determined from the facts as they existed on that day; that if the right then existed, and the plaintiffs availed themselves of it, the subsequent floating off of the vessel in the winter or spring of 1881 would not change the result; and that, in determining whether the injuries to the vessel from the perils of the river were to the extent of 50 per cent of her agreed value, the jury should take into consideration the "place where The Alice lay, and the uncertainty as to when (if at all) a rise would come to float her off, and all other circumstances in the case."

The argument in behalf of the Company is that these instructions disregarded the express terms of the contract between the parties; that while the rule laid down by the court made the probability of the stipulated loss, at the time of abandonment, the test of the right to abandon, the policy made the actual existence of the stipulated proportion of loss the ground of the exercise of that right. We do not think the court mistook the meaning of the contract or erroneously instructed the jury. The jury were distinctly told that the right to abandon depended upon the fact that it was impracticable to recover and repair the vessel. But how were the jury to determine the existence of that fact? The contract provided, as a condition precedent to the right to abandon, that it be "ascertained that the recovery and repairs of said vessel are impracticable." But in what mode ascertained? How was the insured to determine whether the recovery and repair of the vessel was impracticable at the time of abandonment? Why, manifestly, as the jury were told, by taking into consideration where the vessel lay, the uncertainty as to when (if at all) a rise would come to float her off, and all the other attendant circumstances. While the damage must at the time have been equivalent to 50 per cent of the agreed value, and while the fact that the repairs subsequently made amounted to only $6,000 tended to show that the actual damage was not so great as claimed, that fact is not decisive of the right to abandon. For, as said in *Bradlie* v. *Maryland Ins. Co.* 37 U. S. 12 Pet. 378, 397 [9: 1123, 1131], "If the abandonment when made is good, the rights of the parties are definitely fixed, and do not become changed by subsequent events; if, on the other hand, the abandonment when made is not good, subsequent circumstances will not affect it so as, retroactively, to impart to it a validity which it had not at the origin." *Rhinelander* v. *Pennsylvania Ins. Co.* 8 U. S. 4 Cranch, 29 [2: 540]; *Marshall* v. *Delaware Ins. Co.* Id. 202 [2: 596].

Again: "In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although by some fortunate occurrence she may be delivered from her peril without an actual expenditure of one half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good."

In the same case the court quotes with approval the following language of Kent:

"The right of abandonment does not depend upon the certainty, but on the high probability, of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities, and if the facts present a case of extreme hazard and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterwards recovered at a less expense." 3 Kent, 321.

In this connection it is assigned for error that the court erred in ruling that the fact of the actual repair of the vessel for less than 50 per centum of her agreed value was not evidence relevant to the issue as to the amount of damage done to The Alice. This statement as to the ruling of the court is scarcely accurate. The court refused, and properly, to tell the jury that the fact that the vessel was recovered and repaired was "the best evidence" that it was practicable to recover and repair it. That fact, however, went to the jury as evidence, and they were at liberty, under the instructions, to give it due weight in connection with all the other circumstances, in determining whether the recovery and repair of the vessel were, within the principles announced in other instructions, impracticable at the time of the abandonment.

Upon the whole case we are of opinion that no error of law was committed to the prejudice of the Company, and the judgment is *affirmed*.

FRANK MOREY, *Appt.*,
v.
JOHN M. LOCKHART.

(See S. C. Reporter's ed. 56-58.)

Removal of cause from state court—prohibitions against—appeal from order.

1. Under the Act of 1887, which provides that whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court, the action of the circuit court remanding the cause is final and not the subject of review in this court.

2. The prohibitions against appeal and writs of error in the Act of 1887 apply not only to removals on account of prejudice or local influence, but also to removals for other causes.

3. No appeal from an order of the circuit court remanding a suit lies to this court under section 698 of the Revised Statutes. The order of the circuit court remanding the cause to the state court is not a final judgment in the action but a refusal to hear and decide.

[No. 1233.]

Submitted Oct. 18, 1887. Decided Oct. 24, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana from an order of the Circuit Court remanding a suit which was begun and had been removed from a state court after the Act of March 3, 1887, chap. 373, 24 Stat. at L. 552, went into effect.

Reported below, 31 Fed. Rep. 497.

On motion to dismiss. *Granted.*

The facts are stated in the opinion.

Messrs. **William A. Maury, Eugene D. Saunders** and **E. D. White,** for appellee, for the motion:

Under the express terms of the Judiciary Act of March 3, 1887, this court is without jurisdiction to review, in any form of appellate proceedings, a judgment of a circuit court remanding a case from such court to the state court in which it originated.

The Act of 1887 gives the right to remove in cases not federal to defendants being nonresidents of that State, *i. e.*, of the State in which the suit is brought.

But it is contended that the Act of 1875 is not, on this point, repealed by the Act of 1887.

This contention is based on what we consider is a misapprehension of the principles of interpretation announced in the case of *Hess* v. *Reynolds*, 113 U. S. 78 (28: 928). That case, together with the case of *King* v. *Cornell*, 106 U. S. 395 (27: 60), indeed settle this matter in the opposite sense to that for which our opponents contend.

The Act of 1875 contains no clause regulating or referring to the removal of cases under the Local Prejudice Act.

King v. *Cornell, supra.*

Hess v. *Reynolds* is not in conflict with the decision in *King* v. *Cornell*, because they were on different states of facts. Each case is authority in the appropriate state of facts and law.

Baltimore & O. R. R. Co. v. *Bates*, 119 U. S. 467 (30: 438).

The Act of 1887 contains an express regulation of these matters, and is later in date than that contained in the Act of 1875. And the principle announced in *King* v. *Cornell* is that the latter supersedes the former.

Messrs. **J. D. Rouse** and **William Grant,** for appellant:

This case comes before this court upon a division of opinion, duly certified under the provisions of section 652, R. S., an appeal having been taken from a final decree in the cause, under section 698, R. S. The latter section expressly confers jurisdiction upon this court to review "Any final judgment or decree in any civil suit or proceeding before a circuit court," under the circumstances named in the statute.

It is an advisory jurisdiction, and prior to the Act of June 1, 1872, 17 Stat. at L. 196, was exercised only by answering the question certified. The determination of the question certified did not affect the right to bring up the whole case after it was terminated in the court below.

Daniels v. *Chicago & R. I. R. R. Co.* 70 U. S. 3 Wall. 255 (18: 225); *Ward* v. *Chamberlain*, 67 U. S. 2 Black, 435 (17: 323); *U. S.* v. *Bailey*, 34 U. S. 9 Pet. 267 (9: 124).

Under the Act of April 29, 1802, 2 Stat. at L. 159), the cause might proceed in the circuit court after the division arose and the question was certified, without awaiting a decision thereof, provided further proceedings could be had without prejudice to the merits.

The question was to be stated and certified only upon "the request of either party or their counsel." But the Act of 1872 postponed the certificate until a final judgment, decree or order is entered in the suit, and makes it mandatory upon the judges then to certify any question upon which they differed in opinion, which might have been reviewed under the Act of 1802.

All such cases may now be removed to this court by writ of error or appeal, according to the nature of the case. "This is the only material change from the original law."

Dow v. *Johnson*, 100 U. S. 164 (25: 634).

The jurisdiction to answer the question certified was not dependent upon the amount in dispute, as in other cases, but was conferred in all cases without regard thereto.

Waterville v. *Van Slyke*, 116 U. S. 699 (29: 772).

This case was removed into the circuit court, under the provisions of section 2 of the Act of March 3, 1875.

The judges were divided in opinion whether such a suit could be removed since the passage of the Act of March 3, 1887. The latter Act declares in its title that it is amendatory of the Act of 1875.

"If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

State v. *Stoll*, 84 U. S. 17 Wall. 425 (21: 650).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal from an order of the circuit court remanding a suit which was begun and had been removed from a state court after the Act of March 3, 1887, chap. 373, 24 Stat. at L. 552, went into effect. At the hearing of the motion the judges holding the circuit court differed in opinion, and the order to remand was made under section 650 of the Revised

Statutes in accordance with the opinion of the presiding judge. The question as to which the difference of opinion arose was duly certified and recorded, and this appeal was taken from the order which was entered. A motion is now made to dismiss because an appeal does not lie in such a case.

Before the Act of March 3, 1875, there could be no appeal from an order of the circuit court remanding a suit which had been removed, because such an order was not a final judgment or decree in the sense which authorizes an appeal or writ of error. *Chicago & A. R. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 [23: 108]. That Act, however, provided in express terms that "The order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal, as the case may be" (18 Stat. at L. 470, chap. 137, last paragraph of § 5); and under this authority numerous cases have been brought to this court by appeal or writ of error for the review of such orders. But, by section 6 of the Act of 1887, chap. 373, the last paragraph of section 5 of that of 1875, chap. 137, was expressly repealed; and in the last paragraph of section 2 of the Act of 1887 it was enacted that "Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such case shall be allowed." It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

It is contended, however, that the prohibitions against appeals and writs of error in the Act of 1887 apply only to removals on account of prejudice or local influence, but that cannot be so. The section of the statute in which the provision occurs has relation to removals generally, those for prejudice or local influence as well as those for other causes, and the prohibition has no words of limitation. It is in effect that no appeal or writ of error shall be allowed from an order to remand in "any cause" removed "from any state court into any Circuit Court of the United States." The fact that it is found at the end of the section, and immediately after the provision for removals on account of prejudice or local influence, has, to our minds, no special significance. Its language is broad enough to cover all cases, and such was evidently the purpose of Congress.

It is also contended that the appeal lies under section 693 of the Revised Statutes, on account of the certificate in the record of the judges holding the court that their opinions were opposed upon the question of remanding. That section is as follows: "Any final judgment or decree in any civil suit or proceeding before a circuit court * * * wherein the said judges certify, as provided by law, that their opinions were opposed, * * * may be reviewed and affirmed, reversed or modified by the supreme court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and *supersedeas*." But here there has been no judgment in the suit, and therefore this section does not apply. That was the ground on which an appeal was denied in *Chicago & A. R. R. Co.* v. *Wiswall, supra*, where it was said: "The order of the circuit court remanding the cause to the state court is not a 'final judgment' in the action, but a refusal to hear and decide." No case can be brought up under section 693 until there has been a final judgment or decree in the suit.

It follows that we have no jurisdiction of this appeal, and the motion to dismiss is consequently granted.

UNITED STATES, *Appt.*
v.
STATE OF LOUISIANA.

(See S. C. Reporter's ed. 32-39.)

Jurisdiction of court of claims—action by State against United States—Statute of Limitations.

1. The court of claims has jurisdiction of an action by a State against the United States for a demand arising upon an Act of Congress.
2. The action of a State in the court of claims to recover moneys received by the United States from sales of swamp lands granted to the State by the Act of September 28, 1850, is not barred by the Statute of Limitations until six years after the amount is ascertained from proofs of the sales before the Commissioner of the General Land-Office.
3. The direct tax laid by the Act of August 5, 1861, did not create any liability on the part of the States, in which the lands taxed were situated, to pay the tax.

[No. 1025.]

Submitted Oct. 11, 1887. Decided Oct. 24, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The case is stated by the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **Heber J. May,** *Asst. Atty-Gen.*, for appellant:

The court of claims has neither original nor concurrent jurisdiction to hear and determine a cause in which a State is a party in a suit against the United States.

Const. U. S. art. 3, § 2; Judiciary Act 1789, 1 Stat. at L. 78, 13, now § 687, R. S.; *U. S.* v. *Ravara*, 2 U. S. 2 Dall. 298 (1: 328); Spear, Fed. Judiciary, 247-255; *Ames* v. *Kansas*, 111 U. S. 449-472 (28: 482, 491); Act March 3, 1875, 18 Stat. at L. 470; *Russell* v. *U. S.* 80 U. S. 13 Wall. 623 (20: 474); R. S. §§ 1059, 1067, 1073.

Power is conferred upon the court of claims to decide the claims of individuals against the United States, but not to determine claims between States and Nations.

We are not bound by the decisions made in the three cases mentioned in the opinion in which States were parties, but in which the question of jurisdiction was not raised. No appeals were taken.

See *U. S.* v. *McDougall*, 121 U. S. 89 (30: 861); *Texas Case*, 7 Ct. Cl. 301; *State of Illinois and*

State of New Hampshire v. *United States*, 20 Ct. Cl. 342, 394.

As to the items making up the claim for indemnity for swamp lands, the court of claims was without jurisdiction. The petition was not filed within six years after the claim first accrued.

By the Act of March 3, 1857, the provisions of the Act of March 2, 1855, are continued in force, and special reference is made therein to the Act granting the swamp lands to the State of Louisiana, approved March 2, 1849, 9 Stat. at L. 352.

Inasmuch as the tracts of land were sold prior to the passage of the Act of Congress approved March 3, 1857, by which the provisions of the Act of March 2, 1855, were extended, the claims which are founded on these two statutes did not accrue later than March 3, 1857.

They are presented here as claims founded upon such laws under section 1059, Revised Statutes. The petition was filed September 20, 1886, nearly thirty years after such claims accrued under the statutes, and more than thirty years after the sale of such lands.

A claim first accrues, within the meaning of the statute, when suit may first be brought upon it, and from that day the six years' limitation begins to run.

Rice v. *U. S.* 122 U. S. 617 (30: 793).

The appellee relies on the provisions of the Statutes of 1850, 1855, and 1857 for its remedy to prosecute the claim in this court under section 1059, Revised Statutes. Such being the fact, there is nothing to exclude the claim from the provisions of section 1069, Revised Statutes.

The agent of the State of Louisiana never furnished the proof required by section 2 of the Act of 1855.

Any delay in the adjustment and payment of this part of the claim is clearly to be attributed to the appellee, and of such delay it cannot take advantage.

The inaction was entirely on the part of the State. No proof was furnished until, by lapse of time, the Statute of Limitation became a bar to the jurisdiction of the court, if, in fact, such jurisdiction ever attached.

The Commissioner of the General Land-Office cannot abrogate or extend the Statute of Limitations.

The right of action, if it ever accrued in the court of claims in relation to the claim under consideration, accrued March 3, 1855, and the Statute of Limitations began to run against it from the same date.

The grant is an absolute gift, coupled with the provision that so much thereof as may be necessary shall be used for the purpose named.

Wright v. *Roseberry*, 121 U. S. 488 (30: 1039).

The fund is not, therefore, held by the appellant in trust for the State for the purpose of having it specifically applied.

The Commissioner of the General Land-Office is directed and authorized by Congress to pay to the States, upon due proof, the purchase money. This is all there is of the law. No express trust is declared, and none can well be implied.

Rice v. *U. S.* 122 U. S. 611 (30: 793).

The Government is not a trustee of every fund that happens to fall into its possession.

Five Per Cent Cases, 110 U. S. 471 (28: 198).

The part of the final judgment based on Finding 1 of the court is erroneous, because the claim was within the exclusive jurisdiction of the Commissioner of the General Land-Office, under section 2 of the Act of March 2, 1855, 10 Stat. at L. 634.

When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decisions of the tribunal, within the scope of its authority, is conclusive upon all others.

Johnson v. *Towsley*, 80 U. S. 13 Wall. 83 (20: 487); *Marshall's Case*, 21 Ct. Cl. 307; *Woolner's Case*, 18 Ct. Cl. 366; *Portland Company's Case*, 5 Ct. Cl. 445; *Nicholl's Case*, 74 U. S. 7 Wall. 122 (19: 125); *Davidson's Case*, 21 Ct. Cl. 298; *Daily's Case*, 17 Ct. Cl. 144; *Harrison's Case*, 20 Ct. Cl. 122; *Kaufman's Case*, 11 Ct. Cl. 659; *Garfield* v. *Paris*, 96 U. S. 567 (24: 825); *Ramsey's Case*, 14 Ct. Cl. 367; *Bank of Greencastle Case*, 15 Ct. Cl. 225; *Sybrandt's Case*, 19 Ct. Cl. 461.

Mr. **William G. Earle,** for appellee:

The attempted set-off is illegal. There is no mutuality between the parties.

Beauregard v. *Case*, 91 U. S. 141 (23: 263).

These two causes of action are trust funds.

Whilst the statute gave to the State the right of making proofs, etc., this was conferred only as an additional protection and safeguard to the rights vested in the State by the Acts.

The Commissioner of the General Land-Office has exclusive jurisdiction in all matters "Appertaining to the surveying and sale of the public lands of the United States," and power to "audit and settle all public accounts relating to the public lands."

See *Baldwin* v. *Starks*, 107 U. S. 465 (27: 527); *Marquez* v. *Frisbie*, 101 U. S. 473 (25: 800); *Shepley* v. *Cowan*, 91 U. S. 331 (23: 424).

The repudiation of a trust must be clearly and unequivocally made known to the *cestui que trust*.

Speidel v. *Henrici*, 120 U. S. 386 (30: 719).

There could be no bar of the statute until knowledge was brought home to the Governor of Louisiana that the United States had repudiated the trust by entering it as a credit in the treasury department.

American Emigrant Co. v. *Wright County*, 97 U. S. 339 (24: 912); *American Emigrant Co.* v. *Adams County*, 100 U. S. 61 (25: 563); *Mills County* v. *Burlington & M. R. R. R. Co.* 107 U. S. 557 (27: 578).

The original jurisdiction of the supreme court is not made exclusive by the Constitution.

Ames v. *Kansas*, 111 U. S. 449 (28: 482); *Börs* v. *Preston*, 111 U. S. 253 (28: 420).

The court of claims has jurisdiction to hear and determine all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress. A State may maintain an action to enforce its rights.

1 Dill. Mun. Corp. § 14, p. 106.

Mr. Justice **Field** delivered the opinion of the court:

This action was brought in the court of claims by the State of Louisiana against the

United States, to recover two demands, amounting in the aggregate to the sum of $71,385.83. The first of these demands arises upon the Act of Congress of February 20, 1811, "To enable the people of the Territory of Orleans to form a Constitution and State Government," the fifth section of which declared that 5 per cent of the net proceeds of the sales of lands of the United States, within her limits, after the first day of January next ensuing, should be applied to laying out and constructing public roads and levees in the State, as its Legislature might direct. 2 Stat. at L. 641, chap. 21. Pursuant to the authority thus conferred, the people of the Territory of Orleans, represented in a convention called for that purpose, formed themselves into a State, by the name of Louisiana, and adopted a constitution under which the State was admitted into the Union. The 5 per cent of the net proceeds of sales of lands of the United States, made between July 1, 1882, and June 30, 1886, and due to the State by the United States, as found by the Commissioner of the General Land-Office, amounted to $47,530.79.

The second of these demands arises upon the Act of Congress of September 28, 1850, "To enable the State of Arkansas and other States to reclaim the swamp lands within their limits," 9 Stat. at L. 519, chap. 84, and the Act of March 2, 1855, "For the relief of purchasers and locators of swamp and overflowed lands." 10 Stat. at L. 634, chap. 147. The Act of September 28, 1850, granted to the States then in the Union all the swamp and overflowed lands, made unfit thereby for cultivation, within their limits, which at the time remained unsold. The second section made it the duty of the Secretary of the Interior, as soon as practicable after the passage of the Act, to prepare a list of the lands described and transmit the same to the Governor of the State, and at his request to cause a patent to be issued therefor. It would seem that this duty was not discharged; and, notwithstanding the grant was one *in præsenti*, many of the lands falling within the designation of swamp and overflowed lands were sold to other parties by the United States. The Act of March 2, 1855, was designed to correct, among other things, the wrong thus done to the State; it provided that, upon due proof of such sales, by the authorized agent of the State, before the Commissioner of the General Land-Office, the purchase money of the lands should be paid over to the State. Such proof was not made, but equivalent proof was submitted to the commissioner as to the character of the lands from the field notes of the Surveyor-General of the State. This mode of proof was accepted by the commissioner in other cases as early as 1850. The amount found in this way by the commissioner on the 30th of June, 1885, to be due to the State from the United States, on account of sales of swamp lands to individuals, made prior to March 3, 1857, was $23,855.04.

It does not appear that there was any serious contest in the court of claims, either as to the validity or the amount of these demands; but it was objected that the demand arising upon the Acts of September 28, 1850, and of March 2, 1855, was barred by the Statute of Limitations, and that both demands were set off by the unpaid balance of the direct tax levied under the Act of August 5, 1861, 12 Stat. at L. 292, which was apportioned to the State of Louisiana. The First Comptroller of the Treasury had, at different times previous to the commencement of this action, admitted and certified that the sums claimed were due to the State on account of the 5 per cent net proceeds of sales of the public lands, and on account of sales of swamp lands within the State purchased by individuals; but had directed the amounts to be credited to the State on account upon the claim of the United States against her for the unpaid portion of the direct tax mentioned.

It was also objected in the court of claims, and the objection is renewed here, that that court had no jurisdiction, under the Constitution and laws of the United States, to hear and determine a cause in which the State is a party in a suit against the United States. This objection, therefore, must first be examined; for, if well taken, it will be unnecessary to consider the other questions presented.

The Constitution declares that "The judicial power of the United States shall be vested in one supreme court, and such inferior courts as Congress may from time to time ordain and establish," and "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects." This clause was modified by the 11th Amendment, declaring that "the judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

As thus modified, the clause prescribes the limits of the judicial power of the courts of the United States. The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has brought it within the jurisdiction of the court of claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the supreme court. The same article of the Constitution which defines the extent of the judicial power of the courts of the United States declares, that "In all cases affecting ambassadors, other public ministers, and consuls, and *those in which a State shall be a party*, the supreme court shall have original jurisdiction; in all the other cases, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Although the original jurisdiction of the supreme court, where a State is a party, as thus appears, is not

in terms made exclusive, there were some differences of opinion among the earlier judges of this court whether this exclusive character did not follow from a proper construction of the article. In a recent case, *Ames* v. *Kansas*, 111 U. S. 449 [28: 482], this question was very fully examined, and the conclusion reached that the original jurisdiction of the supreme court, in cases where a State is a party, is not made exclusive by the Constitution and that it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States. In that case, it is true, the action was commenced by the State in one of her own courts, and, on motion of the defendant, was removed to the Circuit Court of the United States, and the question was as to the validity of this removal. The case having arisen under the laws of the United States, it was one of the class which could be thus removed, if the circuit court could take jurisdiction of an action in which the State was a party. It was held that the circuit court could take jurisdiction of an action of that character, and the removal was sustained. The Judiciary Act of 1789, it is true, declares that "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original but not exclusive jurisdiction." This clause, however, cannot have any application to suits against the United States, for such suits were not then authorized by any law of Congress. There could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The Act of March 2, 1875, in extending the jurisdiction of the circuit court to all cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States upon any demand in the circuit court, or the court of claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the court of claims, upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a State is a party, than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.

The Statute of Limitations does not seem to us to have any application to the demand arising upon the Swamp-Land Acts. The Act of 1850 contemplates that the Secretary of the Interior will identify the lands described, and although the State could not be deprived of her rights by the inaction of that officer, *Wright* v. *Roseberry*, 121 U. S. 488, 501 [30: 1039, 1042], she was not obliged to proceed in their assertion in the absence of such identification. By the Act of 1855, which provided for the payment to the State of moneys received by the United States on the sales of swamp lands within her limits, the payment was made to depend upon proof of the sales by the authorized agent of the State before the Commissioner of the General Land-Office. No such proof was ever made or offered, and, therefore, until in some other equally convincing mode the swampy character of the lands sold was established to the satisfaction of the commissioner, no definite ascertainment of the amount due to the State was had, so as to constitute a ground of action for its recovery in the court of claims. The method of proving the character of such lands by having recourse to the field notes of the public surveys of the Surveyor-General of the State was adopted by the commissioner as early as 1850, and was followed by him in this case in 1885. On the 30th of June of that year, he found in this mode and certified that there was due to the State from such sales the amount stated above. From that date only the six years within which the action could be brought in the court of claims began to run; and this action was commenced in September of the following year.

Nor do we regard the unpaid portion of the direct tax laid by the Act of Congress, of August 5, 1861, which was apportioned to Louisiana, as constituting any debt to the United States by the State in her political and corporate character, which can be set off against her demands. 12 Stat. at L. 292, chap. 45. That Act imposed an annual direct tax of twenty millions "upon the United States," and apportioned it to the several States of the Union. It directed that the tax should "be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling houses." § 13. It was assessed and laid upon the real property of private individuals in the States. Public property of the States and of the United States was exempted from the tax. Its apportionment was merely a designation of the amount which was to be levied upon and collected from this property of individuals in the several States, respectively. The provisions of the Act are inconsistent with any theory of the obligation of the States to pay the sums levied. It provides for the appointment of officers to assess the property to the different holders, and to collect the tax, and directs with minute detail the proceedings to be taken to enforce the collection, either by a distraint and sale of the personal property of the owners, or, that failing, by a sale of the real property taxed. It allows, it is true, the different States to assume the amounts apportioned to them respectively, and to collect the same in their own way by their own officers. Many of the States did thus assume the amounts, and in such cases it may well be considered that for the sums assumed they became debtors to the United States, and, so far as any portion of those sums has not been paid, that they still remain debtors. But, unless such assumption was had, no liability attached to any State in her political and corporate character. The liability was upon the individual land owners within her limits. The Act declares that the amount of the taxes assessed "shall be and remain a lien upon all lands and other real estate of the individuals who may be assessed for the same during two years after the time it shall annually become due and payable." § 33. Louisiana never assumed the payment of the taxes apportioned to her, or of any portion of them. She allowed the Government to proceed by its officers to collect the tax from the property holders. The amount apportioned to her was $385,886.67;

the amount collected from the owners of land was $314,500.84, leaving only a balance of $71,385.83. It is not for us to suggest in what way this balance may be collected. After the war, the Secretary of the Treasury was authorized to suspend the collection of the tax in any of the States previously declared in insurrection, until January, 1868, and subsequently this authority was extended to January, 1869. 14 Stat. at L. 331, § 14; 15 Stat. at L. 260, chap. 69. The secretary acted upon this authority, and suspended the collection. It is stated that, since 1869, no attempts have been made by the Executive Department to enforce its collection in those States. Be that as it may, it is enough for the disposition of the present case, that the unpaid balance of the tax apportioned to Louisiana constitutes no debt on the part of the State in her political and corporate character to the United States.

We perceive no error in the judgment of the court below, and it is, therefore, *affirmed*.

UNITED STATES, *Appt.*, v.
STATE OF ALABAMA.
[No. 1058.]

UNITED STATES, *Appt.*, v.
STATE OF MISSISSIPPI.
[No. 1059.]

APPEALS from the Court of Claims. *Affirmed.*

Mr. Justice **Field** delivered the opinion of the court:

The questions presented in these cases are covered by the decision in the case of *United States* v. *Louisiana;* and, in conformity with it, the judgments in them must be *affirmed*. So ordered.

BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, *Appt.*

v.

CHARLES E. SIMMONS, Trustee, ET AL.

(See S. C. Reporter's ed. 52-56.)

When decree is interlocutory and not final.

When an action has been brought in the United States Circuit Court, by a junior mortgagee, against the mortgagor and a prior mortgagee, to foreclose his mortgage, and to establish his right to redeem the prior mortgage, and such right to redeem has been established by a decree of that court but the amount he must pay has not been determined, and the amount due on his mortgage has been declared, but what that amount is has not been fixed by the decree, the decree is interlocutory only and not final for the purposes of an appeal, and an appeal therefrom will be dismissed.

[No. 1019.]

Submitted Oct. 11, 1887. Decided Oct. 24, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa, Central Division.

Reported below, 28 Fed. Rep. 849.

On motion to dismiss. *Granted.*

The case is stated by the court.

Messrs. **Herbert B. Turner**, and **B. F. Lee** for appellee, in support of motion:

The decree is interlocutory and not final, according to the decisions of this court.

Parsons v. *Robinson*, 122 U. S. 112 (30: 1122); *Daimese* v. *Kendall*, 119 U. S. 53, 54 (30: 305); *Grant* v. *Phœnix Ins. Co.* 106 U. S. 429 (27: 238); *Ray* v. *Law*, 7 U. S. 3 Cranch, 179 (2: 404); *Whiting* v. *Bank of U. S.* 38 U. S. 13 Pet. 6 (10:33); *Bronson* v. *La Crosse & M. R. R. Co.* 67 U. S. 2 Black, 524 (17: 359); *Green* v. *Fisk*, 103 U. S. 518 (26: 486); *Chicago & A. R. R. Co.* v. *Swasey*, 90 U. S. 23 Wall. 405 (23: 136); *Humiston* v. *Stainthrop*, 69 U. S. 2 Wall. 106 (17: 905); *Perkins* v. *Fourniquet*, 47 U. S. 6 How. 206 (12:406); *Fourniquet* v. *Perkins*, 57 U. S. 16 How. 84 (14:855.)

Mr. **Thos. F. Withrow**, for appellant, cited *Nat. Bk. of Cleveland* v. *Shedd*, 121 U. S. 74 (30: 877); *Parsons* v. *Robinson*, 122 U. S. 112. (30: 1122).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion to dismiss an appeal because the decree appealed from is not final but interlocutory only. The case is in substance this:

A bill was filed by a junior mortgagee against the mortgagor and a prior mortgagee to foreclose his mortgage and to establish his right to redeem the prior mortgage. The defense was that under certain proceedings had for the foreclosure of the prior mortgage his right to redeem had been cut off, and the mortgaged property sold free of his lien. The decree appealed from finds: (1) That the junior mortgage is still a valid and subsisting lien, and that the right of its trustee and beneficiaries to redeem had not been cut off by the proceedings for the foreclosure of the earlier mortgage; (2) That those claiming title under the sale upon the foreclosure of that mortgage, and certain other parties, are entitled to redeem the junior mortgage "by paying off the amount due." thereon, "at such time as shall hereafter be fixed and determined by a further order or decree to be entered in this cause;" (3) In case none of the parties claiming under the prior mortgage redeem the junior mortgage, and the junior mortgagee redeems the prior one, then that the junior mortgage shall be foreclosed and a sale of the property "shall be had under a decree to be entered by this court," and the proceeds shall be applied, first, "to paying off the amount paid to redeem from the first" mortgage; second, the amount found due on the second mortgage; and the balance, if any, paid to the mortgagor; (4) "In the event that none of these parties shall redeem from the others, * * * then a sale" of the mortgaged property "shall be had pursuant to such decree as may hereafter be entered herein, and from the proceeds shall be paid off, first, the amount which it may be hereafter determined is due on the first" mortgage; "second * * * the amount which it may hereafter be determined is due on the second" mortgage; and third, the balance, if any, to the mortgagor.

It was then ordered that, "for the purpose

of determining the amount necessary to be paid by any of the parties in making redemption, as herein provided," the cause be referred to a master "to find and report" the amount due on both the first and the second mortgages in accordance with certain principles of accounting which were specifically stated. The whole then concludes as follows: "This decree being interlocutory, it is ordered that said cause stand continued for further order and decree." From this decree the appeal was taken.

The case is reported as *Simmons* v. *Taylor*, 23 Fed. Rep. 849.

The rulings at the last term in *Parsons* v. *Robinson*, 122 U. S. 112 [30:1123] are decisive of this motion. The right of the junior mortgagee to redeem the prior mortgage has been established by the decree appealed from, but the amount he must pay has not been determined. The validity of his lien as security for the amount due on his mortgage has been declared, but what that amount is has not been fixed. His right to a sale of the mortgaged property in case the debt is not paid has been settled but such a sale cannot be made until a further order to that effect is entered. The litigation has not been ended; the terms of the redemption have not been fixed, and the foreclosure sale awaits the further judicial action of the court. In short, nothing can be done towards carrying the decree into effect until the "further order or decree" for which the cause was continued. This is shown more than once on the face of the decree, and consequently the decree is in fact, what the court took care to say it was, "interlocutory" only, and not final for the purposes of an appeal.

It is suggested in the brief of counsel for the appellant that the cases of *First Nat. Bk. of Cleveland* v. *Shedd*, 121 U. S. 74 [30: 877] and *Parsons* v. *Robinson*, *supra*, are in conflict, but this is a mistake. In *Shedd's Case* there was a decree of sale absolutely and without reserve, which could be carried into execution at once and when a purchaser acquired title under it, he would have held as against all the parties to the suit, no matter what might be the rulings on the other questions in the case which were reserved for further adjudication. The language of the decree, as shown at page 84 [881], was to the effect "that the whole property be sold as an entirety, * * * and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, etc." Such a decree was surely final for the purposes of an appeal within the rule as stated in *Forgay* v. *Conrad*, 47 U S. 6 How. 201 [12:404], where it is said, at page 204 [405]: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such a decree carried immediately into execution, the decree must be considered as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." To the same effect are *Ray* v. *Law*, 7 U.S.3 Cranch, 179 [2:404]; *Bronson* v. *La Crosse & M. R. R. Co.* 67 U. S. 2 Black, 524, 531 [17: 359, 360] and *Thompson* v. *Dean*, 74 U. S. 7 Wall. 342 [19: 94], in which last case it is said, p. 345 [95]: "In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree." If a sale had been made under the decree as it stood in *Shedd's Case*, "the title of the purchaser would not have been overthrown or invalidated, even by a reversal of the decree; and consequently the title of the defendants to the lands would have been extinguished, and their redress upon the reversal, would have been of a different sort from that of a restitution of the land sold." Such was the language of this court, speaking through *Mr. Justice* Story, in *Whiting* v. *Bank of U. S.* 38 U. S., 13 Pet. 6, 15 [10:33, 37], in reference to the effect of a sale under a decree of foreclosure and sale, and there cannot be a doubt of its correctness. It was for this reason the decree in *Shedd's Case* was held to be final in the sense of a court of equity for the purpose of an appeal.

But in *Parsons* v. *Robinson*, we held there was no decree of sale which could be "carried immediately into execution;" that no order of sale could issue until the court had "given its authority in that behalf;" and that "further judicial action must be had by the court before its ministerial officers could proceed to carry the decree into execution." In this consists the difference between the two cases; in *Shedd's Case* there was actually a decree of sale; in *Parson's Case* there was not. So, here, there has been no actual decree of sale; and *the motion to dismiss is granted.*

HENRY S. GILSON, *Plff. in Err.*,
v.
TOWN OF DAYTON.

(See S. C. Reporter's ed. 59–61.)

Town bonds, when invalid.

Where the law, under which town bonds in aid of a railroad purport to have been issued, has been declared void, and the bonds are sought to be supported by another law which requires that the application for the town meeting shall be made by twenty voters and taxpayers, and the record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers, a recovery cannot be had upon them.

[No. 876.]

Submitted Oct. 11, 1887. Decided Oct. 24, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. *Affirmed.*

Action against the Town of Dayton on town bonds purporting to be issued by it under the Act of February 18, 1857, which Act has been

declared void by reason of its not appearing by the legislative journal to have been passed as required by the Constitution. Plaintiff claimed to be a *bona fide* holder and to recover under the Act of March 6, 1867, which was in force on May 1, 1869, when the bonds were issued. A copy of the bond is set forth in the declaration containing the recital that it was issued under the Act of 1857. The Town demurred to the declaration. The circuit court in which the action was commenced sustained the demurrer and dismissed the action and the plaintiff Gilson appealed to this court.

Messrs. **George A. Sanders** and **R. W. Haynes,** for plaintiff in error:

The Act of March 6, 1867, gave ample power for the vote and issue of the bonds in question.

Knox County v. *Aspinwall*, 62 U. S. 21 How. 539 (16: 208); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 203 (17:524); *Marshall County* v. *Schenck*, 72 U. S. 5 Wall. 784 (18:559); *Lexington* v. *Butler*, 81 U. S. 14 Wall. 282 (20:809).

Municipal bonds held by *bona fide* purchasers bought before maturity, in good faith, for a valuable consideration, and without notice of any defense, have been held valid, where there appeared adequate legislative authority therefor; and where a vote of the people is recited on the face of the bonds, the municipality is estopped from denying the election.

Warren County v. *Marcy*, 97 U. S. 104 (24:980); *Douglas County* v. *Bolles*, 94 U. S. 104 (24:46); *Empire Twp.* v. *Darlington*, 101 U. S. 87 (25:878); *Marcy* v. *Oswego*, 92 U. S. 638 (23:748); *Coloma* v. *Eaves*, 92 U. S. 484 (23:579).

The bonds reciting on their face a void Act, that of February 18, 1857, as legislative authority, when the valid Act of March 6, 1867, giving ample power to issue the bonds, was in force, must be chargeable to the officers of the Town, and no loss thereby should fall upon a *bona fide* holder of bonds purchased without notice and for a valuable consideration before maturity.

Marcy v. *Oswego*, and *Coloma* v. *Eaves*, *supra*.

If there was any legislative power in existence, at the time the bonds were issued, for the vote and the issue of the bonds in question, an innocent purchaser had a right to rely upon it, and the bonds are valid.

Maher v. *Chicago*, 38 Ill. 273; *Johnson County* v. *January*, 94 U. S. 204 (24:111).

Where the wrong Act is recited, the recital of it will be rejected, and the bonds held valid under an existing Act granting the power to issue them.

Anderson County v. *Beal*, 113 U. S. 227 (28:966); *Johnson County* v. *January*, *supra*; *Burr* v. *Chariton County*, 2 McCrary, 603.

A municipal bond is valid as negotiable paper under the law merchant, when any power existed for its issue, even though not disclosed upon its face.

1 Dill. Mun. Corp. 541; *Ackley School Dist.* v. *Hall*, 113 U. S. 139 (28:956); *Moran* v. *Miami County*, 67 U. S. 2 Black, 722 (17:342); *Mercer County* v. *Hacket*, 68 U. S. 1 Wall. 83 (17:548); *White* v. *Vermont & M. R. R.* 62 U. S. 21 How. 576 (16:222); *Thompson* v. *Lee County*, 70 U. S. 3 Wall. 331 (18:178); *Marion County* v. *Clark*, 94 U. S. 278 (24:59); *Cromwell* v. *Sac County*, 96 U. S. 51 (24:681).

Questions of form merely, or irregularity, or fraud, or misconduct on the part of the agents of the Town cannot be considered.

East Lincoln v. *Davenport*, 94 U. S. 801 (24:322); *Rock Creek* v. *Strong*, 96 U. S. 271 (24:815).

The bonds in this suit appearing regular on their face in every particular, the doctrine of equitable estoppel is applicable.

Johnson County v. *January*, 94 U. S. 202 (24:110); *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327; *Wilmarth* v. *Crawford* 10 Wend. 343; *Alleghany City* v. *McClurkan*, 14 Pa. 83.

Mr. **G. S. Eldredge,** for defendant in error:

This case seems to be a wholly groundless attempt to procure the reconsideration of a question which has been heard and conclusively settled by the Supreme Court of Illinois in the cases of *Ryan* v. *Lynch*, 68 Ill. 160, and *Miller* v. *Goodwin*, 70 Ill. 659, and by this court in *South Ottawa* v. *Perkins*, 94 U. S. 260 (24:154), and *Amoskeag Nat. Bank* v. *Ottawa*, 105 U. S. 667 (26:1204).

The bonds sued upon were issued under the Act of February 18, 1857, and in pursuance of no other authority whatever. The resort to the Act of 1867 is a mere subterfuge, and can avail nothing.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed on the authority of *Crow* v. *Oxford*, 119 U. S. 215 [30: 388]. See also *Post* v. *Supervisors*, 105 U. S. 667, 691 [26:1204, 1213]. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the Act of February 18, 1857, and that the vote of the Town was taken at a special town meeting called upon the "application in writing of fifty legal voters of said Town," which is in accordance with the provisions of that Act. The Act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by "twenty voters and taxpayers." The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the Act of 1857, but that they were not issued under that of 1867.

Affirmed.

POTOMAC STEAMBOAT COMPANY,

Claimant of the Steamer EXCELSIOR,

Appt.,

v.

BAKER SALVAGE COMPANY.

(See S. C. "*The Excelsior*," Reporter's ed. 40-51.)

Salvage claim—when not barred—agreement to arbitrate—excessive recovery.

1. To bar a meritorious claim for salvage by a special contract, it is necessary to plead and prove a binding contract to be paid at all events for the work, labor and service in attempting to save the property whether the same should be lost or saved.

2. A binding contract of that character is not proved by a loose conversation between the respec-

tive parties after the salvage service had been partly rendered.

3. An agreement to submit to arbitration the amount to be received for the salvage service in case the parties could not agree is no bar to an action for salvage brought in the ordinary way in the admiralty division. If effect could have been given to it at all, it would be only by bringing an action upon it for not submitting to arbitration.

4. Since the Act of 1875, in cases of salvage, as in other admiralty cases, this court should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that upon any reasonable view of the facts found the award cannot be justified by the rules of law applicable to the case.

[No. 181.]

Submitted Oct. 11, 1887. Decided Oct. 24, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia. *Affirmed.*

Reported below, 19 Fed. Rep. 436.

The facts of the case are fully stated in the opinion.

Mr. **Theodore S. Garnett, Jr.,** for appellant:

The claim for salvage is barred by the special contract shown.

The Independence, 2 Curt. C. C. 355.

The award is grossly excessive.

The H. B. Foster, Abb. Adm. 223.

Mr. **W. H. C. Ellis,** for appellee:

The facts certified by the circuit court in this case constitute a salvage service.

The Connemara, 108 U. S. 352 (27:751).

Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful, will operate as a bar to a meritorious claim for salvage. The evidence must show a definite and explicit bargain.

The Camanche, 75 U. S. 8 Wall. 477 (19:405); *The Independence*, 2 Curt. C.C. 350; *The Salacia*, 2 Hagg. Adm. 262.

If the libelants refused to refer the amount of compensation to arbitration as agreed, that is no bar to a suit for salvage.

Coffin v. *The John Shaw*, 1 Cliff. 230.

Mr. Justice **Blatchford** delivered the opinion of the court.

This is a libel *in rem*, in admiralty, in a cause of salvage, filed by the Baker Salvage Company, a corporation of Virginia, against the steamer Excelsior and her cargo, in the District Court of the United States for the Eastern District of Virginia. That court awarded to the libelant, by a decree made on the 21st of of February, 1884, the sum of $ 5,600, as salvage, being 3½ per cent on $160,000, the value of The Excelsior having been found at $150,000, and the value of her cargo at $10,000. 19 Fed. Rep. 436. The claimant appealed to the circuit court, which, on the 19th of May, 1884, affirmed the decree of the district court, with interest on the $5,600 from the date of the decree of the district court, until paid, at the rate of 6 per cent per annum, and the costs of suit.

The circuit court found the following facts and conclusions of law:

"On the afternoon of the fourth of December, 1882, at five o'clock, the steamer Excelsior, Captain T. E. Baldwin, of the Potomac Steamboat Company, plying between Norfolk, Va., and Washington, D. C., touching at Old Point, Fortress Monroe, left her dock at Norfolk, steamed down the Elizabeth River and into Hampton Roads, heading the usual course to make a landing at Old Point wharf. She had on board a competent crew and an average number of passengers, the agreed value of the steamer being $150,000 and of her cargo $10,000.

"As The Excelsior was heading the aforesaid course in Hampton Roads, at or near six P. M., the United States steam tug Fortune came into collision with her, by an accident. The Fortune struck The Excelsior, which is of wood, on the starboard bow, making a hole in her hull at least 8 by 10 feet; and it being apparent that The Excelsior must otherwise sink in deep water, from the quantity she was making in her hull through the hole in her bow, she was promptly headed for the shore, going ashore on the south side of Hampton Bar, at about its middle point, about two miles from Old Point wharf, three or four miles from Sewell's Point, between half a mile and a mile from the Soldiers' Home shore, the nearest shore, and within a hundred yards of the channel, where she sank, full of water, with a hole extending from her hurricane deck far down under water, lying almost head on to the shore, in water ranging in depth from six to seven feet at her bow to from ten to twelve feet at her stern.

"After ascertaining the above soundings and landing his passengers at Old Point Comfort, Captain Baldwin, of The Excelsior, proceeded to the same point and sent the following telegram to the Baker Salvage Company, at Norfolk, Va.:

" 'December 4, 1882.

" 'Send assistance, with steam pumps, to Excelsior, on Hampton Bar. Get here by low water.'

"Subsequently, Captain Baldwin sent another telegram, as follows:

" 'Dec. 4, 1882.

" 'Del'y guaranteed. Bring steamer Resolute, a diver, with appliances.'

"The first of these telegrams was received at the telegraph office, in Norfolk, at 8.2 P. M., and the other at 9.15 P. M., on the evening of the collision.

"The Baker Salvage Company, through the agency of its superintendent and general manager, Captain E. M. Stoddard, at once, and vigorously, set to work in response to the telegrams, to render the aid asked for; and, at or about ten P. M., a fully equipped expedition, under the command of Capt. Stoddard, left Berkeley, opposite Norfolk, at the intersection of the southern and eastern branches of the Elizabeth River, where the wharves of the Baker Salvage Company are located, for the purpose of relieving The Excelsior. The expedition consisted of the powerful wrecking steamer Resolute, Hobbs, master, with her stationary steam pump, capable of pumping four hundred tons per hour, with the schooner Scud in tow, having on board a portable steam pump capable of pumping one hundred tons per hour, and a full complement of wrecking material and appliances, the whole manned by a crew of ten seamen experienced in wrecking operations, and accompanied by a skilled diver, with diving apparatus. Captain Stoddard making all

reasonable haste, and in the exercise of his judgment, did not attempt to go alongside of The Excelsior that night, not knowing her exact position on Hampton Bar, and being unable to identify her lights, but went directly to Old Point wharf, where he arrived about one o'clock on the morning of December 5, when it was flood tide there. Between that hour and daylight he secured the services of a number of laborers at Old Point, whose services he anticipated would be needed to remove the cargo, thus materially advancing the work for which he had come. At daylight on the morning of the 5th of December, Capt. Stoddard, with the expedition above described, went to The Excelsior, and found her lying as above described, submerged to her main deck, with a hole in her bow, and full of water, water standing on her main deck aft at high tide, and about two feet below her guards at low tide.

"The Excelsior's cargo had not been reached by the water, being stored about amidships, which was higher than the stern. Captain Stoddard at once had an interview with Captain Baldwin, in the presence of the purser of The Excelsior. Captain Baldwin asked what it was going to cost to get the ship off and deliver her at the railroad. Stoddard replied: 'I do not know;' to which Baldwin replied: 'This is not a salvage service;' to which Stoddard replied: 'Call it what you please, so I get my pay;' to which Captain Baldwin replied: 'It is no salvage service;' and they both agreed to submit to arbitration the amount to be received for the service by the Baker Salvage Company, in case the two Companies could not agree upon a sum.

"At this point, viz., about seven o'clock on the morning of the 5th, Captain Stoddard began the direct operations upon The Excelsior and her cargo, for their relief. He brought The Scud alongside The Excelsior, for the purpose of removing the steamer's cargo to Old Point wharf, and, placing the diving apparatus aboard The Excelsior, set the diver to work to ascertain minutely the exact extent of the wound that had been sustained by the steamer in the collision; and, while this was going on, he returned to Old Point wharf in The Resolute, and brought off the laborers above mentioned, who had been employed to assist in the removal of cargo, and lumber to be used by the diver in battening up the hole.

"The work of removing the cargo to Old Point wharf was continued throughout the day, until, after three trips of The Scud, in tow of The Resolute, it was successful between 4 and 5 o'clock of the afternoon of the 5th of December, without loss, the work being done under the management and at the risk of the Baker Salvage Company, the second officer of The Excelsior supervising the same, hurrying up the laborers, keeping their time, and seeing that nothing was stolen.

"The diver, who began his operations about seven A. M. of the 5th of December, as aforesaid, worked steadily until the night of that day, battening up the hole with plank and covering the same with canvas. Resuming his work at an early hour the next morning, he completed it by one P. M. of the same day, the 6th.

"On the afternoon of the 5th, after the removal of the cargo to Old Point wharf had been completed, and The Scud anchored for safety inside Hampton Bar, with but one man left aboard of her as a guard, The Resolute came alongside The Excelsior on her starboard or weather side, put out fenders, made fast so as to be in position to use her stationary pump, and began to assist in the work of setting up the portable pump on board of The Excelsior. The work of setting up this portable pump was continued until nine P. M., the pump and all attachments being furnished by the Baker Salvage Company, only the steam for running it being supplied by the donkey engine of The Excelsior, while The Resolute was lying on The Excelsior's starboard side or windward side, as aforesaid. Between 7 and 8 o'clock on December 5 it began to blow a fresh or strong breeze from the east or southeast, so as to induce the master of The Excelsior to request that The Resolute lie alongside of the steamer, for the protection of the lives of those aboard of her, in case her joiner work should be carried away and she should begin to break up. The Resolute thus continued to lie on the starboard or weather side of the steamer, it being impracticable to shift her position to the lee side in such a breeze and with such a sea on; and, while lying thus, she afforded considerable protection to The Excelsior, acting as a breakwater to her, and incurred considerable risk herself. This wind, which produced quite a rough sea, lasted from between 7 and 8 o'clock on the evening of December 5, until about one o'clock on the following morning, during which time a portion of the crew of The Resolute had to be constantly at work putting in new fenders between the steamers as others would be crushed by the chafing, and keeping them in position; to do which it was necessary to go between the two steamers upon their guards, with no little danger to life or limb. Steam was also kept up on The Resolute all night, for immediate use in case of emergency.

"Soon after daylight on the morning of the 6th work was resumed; the diver and gang battening up the hole, the crew of The Resolute, under the superintendence of Captain Stoddard, getting ready the stationary pump on board The Resolute, and completing the work of setting up the portable pump on board The Excelsior that had been begun the previous evening. The latter was completed about nine A. M., of this day, the 6th, as aforesaid, and was set to work to lower the water in the hold of the steamer, and thus assist the diver in his work of covering the planking with canvas, by drawing the canvas in. The stationary pump was ready by 12 M.; and, the diver completing his work of battening soon after that, both pumps were set to work at their full capacity, so that, at or near 2:30 P. M., the hull of The Excelsior had been so far freed from water, that the tug Olive Baker, that had been previously engaged to assist in the work, and had a line attached, hauled the steamer afloat. Captain Stoddard at once started to Norfolk with The Excelsior, having her in tow of the steam tugs Olive Baker and Olive Branch, and the wrecking steamer Victoria J. Peed; while The Resolute kept alongside, pumping every twenty minutes, to keep the hull free from water. Great care was exercised in towing the steamer across Hampton

Roads and up the river to Norfolk, as the hole in her bow was only covered with pine boards, one inch thick, and one thickness of No. 1 canvas, which might be knocked off by any hard substance floating in the water, that might come in contact with it. The work was successfully accomplished, however, and by five P. M., of December 5, 1882, The Excelsior had been safely docked in Norfolk.

"The salvage service was thus successfully completed within less than 45 hours after the aid of the salvors had been invoked, and that without a single error of omission or commission on their part. The work was done with an energy, skill, fidelity, and courage that admit of no question. The officers and crew of The Excelsior rendered all the aid in their power to the salvors."

"The point at which The Excelsior was lying is on the south side of Hampton Bar, about midway between its northeastern and southeastern extremities, and on the northern border of Hampton Roads; the locality an exposed one, vessels ashore there being exposed to all winds from the east round to the southwest, and winds from the east come right in from the Atlantic Ocean, through the Capes on to the bar, with no breakwater, except that furnished by the rip-raps and the small shoals about it. The weather, as it actually existed during the greater portion of the time of the salvage service was moderate, with light winds and no very heavy sea; but, on the evening of the 5th of December, a strong breeze set in from the east or southeast, between seven and eight o'clock, which lasted until one o'clock on the morning of the 6th, causing the water to be rough, and creating considerable apprehension for the safety of The Excelsior. This constantly threatened danger was increased by the fact that The Excelsior is an expensively furnished bay and river steamer, standing very high out of the water, and composed almost entirely, above her main deck, of light joiner work, liable to be carried away by winds and waves, with guards from two to three feet wide at her stern to ten or twelve feet wide at her wheel houses, under which, in her then present position, the waves struck with great force, since she could not rise with them, liable to tear up her guards, and to cause her slender joiner work to give way and the steamer to break up. These things rendered dispatch necessary.

"The Baker Salvage Company, the libelant, is a body politic and corporate, with its principal office located at Norfolk, in the State of of Virginia. Its business is that of wrecker and salvor, in which it is extensively engaged, its operations being conducted in the Atlantic Ocean and Gulf of Mexico, and along the coasts of those waters and the waters tributary thereto, wherever its services may be needed. The capital embarked in the said business is about $100,000, and it keeps constantly on hand, and in readiness for immediate use in its business, a number of powerful steamers and sailing vessels, proper for wrecking services, with a full equipment of the best and most improved wrecking apparatus and gear, such as steam pumps and connections, diving apparatus and gear, hoisting engines, anchors, chains, and cables of unusual size, falls, with a competent force of seamen, navigators, and divers, who have attained skill from their experience in wrecking operations. This immense equipment is kept up at an average expense of $5,000 per month during the busy months—say, eight months in the year—and at an average of $2,500 during the balance of the year, and that, exclusive of interest on the large amount of capital invested, being the mere running expenses.

"In addition to the wrecking steamers Resolute and Victoria J. Peed, and the schooner Scud, with all the wrecking appliances and apparatus, its own property, which the Baker Salvage Company had employed in this service, it had also chartered, and used to assist in the work, the steam tugs Olive Branch, Olive Baker, and Nettie. The Baker Salvage Company had exposed to dangers incident to this salvage service at least $50,000 worth of its valuable property, which, in the case of destruction, must have been a total loss, since insurance companies will only insure property so engaged at exorbitant rates, if at all. And the court finds that the libelant is entitled, for its salvage service in this cause, to the sum of $5,600, with interest thereon from the 21st day of February, 1884, until paid;" "and the court finds the law to be, that this is a case of salvage;" "that the alleged contract which the claimant attempts to set up is no bar to a meritorious claim for salvage, in admiralty; that the libelant, the salvor, is entitled to be rewarded for the salvage service in proportion to the personal risk run by its employés while engaged in this salvage service, to the danger to which its valuable wrecking equipment was exposed while engaged in this service, to the danger from which the large and valuable property of the claimant has been relieved, to the labor expended by the salvors in rendering the salvage services, and the promptness, skill, and energy with which those services were rendered."

The claimant of The Excelsior and her cargo has appealed to this court, and assigns for error; (1) that the circuit court, in its finding of facts, has ascertained and stated as proved, an agreement between the libelant and the claimant for a *quantum meruit* for the work and labor done by the libelant, and ought not to have decreed salvage therefor; (2) that the award is excessive in amount.

1. It is contended, on the facts found, that the question of salvage was fairly raised and settled between the parties before any work was done on the vessel; that what passed amounted to an announcement by Captain Stoddard, the master of the libelant's wrecking steamer, that he must be paid for his services at all events; that this proposal was assented to by the master of The Excelsior; that the work proceeded under that arrangement; and that, therefore, there could be no claim for salvage.

It is very clear that the services rendered by the libelant to The Excelsior constituted a salvage service of a meritorious character. The telegrams sent to the libelant, by virtue of which it entered upon the service, summoned it as a salvor; and the services detailed in the finding of facts constituted salvage services. No agreement was made for a fixed sum to be paid, nor any binding engagement to pay at

all events, although there was an agreement to submit to arbitration the amount to be received by the libelant for the service, in case the two companies could not agree upon a sum. It was, however, held by this court, in the case of *The Camanche*, 75 U. S. 8 Wall. 448, 477, [19:397, 405,] that "nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage."

Nor was there in this case any agreement for a *quantum meruit* for the work and labor to be done by the libelant. In the case of *The Independence*, 2 Curt. C. C. 350, 357, the proper rule on the subject was laid down by *Mr. Justice* Curtis, in these words: "To bar a claim for salvage, where property in distress on the sea has been saved, it is necessary to plead and prove a binding contract to be paid at all events for the work, labor, and service, in attempting to save the property, whether the same should be lost or saved." A binding contract of that character is not proved by such a conversation as took place between the respective parties in the present case. In *The Salacia*, 2 Hagg. Adm. 262, 265, it was shown that the master of the salvor vessel declared at first "that he should not demand any salvage, but that his crew would not work unless paid for their labor, and that they declined taking a dollar a day, but would take two." As to this, *Sir* Christopher Robinson said: "It is probable that some such conversation may have passed at the beginning of this service, but it might not be known what would be the extent of it; and the court is not in the habit of considering such loose conversations as conclusive of the merits of any case, when brought regularly before it." In the present case, there was no assent by Captain Stoddard to the statement of Captain Baldwin that the service was not a salvage service, and the assertion by Captain Stoddard that the name of the service was immaterial, so long as he should get his pay, was fairly a statement that he should insist on his pay for the services according to their actual character.

The answer sets up an agreement between the masters of the respective vessels, after The Resolute had arrived at the place where The Excelsior was, that no salvage would be claimed by the libelant. Not only is it not found by the circuit court that any such agreement was made, but, on the facts found, the question was left open as to whether the services were to be paid for as salvage services, in case of success. Moreover, at the time of the conversation between the masters, the salvage service had been partly rendered, because the expedition had been fitted out, and The Resolute and her accompanying schooner, and the steam pumps and other appliances, and the diver, had been taken to where The Excelsior was, in compliance with the summons of her master.

Nor can the agreement for arbitration affect the question of a salvage service. In the case of *The Raisby*, 10 P. D. 114, there was an agreement to tow a ship in distress, "the matter of compensation to be left to arbitrators at home, to be appointed by the respective owners." As to this *Sir* James Hannen said: "This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the Admiralty Division, and if effect could have been given to it at all, it would only have been by bringing an action upon it for not submitting to arbitration."

2. As to the amount awarded, the case is not one where, as a question of law, this court can say that the allowance was excessive. On the contrary, it seems to have been reasonable and fair, at least as respects the claimant of The Excelsior and her cargo.

In the recent case in this court of *The Connemara*, 108 U. S. 352 [27:751], the question involved was so fully considered that it is only necessary to refer to that case, as establishing the principle, that, "since the Act of 1875, in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case." See, also, *The Tornado*, 109 U. S. 110 [27:874], and *The Hesper*, 122 U. S. 256 [30:1175].

The decree of the Circuit Court is affirmed.

SUN MUTUAL INSURANCE COMPANY OF NEW ORLEANS ET AL., *Appts.*,
v.
THE KOUNTZ LINE ET AL.

(See S. C. Reporter's ed. 65-67.)

Rehearing denied and mandate modified.

[No. 136].

Submitted Oct. 10, 1887. Decided Oct. 24, 1887.

PETITION for rehearing. *Denied.*

This case is fully reported in book 30, Lawyer's edition of United States Supreme Court Reports, p. 1137.

***Messrs.* A. H. Garland, Chas. B. Singleton, R. H. Browne,** for appellees:

When several parties unite in one suit, each claiming a separate and distinct amount, the amounts being under that prescribed by law for the jurisdiction of the court, this court will not examine the cause.

Rich v. *Lambert*, 53 U. S. 12 How. 352, 353 (13: 1019); *The Connemara*, 103 U. S. 755 (26: 822); *Seaver* v. *Bigelows*, 72 U. S. 5 Wall. 208 (18:595); *Oliver* v. *Alexander*, 31 U. S. 6 Pet. 143 (8:349); *Stratton* v. *Jarvis*, 33 U. S. 8 Pet. 4 (8:846); *Stewart* v. *Dunham*, 115 U. S. 61 (29:329); *Gibson* v. *Shufeldt*, 122 U. S. 27 (30:1083).

Interest is not allowable as a matter of law except in cases of contract or the unlawful detention of money.

Lincoln v. *Claflin*, 74 U. S. 7 Wall. 139 (19:109).

Interest not being specially claimed cannot be computed, for it is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item.

Olney v. *The Falcon*, 58 U. S. 17 How. 19 (15:43).

This court has not allowed any interest or damages in its decree, therefore it was equivalent to a denial of damages or interest.

See *Hemmenway* v. *Fisher*, 61 U. S. 20 How. 255 (15:799).

No such thing as interest could be allowed, there being no money judgment of the lower court to be affirmed or disaffirmed.

Code Prac. of La. art. 553.

Interest when stipulated in a contract cannot be allowed unless prayed for.

Brown v. *Bessou*, 30 La. Ann. 736.

Judgments, whether in the state or federal courts, do not bear interest as a legal right.

Saunders v. *Taylor*, 7 Mart. N. S. 15; *Baudin* v. *Conway*, 2 La. 513; *Le Blanc* v. *Victor*, 3 La. 47.

The mere fact that the fund in court exceeds $5,000 makes no difference as to the jurisdiction.

Seaver v. *Bigelows*, 72 U. S. 5 Wall. 208 (18:595).

If the partnership is denied, and the recovery is based upon the ground that the defendant has held himself out as a partner, the plaintiff should prove affirmatively that he did so hold himself out to them, and that they gave credit to the firm after such knowledge came to them.

Irvin v. *Conklin*, 36 Barb. 66, 68; *Wood* v. *Pennell*, 51 Me. 59; *Markham* v. *Jones*, 7 B. Mon. 457; *Wright* v. *Powell*, 8 Ala. 560.

There must be some proof, although slight, that the seller knew that the party had held himself out as a partner in the transactions.

Hefner v. *Palmer*, 67 Ill. 161; see also 2 Greenl. Ev. §§ 477–482 *et seq.*; *Campbell* v. *Hastings*, 29 Ark. 512; *St. Louis Ins. Co.* v. *St. Louis V. T. H. & I. R. R. Co.* 104 U. S. 149 (26: 682).

It is necessary to establish not only the fact of misrepresentation or concealment, but also that it has been a matter of substance or of importance to the interest of the other party, and that he has been actually misled by it.

1 Story, Eq. Jur. p. 191; Bigelow, Estoppel, 473.

Mr. Justice **Harlan:**

The rehearing asked is *denied* and the mandate is modified so as to read as follows:

"The decree, in so far as it dismisses the original libel of the appellants, the Sun Mutual Insurance Company of New Orleans and the Hibernia Insurance Company of New Orleans, and adjudges that the M. Moore Transportation Company and the K. P. Kountz Transportation Company, respectively recover from said appellants the cost and expenses of the seizure, detention and sale of the steamboats J. B. M. Kehlor and Katie P. Kountz, respectively, *is reversed, and the cause is remanded* with directions to the court below to set aside all orders inconsistent with the rights of said appellants as declared in the opinion of this court, and to enter such orders and decrees as may be in conformity therewith."

Ex Parte:

In the Matter of AUGUST SPIES ET AL.

(See S.C. Reporter's ed. 143.)

Motion for writ of error to state court—practice when heard by full bench.

1. This court permits a motion to be made in open court, at the suggestion of the justice to whom the application was first presented, for the allowance of a writ of error to a state court, the case being urgent and important.

2. In such case the proper practice is to hear counsel in support of the motion both on the point whether any federal questions were made and decided in the state court, and upon the character of those questions.

[No. 9 Orig.]

Decided Oct. 24, 1887.

MOTION for the allowance of a writ of error to the Supreme Court of the State of Illinois.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Following the precedent in *Twitchell* v. *Commonwealth*, 74 U. S. 7 Wall. 321 [19:223], we have permitted this motion to be made in open court, at the suggestion of *Mr. Justice* Harlan to whom the application was first presented, on account of the urgency of the case and its importance. But, as was said in that case, "Writs of error to the state courts have never been allowed as of right," that is to say, as of course, and it is the duty of him to whom an application for such a writ is made to ascertain, from an examination of the record of the state court, "whether any question, cognizable here on appeal, was made and decided in the proper court of the State, and whether the case on the face of the record will justify the allowance of the writ."

Deeming that the proper practice, we will hear counsel on Thursday next, in support of this motion, not only upon the point whether any federal questions were actually made and decided in the Supreme Court of the State, but also upon the character of those questions, so that we may determine whether they are such as to make it proper for us to bring the case here for review.

We have caused the Attorney-General of Illinois to be informed that the motion will be heard at the time stated.

Ex Parte:

In the Matter of AUGUST SPIES ET AL.*

(See S. C. Reporter's ed. 131–132.)

Writ of error to state court—when allowed—constitutional amendments—challenges to jurors—construction of state statute—impartial juror—opinions based upon newspaper statements—accused, as a witness—unlawful search—objection, when to be raised—record controls.

1. When application is made to this court, on the suggestion of one of its number to whom a similar application had been previously addressed, for the allowance of a writ of error to the highest court of a State under section 709 of the Revised Statutes, it is the duty of this court to ascertain whether any question reviewable here was made and decided in the court below and whether it is of a character to justify bringing it here for re-examination.

2. The writ ought not to be allowed, if it appears from the face of the record that the decision of the federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with the judgment of this court in similar cases.

*For reports of this case below see 122 Ill., also 10 West. Rep. 701, 3 Ill. L. ed. 87.

1. The first ten articles of amendment of the Constitution of the United States were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone.

2. On an application to this court for a writ of error to a state court, on the ground that a statute of a State as construed by the state court deprived the petitioners of a trial by an impartial jury, this court will only consider rulings on the challenges to the jurors who actually sat at the trial. When a challenge to a juror for bias is disallowed and the juror is peremptorily challenged and excused and an impartial juror is obtained in his place, the constitutional right of the accused is maintained.

3. Where a statute of the State provided that "In the trial of a criminal cause, the fact that a person called as a juror has formed an opinion or impression—based upon rumor or upon newspaper statements, about the truth of which he has expressed no opinion—shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and evidence, and the court shall be satisfied of the truth of such statement;" and, at the trial, the state court construed the statute to mean that, "Although the person called as a juryman may have formed an opinion based upon rumor or upon newspaper statements, but has expressed no opinion as to the truth of the newspaper statement, he is still qualified as a juror if he states that he can fairly and impartially render a verdict in accordance with the law and the evidence and the court shall be satisfied of the truth of such statement;" *held*, that the statute, as construed by the trial court, is not repugnant to section 9 of article 2 of the Constitution of the State, which guarantees to the accused party in every criminal prosecution a speedy trial by an impartial jury.

4. The finding of the trial court upon the issue of whether a juror is impartial ought not to be set aside by the reviewing court unless the error is manifest. Where the challenge is on the ground that the juror had formed an opinion, it must be made clearly to appear that, upon the evidence, the court ought to have found that he had formed such an opinion that he could not in law be deemed impartial.

5. Where it appeared upon the trial that some of the jurors had formed an opinion based upon newspaper statements about the truth of which they had expressed no opinion, and they stated upon oath that they could determine the case upon the proof presented, regardless of such opinion, *held*, under the circumstances and facts of this case, the action of the court below in permitting such jurors to sit did not amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime.

6. A party accused of crime who is a witness in his own behalf is bound to submit to a cross examination; and whether such cross examination must be confined to matters pertinent to the testimony in chief or may be extended to the matters in issue, is a question of state law as administered in the courts of the State, and not of federal law.

7. An objection to the use in evidence of a letter on the ground that it was obtained from the defendant by an unlawful search and seizure, which was not made on the trial in the court below, cannot be considered here. To give to this court jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any right or immunity claimed under the Constitution, it must appear on the record that such right or immunity was specially set up or claimed at the proper time and in the proper way.

8. The objection that defendants, who are foreign born, were denied by the trial court rights guaranteed by treaty, cannot be raised in this court for the first time.

9. The objection that the defendants were not actually present in the state court when sentence was pronounced cannot be made if the record shows that they were present. If this is not in accordance with the fact, the record must be corrected below, not here.

[No. 9. Orig.]

Argued Oct. 21, 27, 28, 1887. Decided Nov. 2, 1887.

APPLICATION for the allowance of a writ of error to the Supreme Court of the State of Illinois. *Dismissed.*

Petitioners, jointly indicted, tried and convicted of murder in the Criminal Court of Cook County, Illinois, took the case by writ of error to the Supreme Court of that State, where the judgment was affirmed, and the petitioners sentenced to be executed on the 11th of November, 1887.

By section 709 of the United States Revised Statutes, the Supreme Court of the United States has jurisdiction to re-examine "a final judgment in any suit in the highest court of a State, where is drawn in question the validity of a statute of, or any authority exercised under, a State, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution (of the United States), and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution."

Petitioners allege the following federal questions to be involved and presented in the case; namely:

First. Petitioners challenged the validity of the Statute of Illinois, under and pursuant to which the trial jury was selected and impaneled, on the ground of repugnancy to the Constitution of the United States, and the state court sustained the validity of the statute.

Second. Petitioners asserted and claimed, under the Constitution of the United States, the right, privilege and immunity of trial by an impartial jury, and the decision of the state court was against the right, privilege and immunity so asserted and claimed.

Third. The State of Illinois made, and the state court enforced against petitioners, a law (the aforesaid statute) whereby the privileges and immunities of petitioners as citizens of the United States were abridged, contrary to the Fourteenth Amendment of the Federal Constitution.

Fourth. Upon their trial for a capital offense, petitioners were compelled by the state court to be witnesses against themselves, contrary to the provisions of the Constitution of the United States, which declare that "No person shall be compelled in any criminal case to be a witness against himself," and that "no person shall be deprived of life or liberty without due process of law."

Fifth. That by the action of the state court in said trial, petitioners were denied the equal protection of the laws, contrary to the guaranty of the said Fourteenth Amendment of the Federal Constitution.

The further facts are sufficiently stated in the opinion.

Messrs. M. Salomon, **Roger A. Pryor, J. Randolph Tucker** and **B. F. Butler**, for petitioners:

If, upon the record, it be reasonably doubtful whether a federal question is involved, the writ of error will be allowed.

Callan v. *May*, 67 U. S. 2 Black, 543 (17:282).

If a federal question be sufficiently apparent, the writ will be allowed without consideration of the question itself.

Twitchell v. *Commonwealth*, 74 U. S. 7 Wall. 324 (19:223); *Gleason* v. *Florida*, 76 U. S. 9

Wall. 783 (19:731); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 56 (19:375); *Bohanan* v. *Nebraska*, 118 U. S. 231 (30:71); *Pennywit* v. *Eaton*, 82 U. S. 15 Wall. 380 (21:72); *Millingar* v. *Hartupee*, 73 U. S. 6 Wall. 258, 260 (18:829); *Hall* v. *Jordan*, 82 U. S. 15 Wall. 393, 395 (21:72); *Arrowsmith* v. *Harmoning*, 118 U. S. 195 (30:243); *Church* v. *Kelsey*, 121 U. S. 282 (30:960); *Baltimore & O. R. R. Co.* v. *Maryland*, 87 U. S. 20 Wall.643 (22:446); *Hayes* v. *Missouri*, 120 U. S. 68 (30:578); *Foster* v. *Kansas*, 112 U. S. 206 (28:697).

The particular provision of the Federal Constitution, under which the right, privilege or immunity is claimed, or to which the state law is repugnant, need not be indicated upon the record; but it suffices to make a general claim of protection under the Constitution of the United States.

Bridge Propre. v. *Hoboken Co.* 68 U. S. 1 Wall. 116 (17:571); *Furman* v. *Nichol*, *supra*; *Murray* v. *Charleston*, 96 U. S. 432 (24:760); *Dugger* v. *Bocock*, 104 U. S. 603 (26:849); *Miller* v. *Nicholls*, 17 U. S. 4 Wheat. 311 (4:578).

It is sufficient if it appears by clear and necessary intendment that the question must have been raised.

Crowell v. *Randell*, 35 U. S. 10 Pet. 368 (9:458); *Phœnix Ins. Co.* v. *The Treasurer*, 78 U. S. 11 Wall. 209 (20:112); *Pennywit* v. *Eaton*, *supra*; *Craig* v. *Missouri*, 29 U. S. 4 Pet. 410 (7:903); *Minnesota* v. *Batchelder*, 68 U. S. 1 Wall. 109 (17:551).

The last formal exposition by this court of the 25th section of the Act of 1789 is in *Furman* v. *Nichol*, *supra*.

But the jurisdiction of this court to re-examine the judgments of the highest state court is regulated now, not by the Act of 1789, but by the Act of 1867, section 2.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 590 (22:429).

The requirement in the Act of 1789 that the federal question must appear on the face of the record, is omitted from the Act of 1867.

R. S. § 709; *Gross* v. *Mortgage Co.* 108 U. S. 484 (27:797); *Tennessee* v. *Davis*, 100 U. S. 258 (25:648).

It is not necessary to the jurisdiction of the United States Supreme Court, that the highest state court in terms passed upon petitioners' claim, if it has been withheld or denied by the judgment below.

Chicago L. Ins. Co. v. *Needles*, 113 U. S. 579 (28:1086); *Brown* v. *Colorado*, 106 U. S. 95-97 (27:132, 133); *Arrowsmith* v. *Harmoning*, *supra*; *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 634 (22:443); *Walker* v. *Sauvinet*, 92 U. S. 92 (23:679).

The federal question may be raised and presented by the rulings of the court on offers of evidence (*Hall* v. *Jordan*, *supra*); or by the reasons given by the court for its rulings (*Boston Beer Co.* v. *Mass.* 97 U. S. 31 (24:989); or by implication on the decision of a demurrer (*Williams* v. *Bruffy*, 96 U. S. 182 (24:716); *Ford* v. *Surget*, 97 U. S. 602 (24:1020); *Armstrong* v. *The Treasurer*, 41 U. S. 16 Pet. 281 (10:965).

So, for the existence and decision of a federal question we may look to the opinion of the state court, especially of Illinois.

Gross v. *Mortgage Co.* 108 U. S. 477, 486 (27:795, 798); *Philadelphia F. Asso.* v. *People*, 119 U. S. 110, 116 (30:342); *Murdock* v. *Memphis*, *supra*.

And the decision of the federal question need not be the principal ground of judgment in the state court.

Baltimore & O. R. R. Co. v. *Maryland*, 88 U. S. 21 Wall. 457 (22:678); *Arrowsmith* v. *Harmoning*, and *Bohanan* v. *Nebraska*, *supra*; *Hurtado* v. *California*, 110 U. S. 516 (28:232).

The state courts adjudicated that the Illinois Statute authorized the impaneling of jurors with a preconceived and present opinion as to the guilt of petitioners; and accepting that construction as conclusive, the United States Supreme Court may hold that the Act is unconstitutional and void.

Hall v. *DeCuir*, 95 U. S. 485 (24:547).

Though the law be fair on its face yet if it is administered with an unequal hand, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. *Hopkins*, 118 U. S. 366, 373, 374 (30:222, 227).

Its constitutional validity must be determined by its natural and reasonable effect.

Henderson v. *Wickham*, 92 U. S. 259 (23:543).

Whoever, by virtue of public position under a state government deprives another of life, liberty or property, without due process of law, violates the constitutional inhibition.

Ex parte Va. 100 U. S. 339, 347 (25: 676, 679); *Strauder* v. *West Va.* 100 U. S. 303, 310 (25: 664, 666); *Virginia* v. *Rives*, 100 U. S. 313, 318 (25:667, 669); *Neal* v. *Delaware*, 103 U. S. 370, 397 (26:567, 574); *Civil Rights Cases*, 109 U. S. 3, 11, 13, 15 (27:836, 839, 840).

In passing the Act of 1867, it was the purpose of Congress to secure to every litigant whose rights depended on any question of federal law, that the question should be decided for him by the highest federal tribunal, if he desired it.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 632 (22:443).

Constitutional provisions for the security of person and property should be liberally construed.

Boyd v. *United States*, 116 U. S. 617, 635 (29:746, 752).

By a uniform current of decisions, the Supreme Court of Illinois held, under its former Constitutions of 1818 and 1848, that one on trial charged with a criminal offense was entitled to an impartial jury; and that if a proposed juror admitted upon his *voir dire* that he had a fixed or firm opinion touching the question of the prisoner's guilt,—no matter upon what such opinion was based,—an opinion to remove which evidence would be required, such person was not impartial.

See *Smith* v. *Eames*, 3 Scam. 76; *Gardner* v. *People*, 3 Scam. 83; *Vennum* v. *Harwood*, 1 Gilm. 659; *Baxter* v. *People*, 3 Gilm. 368; *Neely* v. *People*, 13 Ill. 685; *Gray* v. *People*, 26 Ill. 344; *Collins* v. *People*, 48 Ill. 146; *Chicago & A. R. R. Co.* v. *Adler*, 56 Ill. 344.

By sections 5 and 9 of article 2 of the third Constitution of the State of Illinois, adopted in 1870, it was provided as follows:

"Sec. 5. The right of trial by jury as heretofore enjoyed shall remain inviolate."

"Sec. 9. In all criminal prosecutions the ac-

cused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Under these provisions of said last mentioned Constitution the same ruling was enforced touching the disqualification of a proposed juror by reason of the formation of a fixed opinion as under the prior Constitutions.

Winnesheik Ins. Co. v. *Schueller*, 60 Ill. 465; *Plummer* v. *People*, 74 Ill. 361.

The Supreme Court of Illinois has uniformly accorded to persons accused of crime the protection in the selection of a jury of excluding from the jury, as disqualified by reason of partiality, favor or bias, persons who confessed a prejudice against the class of persons to which the defendants confessedly belonged.

See *Winnesheik Ins. Co.* v. *Schueller*, *supra*; *Chicago & A. R. R. Co.* v. *Buttolf*, 66 Ill. 347; *Lavin* v. *People*, 69 Ill. 303.

Supplemental brief by *Mr.* **Roger A. Pryor:**

The Illinois Statute is not "due process of law" within the meaning of that provision of the Constitution.

Murray v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 276 (15:372); *Davidson* v. *New Orleans*, 96 U. S. 102, 107 (24:618, 620); *Hoke* v. *Henderson*, 4 Dev. 15; *Wynehamer* v. *People*, 13 N. Y. 395; *Taylor* v. *Porter*, 4 Hill, 140; Pomeroy, Const. L. 163; *Hager* v. *Reclamation Dist. No. 108*, 111 U. S. 708 (28:572); *Bank* v. *Okely*, 17 U. S. 4 Wheat. 244 (4:561); *Pennoyer* v. *Neff*, 95 U. S. 714 (24:565); Cooley, Const. Lim. 356; *Hurtado* v. *California*, 110 U. S. 527, 528 (28:236); *Kennard* v. *Louisiana*, 92 U. S. 481 (23:479).

To be "due process of law," state legislation must be exerted within the limits of those fundamental principles which lie at the base of our civil and political institutions.

Hurtado v. *California*, 110 U. S. 535 (28:238); *Brown* v. *Commissioners*, 50 Miss. 478-487, cited with approval by this court in *Hurtado* v. *California*, *supra*; *Rowan* v. *State*, 30 Wis. 139; *Hopt* v. *Utah*, 110 U. S. 579 (28: 265); *Re Ziebold*, 23 Fed. Rep. 791; 4 Bl. Com. 349; Creasy, English Const. 243; Hamilton, Dawson's Federalist, 581.

At the time of the adoption of the Fourteenth Amendment of the Constitution, in every State of the Union, capital offenses were triable only by jury.

Ex parte Bain, 121 U. S. 12 (30:849); Sedgwick, Stat. & Const. L. p. 225, note a. 1 Story, Const. § 165; 2 Story, §§ 1779-1782.

Due process of law implies and requires a trial by an impartial jury.

A jury is generally understood to mean *ex vi termini*, a jury of twelve men impartially selected, who must unanimously concur in the guilt of the accused. Any law, therefore, dispensing with any of these requisites may be considered unconstitutional.

Paschal, Annotated Const. 210; *Work* v. *State*, 2 Ohio St. 296; *State* v. *Cox*, 3 Eng. (Ark.) 436; *People* v. *Johnson*, 2 Parker, Crim. Cas. 322; *People* v. *Fisher*, Id. 402; *People* v. *Toynbee*, Id. 562; *Cancemi* v. *People*, 18 N. Y. 135; 2 Lead. Crim. Cas. 827, note; Story, Const. § 1779; *Ex Parte Milligan*, 71 U. S. 4 Wall. 123 (18:296); *U. S.* v. *Reid*, 53 U. S. 12 How. 363, 364 (13:1024); *Olive* v. *State*, 11 Neb. 23; 1 Co. Lit. 155 a, note (d); 4 Bl. Com. 249; *Hayes* v. *Missouri*, 120 U. S. 69, 70 (30:578); Waite, *Ch. J.*, in *Reynolds* v. *U. S.* 98 U. S. 155 (25:246); Taney, *Ch. J.*, Whart. Crim. Pr. & Pl. § 625.

If a juror's mind is preoccupied with an opinion upon the case to be tried, that, upon principle, and by all the cases, incapacitates him as a juror.

Cancemi v. *People*, 16 N. Y. 501, 504, 505.

The Illinois Statute makes competent a juror with a preconceived and present opinion as to the guilt of the accused.

Henderson v. *The Mayor*, 92 U. S. 259 (23:543); *Hall* v. *De Cuir*, 95 U. S. 485 (24:547); 1 Bish. Crim. Proc. § 910; Cooley, *J.*, *Stephens* v. *People*, 38 Mich. 742.

The accused had a right to protect themselves as well by challenge for cause as by peremptory challenge.

Hayes v. *Missouri*, *supra*.

And it is not within the compass of legislation to change the legal presumptions of innocence.

Wynehamer v. *People*, 13 N. Y. 447; *Cummings* v. *Missouri*, 71 U. S. 4 Wall. 328 (18:364); *Pennoyer* v. *Neff*, *supra*.

An equal right to an impartial jury is placed by the Fourteenth Amendment under the protection of the General Government, and guaranteed by it.

Ex parte Va. 100 U. S. 345 (25:679).

Some of the petitioners were, by the production in evidence of papers and property unlawfully seized and taken, compelled to be witnesses against themselves.

Boyd v. *U. S.* 116 U. S. 617 (29:746); 2 Hallam, Const. Hist.; 7 Coke, 3d, Inst. 35; 2 Story, Const. § 1788.

The immunity from self-accusing evidence was abridged by the action of the state court in compelling petitioners to be witnesses against themselves. The action of the state judiciary is the action of the State.

Ex parte Va. supra; *Strauder* v. *West Va.* 100 U. S. 303-310 (25:664, 666); *Virginia* v. *Rives*, Id. 313-318 (25:667, 669); *Neal* v. *Delaware*, 103 U. S. 370-397 (26:567, 574); *Civil Rights Cases*, 109 U. S. 3, 11, 13, 15 (27:836, 839, 840, 841); *Yick Wo* v. *Hopkins*, 116 U. S. 366, 373, 374 (30:222, 227).

The Nation, through its Congress and its courts, can afford to its citizens at home complete protection against the discriminating legislation of the States which may attempt to invade their privileges and immunities.

Pomeroy, Const. L. pp. 154, 155, 178, 179.

Additional brief of *Mr.* **J. Randolph Tucker:**

Where this court has jurisdiction, the writ of error is a writ of right.

Armstrong v. *The Treasurer*, 41 U. S. 16 Pet. 281 (10:965); *Callan* v. *May*, 67 U. S. 2 Black, 543 (17:282); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 56 (19:375); *Pennywit* v. *Eaton*, 82 U. S. 15 Wall. 380 (21:72); *Hall* v. *Jordan*, 82 U. S. 15 Wall. 393 (21:72); *Arrowsmith* v. *Harmoning*, 118 U. S. 195 (30:243); *Hayes* v. *Missouri*, 120 U. S. 68 (30:578); *Buel* v. *Van Ness*, 21 U. S. 8 Wheat. 313 (5:625); *Twitchell* v. *Commonwealth*, 74 U. S. 7 Wall. 324 (19:223); *Bohanan* v. *Nebraska*, 118 U. S. 231 (30:71).

The special clause of the Constitution to which the alleged repugnancy existed need not be stated.

Bridge Proprs. v. *Hoboken Co.* 68 U. S. 1 Wall. 116 (17:571); *Furman* v. *Nichol, supra; Walker* v. *Sauvinet*, 92 U. S. 92 (23:679).

If it appears in the lower court of the State or in the highest court, *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 (9:458); *Craig* v. *Missouri*, 29 U. S. 4 Pet. 410 (7:903); *Minnesota* v. *Batchelder*, 68 U. S. 1 Wall. 109 (17:551); *Moore* v. *Illinois*, 55 U. S. 14 How. 18 (14:306); where point was first taken in highest court of State; and without clear reference to the conflict, if necessarily inferred.

Same cases; see specially *Satterlee* v. *Matthewson*, 27 U. S. 2 Pet. 380 (7:458); *Boughton* v. *Exchange Bank*, 104 U. S. 427 (26:765).

If an Act of Congress was applicable to the case it will suffice.

Same cases; *Miller* v. *Nicholls*, 17 U. S. 4 Wheat. 311 (4: 578); *Phœnix Ins. Co.* v. *The Treasurer*, 78 U. S. 11 Wall. 204 (20:112); *Murray* v. *Charleston*, 96 U. S. 432 (24:760); *Dugger* v. *Bocock*, 104 U. S. 603 (26:848); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22:429); *Tennessee* v. *Davis*, 100 U. S. 257 (25:648); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 579 (28:1086); *Brown* v. *Colorado*, 106 U. S. 95 (27:132).

Reference may be had to the opinion of the court.

Gross v. *Mortgage Co.* 108 U. S. 477 (27:795); *Philadelphia F. Asso.* v. *New York*, 119 U. S. 110 (30:342).

It is not only when a law is repugnant to the Constitution, but when the law, though constitutional, is so construed by state courts as to make its operation unconstitutional, that a writ of error lies.

Hall v. *De Cuir*, 95 U. S. 485 (24:547); *U. S.* v. *Harris*, 106 U. S. 639 (27:294); *Virginia Cases*, 100 U. S. 313, 339 (25:667, 676); *Strauder* v. *West Va.* Id. 303 (25:664); *Neal* v. *Delaware*, 103 U. S. 370 (26:567); *Civil Rights Cases*, 109 U. S. 3 (27:836); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30:220), and cases there cited.

The Fourteenth Amendment declares that no State shall deprive any person of life, liberty, or property without due process of law.

Hurtado v. *California*, 110 U. S. 516 (28: 232).

"Due process" means consistency with common-law right. There must be an impartial jury.

Whart. Am. L. § 566

"Due process" means jury trial, made so by Magna Charta.

1 Kent, 612–14; see also *Reg.* v. *Baldry*, 2 Den. C. C. 444; *Reg.* v. *Jarvis*, 1 L. R. C. C. 96.

So being twice put in jeopardy is against common-law right.

Reg. v. *Bird*, 2 Den. C. C. 216; Essays, etc., of J. S. Blach. 519.

The Fourteenth Amendment provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Those privileges and immunities have been judicially defined partially in *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

Slaughter-House Cases, 83 U. S. 16 Wall. 36 (21:394); *Passenger Cases*, 48 U. S. 7 How. 283 (12:702); *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 (21:929); *Walker* v. *Sauvinet*, 92 U. S. 90 (23:678).

The fundamental nature of these rights, as common-law rights, may be seen by reference to Tucker's Blachs. App. 305, 3 Story, §§ 1779, 1781–1783. As to searches, self-accusations, etc.:

3 Story, § 1895; May, Const. L. chap. 11, and especially *Boyd* v. *U. S.* 116 U. S. 616 (29:746), and the opinion of *Mr. Justice* Bradley and the history there given.

As to the law of selecting jurors and challenges:

Queen v. *Hepburn*, 11 U. S. 7 Cranch, 290 (3:348); *Reynolds* v. *U. S.* 98 U. S. 154 (25:246), citing *Lord* Coke, "that a juror must be indifferent, as he stands unsworn," and also Marshall, *Ch. J.*, in Burr's trial, 416.

Hayes v. *Missouri*, 120 U. S. 70 (30:579), Field, *J.*, on the value of peremptory challenges.

The prisoners were denied "due process of law," because tried by a packed jury.

Spies was illegally examined on matters as to which he did not testify in chief,—he was compelled to answer; and letters were illegally seized by officers of the Government without warrant of law.

Boyd v. *U. S. supra.*

Messrs. **George Hunt** *Atty-Gen. of Illinois*, and **Julius S. Grinnell**, in opposition:

The record does not show that any federal question is involved.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 590, 636 (22:429, 444); *Chouteau* v. *Gibson*, 111 U. S. 200 (28:400); *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473 (30:461).

The prohibitions contained in the first ten amendments to the Constitution are limitations on the powers of the Federal Government, and not upon the States.

Story, Const. §§ 1904, 1947; *U. S.* v. *Cruikshank*, 92 U. S. 542 (23:588); *Walker* v. *Sauvinet*, 92 U. S. 90 (23:678); *Presser* v. *Illinois*, 116 U. S. 267 (29:619).

So far as petitioners rely upon anything contained in those amendments they have no standing in this court. The Fourteenth Amendment is equally foreign to any right, privilege, or immunity here claimed by the petitioners.

Story, Const. § 1947.

"Due process of law" means law of the land.

Story, Const. §§ 1943, 1945; *Yick Wo* v. *Hopkins*, 118 U. S. 367 (30:225).

A trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge.

Walker v. *Sauvinet, supra.*

The last clause of the Amendment, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts which the State might establish.

Missouri v. *Lewis*, 101 U. S. 22 (25:989).

The systems of procedure in them may be different without violating any provision of the Fourteenth Amendment.

Hayes v. *Missouri*, 120 U. S. 68 (30:578).

The number of peremptory challenges must necessarily depend upon the discretion of the Legislature. The whole matter is under its control.

Stokes v. *People*, 53 N. Y. 164; *Walter* v. *Peo-*

ple, 32 N. Y. 147, 159; *Commonwealth* v. *Dorsey*, 103 Mass. 412, 418.

Legislation which affects alike all persons similarly situated is not within the Amendment.

Barbier v. *Connolly*, 113 U. S. 32 (28:925); approved in *Yick Wo* v. *Hopkins*, *supra*; *Hayes* v. *Missouri*, 120 U. S. 72 (30:580).

The Fourteenth Amendment does not prevent a State from passing such laws to regulate the privileges and immunities of its own citizens as do not abridge their privileges and immunities as citizens of the United States.

Presser v. *Illinois*, *supra*.

The privileges and immunities of citizens of the United States are placed under the protection of the Fourteenth Amendment; and are those which arise out of the nature of the National Government or its Constitution or laws and treaties.

Slaughter-House Cases, 83 U. S. 16 Wall. 36 (21:394).

A State cannot be deemed to be guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision.

Arrowsmith v. *Harmoning*, 118 U. S. 194 (30:243); *Lehigh Water Co.* v. *Easton*, 121 U. S. 388 (30:1059); *U. S.* v. *Cruikshank*, 92 U. S. 542 (23:588).

It must appear from the record that a federal question was raised and decided in the state court.

Starin v. *New York*, 115 U. S. 248 (29:388); *Germania Ins. Co.* v. *Wisconsin*, *supra*; *Ames* v. *Kansas*, 111 U. S. 449 (28:482).

If it does not appear affirmatively that the federal question raised here was raised in the court below and was decided, and that its decision was necessary to the judgment rendered, this court has no jurisdiction in error over the judgment of such state court.

Detroit R. Co. v. *Guthard*, 114 U. S. 133 (29:118); *Savings Bank* v. *Savings Asso.* 114 U. S. 365 (29:174); *Chouteau* v. *Gibson*, *supra*; *Santa Cruz Co.* v. *Santa Cruz R. R. Co.* 111 U. S. 361 (28:456); *Murdock* v. *Memphis*, *supra*; *Twitchell* v. *Commonwealth*, 74 U. S. 7 Wall. 321 (19:223).

The first twelve amendments do not apply to state governments.

Barron v. *Baltimore*, 32 U. S. 7 Pet. 243 (8:672); *Fox* v. *Ohio*, 46 U. S. 5 How. 434 (12:223); *Smith* v. *Maryland*, 59 U. S. 18 How. 76 (15:269); *Withers* v. *Buckley*, 61 U. S. 20 How. 90 (15:816).

The *personnel* of the jury which tried petitioners in this case cannot be considered in the present proceeding.

Several States, to wit: Arkansas, Colorado, Michigan, New York, and Nebraska, have passed laws relating to the qualifications of jurors similar to the law of the State of Illinois.

The New York Statute has been passed upon by the highest court of that State in the following cases:

Stokes v. *People*, 53 N. Y. 171; *Thomas* v. *People*, 67 N. Y. 220; *Phelps* v. *People*, 72 N. Y. 363; *Greenfield* v. *People*, 74 N. Y. 277; *Balbo* v. *People*, 80 N. Y. 484; *Cox* v. *People*, Id. 512; *People* v. *Otto*, 101 N. Y. 690.

Mr. Chief Justice **Waite** delivered the opinion of the court:

When, as in this case, application is made to us on the suggestion of one of our number, to whom a similar application had been previously addressed, for the allowance of a writ of error to the highest court of a State under Section 709 of the Revised Statutes, it is our duty to ascertain not only whether any question reviewable here was made and decided in the proper court below, but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our own well considered judgments in similar cases. That is in effect what was done in *Twitchell* v. *Commonwealth*, 74 U. S. 7 Wall. 321 [19:223], where the writ was refused, because the questions presented by the record were "no longer subjects of discussion here," although if they had been in the opinion of the court "open" it would have been allowed. When, under Section 5 of our Rule 6, a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when "the question on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument." *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 195 [30:243]; *Church* v. *Kelsey*, 121 U. S. 282 [30:960]. The propriety of adopting a similar rule upon motions in open court for the allowance of a writ of error is apparent, for certainly we would not be justified as a court in sending out a writ to bring up for review a judgment of the highest court of a State, when it is apparent on the face of the record that our duty would be to grant a motion to affirm as soon as it was made in proper form.

In the present case we have had the benefit of argument in support of the application, and while counsel have not deemed it their duty to go fully into the merits of the federal questions they suggest, they have shown us distinctly what the decisions were of which they complain, and how the questions arose. In this way we are able to determine as a court in session whether the errors alleged are such as to justify us in bringing the case here for review.

We proceed, then, to consider what the questions are on which, if it exists at all, our jurisdiction depends. They are thus stated in the opening brief of counsel for petitioners:

"First. Petitioners challenged the validity of the Statute of Illinois, under and pursuant to which the trial jury was selected and impaneled, on the ground of repugnancy to the Constitution of the United States, and the state court sustained the validity of the statute.

"Second. Petitioners asserted and claimed, under the Constitution of the United States, the right, privilege, and immunity of trial by an impartial jury, and the decision of the state court was against the right, privilege, and immunity so asserted and claimed.

"Third. The State of Illinois made, and the state court enforced against petitioners, a law (the aforesaid statute) whereby the privileges and immunities of petitioners, as citizens of the United States, were abridged, contrary to

the Fourteenth Amendment of the Federal Constitution.

"Fourth. Upon their trial for a capital offense, petitioners were compelled by the state court to be witnesses against themselves, contrary to the provisions of the Constitution of the United States, which declare that 'no person shall be compelled in any criminal case to be a witness against himself,' and that 'no person shall be deprived of life or liberty without due process of law.'

"Fifth. That by the action of the state court in said trial petitioners were denied 'the equal protection of the laws,' contrary to the guaranty of the said Fourteenth Amendment of the Federal Constitution."

The particular provisions of the Constitution of the United States on which counsel rely are found in articles IV, V, VI, and XIV of the amendments, as follows:

Art. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Art. V. "No person * * * shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law."

Art. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Art. XIV. § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law."

That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since. *Barron* v. *Baltimore*, 32 U. S. 7 Pet. 243, 247 [8:672, 674]; *Livingston* v. *Moore*, Id. 469, 552 [8:751, 781]; *Fox* v. *Ohio*, 46 U. S. 5 How. 410, 434 [12:213, 223]; *Smith* v. *Maryland*, 59 U. S. 18 How. 71, 76 [15: 269, 271]; *Withers* v. *Buckley*, 61 U. S. 20 How. 84, 91 [15:816, 819]; *Pervear* v. *Commonwealth*, 72 U. S. 5 Wall. 475, 479 [18:608, 609]; *Twitchell* v. *Commonwealth*, 74 U. S. 7 Wall. 321, 325 [19:223, 224]; *The Justices* v. *Murray*, 76 U. S. 9 Wall. 274, 278 [19:658, 660]; *Edwards* v. *Elliott*, 88 U. S. 21 Wall. 532, 557 [22:487, 492]; *Walker* v. *Sauvinet*, 92 U. S. 90 [23:678]; *U. S.* v. *Cruikshank*, Id. 542, 552 [23: 588, 591]; *Pearson* v. *Yewdall*, 95 U. S. 294, 296 [24:436, 437]; *Davidson* v. *New Orleans*, 96 U. S. 97, 101 [24:616, 618]; *Kelly* v. *Pittsburgh*, 104 U. S. 79 [26: 658]; *Presser* v. *Illinois*, 116 U. S. 252, 265 [29: 615, 619].

It was contended, however, in argument, that, "though originally the first ten amendments were adopted as limitations on federal power, yet in so far as they secure and recognize fundamental rights—common-law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten amendments as limitations on power only apply to the Federal Government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten amendments had limited federal power."

It is also contended that the provision of the Fourteenth Amendment which declares that no State shall deprive "any person of life, liberty, or property without due process of law" implies that every person charged with crime in a State shall be entitled to a trial by an impartial jury, and shall not be compelled to testify against himself.

The objections are in brief: (1) that a statute of the State as construed by the court deprived the petitioners of a trial by an impartial jury; and, (2) that Spies was compelled to give evidence against himself. Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the federal questions relied on in fact do arise on the face of this record.

The statute to which objection is made was approved March 12, 1874, and has been in force since July 1 of that year. Hurd, R. S. Ill. 1885, p. 752, chap. 78, § 14. It is as follows:

"It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in section 2 of this Act; or if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror; or, that he is a party to a suit pending for trial in that court at that term. It shall be the duty of the court to discharge from the panel all jurors who do not possess the qualifications provided in this Act, as soon as the fact is discovered: *Provided*, if a person has served on a jury in a court of record within one year, he shall be exempt from again serving during such year, unless he waives such exemption: *Provided further*, that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: *And provided further*, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

The complaint is that the trial court, acting under this statute and in accordance with its requirements, compelled the petitioners against their will to submit to a trial by a jury that was not impartial, and thus deprived them of one of the fundamental rights which they had as citizens of the United States under the National Constitution, and if the sentence of the court is carried into execution they will be de-

prived of their lives without due process of law.

In *Hopt* v. *Utah*, 120 U. S. 430 [30:708], it was decided by this court that when "a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed he has other peremptory challenges which he can use." And so in *Hayes* v. *Missouri*, 120 U. S. 71 [30:580], it was said: "The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." Of the correctness of these rulings we entertain no doubt.

We are, therefore, confined in this case to the rulings on the challenges to the jurors who actually sat at the trial. Of these there were but two—Theodore Denker, the third juror who was sworn, and H. T. Sanford, the last, who was called and sworn after all the peremptory challenges of the defendants had been exhausted.

At the trial the court construed the statute to mean, that, "although a person called as a juryman may have formed an opinion based upon rumor or upon newspaper statements, but has expressed no opinion as to the truth of the newspaper statement, he is still qualified as a juror if he states that he can fairly and impartially render a verdict thereon in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement. It is not a test question whether the juror will have the opinion which he has formed from newspapers changed by the evidence, but whether his verdict will be based only upon the account which may here be given by witnesses under oath."

Interpreted in this way, the statute is not materially different from that of the Territory of Utah, which we had under consideration in *Hopt* v. *Utah*, *ubi supra*, and to which we then gave effect. As that was a territorial statute, passed by a Territorial Legislature for the government of a Territory over which the United States had exclusive jurisdiction, it came directly within the operation of article VI of the amendments, which guaranteed to Hopt a trial by an impartial jury. *Webster* v. *Reid*, 52 U. S. 11 How. 437, 459 [13:761, 770]. No one at that time suggested a doubt of the constitutionality of the statute, and it was regarded, both in the territorial courts and here, as furnishing the proper rule to be observed by a territorial court in impaneling an impartial jury in a criminal case.

A similar statute was enacted in New York, May 3, 1872, Acts of 1872, chap. 475, 9 N. Y. Stat. at L. 2d ed. 873; in Michigan, April 18, 1873, Acts of 1873, 162, art. 117; How. Stat. § 9564; in Nebraska, Compt. Stat. Neb. 1885, p. 833; Crim. Code, § 468; and in Ohio, R. S. Ohio, 1880, § 7278. The constitutionality of the Statute of New York was sustained by the Court of Appeals of that State in *Stokes* v. *People*, 53 N. Y. 164, 172, decided June 10, 1873, and that of Ohio, in *Cooper* v. *State*, 16 Ohio St. 328. So far as we have been able to discover, no doubt has ever been entertained in Michigan or Nebraska of the constitutionality of the statutes of those States respectively, but they have always been treated by their supreme courts as valid, both under the Constitution of the United States, and under that of the State. *Stephens* v. *People*, 38 Mich. 739, 741; *Ulrich* v. *People*, 39 Mich. 245; *Murphy* v. *State*, 15 Neb. 383.

Indeed, the rule of the Statute of Illinois as it was construed by the trial court is not materially different from that which has been adopted by the courts in many of the States without legislative action. *Commonwealth* v. *Webster*, 5 Cush. 295; *Holt* v. *People*, 13 Mich. 224; *State* v. *Fox*, 1 Dutch. 566; *Osiander* v. *Commonwealth*, 3 Leigh, 780; *State* v. *Ellington*, 7 Ired. 61; *Smith* v. *Eames*, 3 Scam. 81. See also an elaborate note to this last case in 36 Am. Dec. 521; where a very large number of authorities on the subject are cited.

Without pursuing this subject further, it is sufficient to say that we agree entirely with the Supreme Court of Illinois in its opinion in this case that the statute on its face, as construed by the trial court, is not repugnant to section 9 of article 2 of the Constitution of that State, which guarantees to the accused party in every criminal prosecution, "A speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed." As this is substantially the provision of the Constitution of the United States on which the petitioners now rely, it follows that, even if their position as to the operation and effect of that Constitution is correct, the statute is not open to the objection which is made against it.

We proceed, then, to a consideration of the grounds of the challenge to the jurors Denker and Sanford, to see if in the actual administration of the rule of the statute by the court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated.

Denker was examined by the counsel for the defendants when he was called as a juror, and, after stating his name and place of residence, proceeded as follows:

"Q. You heard of this Haymarket meeting, I suppose? A. Yes.

"Q. Have you formed an opinion upon the question of the defendants' guilt or innocence upon the charge of murder, or any of them? A. I have.

"Q. Have you expressed that opinion? A. Yes.

"Q. You still entertain it? A. Yes.

"Q. You believe what you read and what you heard? A. I believe it; yes.

"Q. Is that opinion such as to prevent you from rendering an impartial verdict in the case, sitting as a juror, under the testimony and the law? A. I think it is."

At this stage of the examination he was "challenged for cause" for the defendants; but before any decision was made thereon the following occurred:

"Mr. Grinnell (for the State). If you were taken and sworn as a juror in the case, can't you determine the innocence or the guilt of the defendants upon the proof that is presented to you here in court, regardless of your having any prejudice or opinion? A. I think I could.

"Q. You could determine their guilt or in-

nocence upon the proof presented to you here in court, regardless of your prejudice and regardless of your opinion, and regardless of what you have read? A. Yes.

"The Court: Do [Can] you fairly and impartially try the case and render an impartial verdict upon the evidence as it may be presented here and the instructions of the court. A. Yes; I think I could."

The court thereupon overruled the challenge, but before the juror was accepted and sworn he was further examined by counsel for the defendants, as follows:

"Mr. Foster: I was going to ask you something about the opinion that you have formed from reading the papers and from conversation. I believe you answered me before that you had formed an opinion from reading and hearing conversation. That is correct, is it? A. Yes; but I don't believe everything I read in the newspapers.

"Q. No; but you believe enough to form an opinion? A. Yes; I formed an opinion.

"Q. Was that opinion principally from what you read in the papers or was it from what you heard on the street? A. From what I read entirely.

"Q. Then you did believe enough of what you read to form an opinion upon the question of the guilt or innocence of these men or some of them? A. Yes.

"Q. And I believe you said you also expressed your opinion which you have formed to others with whom you conversed? A. Yes; I have expressed that opinion.

"Q. During the expression of this opinion I will ask you whether you stated in substance to these persons or any of them that you believed enough of what you had read to form the opinion which you had?

"The Court: Did you in any conversation that you had say anything as to whether you believed or not the account which was in the newspapers which you read? A. No, sir; I never expressed an opinion in regard to whether the newspapers were correct or not.

"Q. You never discussed that matter at all? A. No, sir."

Then, after some inquiries as to his business, age, and residence, the examination by the counsel for the defendant proceeded:

"Q. Are you acquainted with any members of the police force of the City of Chicago that were present at the Haymarket meeting on the occasion referred to? A. No, sir.

"Q. Have you ever had any conversation with any one that undertook to detail the facts as they occurred at the Haymarket Square, or who claimed they had been there? A. No, sir.

"Q. Is your opinion entirely made up of what you have read distinguished from what you have heard? A. Entirely from what I have read in the newspapers.

"Q. Have you had much conversation with others in regard to it at or about your place of business or elsewhere? A. We have conversed about it a number of times there in the house.

"Q. There is where you have expressed, I presume, the opinion which you have formed? A. Yes, sir.

* * * * *

"Q. Do you know anything about socialism, anarchism, or communism? A. No, sir; I do not.

"Q. Have you any prejudice against this class of persons? A. I think I am a little prejudiced against socialism. I don't know that I am against anarchism. In fact, I don't really understand what they are. I do not know what their principles are at all.

"Q. I understand you to say that notwithstanding the opinion you formed at the time you read the newspaper that you now are conscious of the fact that you can try this case and settle it upon the testimony introduced here? A. Yes, I think I could.

"Q. And not be controlled or governed by any impression that you might have had heretofore? A. Yes, sir.

"And the law, as given you by the court, governing it? A. Yes, sir.

"Q. In the conversations that you have had there at the store, you say you have expressed the opinion which you have formed before? A. Yes, sir.

"Q. Is that of frequent occurrence—that you have expressed the opinion you have formed? A. Well, I think I have expressed it pretty freely.

"Q. As to the number of times—as to whether it was frequent or not? A. O no; we did not bring the matter up in conversation very often, but when we did we generally expressed our opinion in regard to the matter.

"Q. Your mind was made up from what you read, and you had no hesitancy in saying it—speaking it out? A. I don't think I hesitated.

"Q. Would you feel yourself any way governed or bound in listening to the testimony and determining it upon the prejudgment of the case you had expressed to others before? A. Well, that is a pretty hard question to answer.

"Q. I will ask you whether acting as a juror here you would feel in any way bound or governed by the judgment that you had expressed on the same question to others before you were taken as a juryman; do you understand that? A. I don't think I would.

"Q. That is, you have now made up your mind, or at least you have formed an opinion; you have expressed that freely to others. Now, the question is whether when you listen to the testimony you will have in your mind the expression which you have given to others and have to guard against that and be controlled by it in any way. A. No, sir; I don't think I would. I think I could try the case from the testimony regardless of this.

* * * * *

"Q. I understand you to say that you believe that you can entirely lay to one side the opinion which you have formed; it would require no circumstances or evidence to overcome it if you were accepted as a juryman? A. I think I could lay aside that opinion I have formed.

"Q. You believe that you could? A. Yes."

Here the examination of the juror by the counsel for the defendant, so far as it seems to be important to the present inquiry, was closed.

Then on examination by the attorney for the State the following appears:

"Q. Do you know anything of the counsel upon the other side? A. No, sir.

"Q. You have men under you assisting you in shipping? A. No; there are no men under me.

"Q. Do you belong to any labor organization? A. No, sir.

"Q. You stated, I believe, that you didn't know much about anarchism or communism, and therefore you couldn't tell whether you had a prejudice or not. A. No, sir, I do not.

"Q. But you have read something about socialism? A. Yes, sir.

"Q. Do you believe in the maintenance of the laws of the State of Illinois and the Government of the United States? A. Yes, sir; I do.

"Q. Have you any sympathy with any individual or class of individuals who have for their purpose or object the overthrow of the law by force? A. No, sir.

"Q. Have you any conscientious scruples against the infliction of the death penalty in proper cases? A. No, sir.

"Q. If taken as a juror in this case do you believe you could determine the innocence or guilt of the defendants upon the proof presented to you here in court, under the instructions of the court, regardless of everything else? A. Yes, I think I could.

"Q. You know now of no prejudice or bias that would interfere with your duties as a juror? A. No, sir.

"Q. Are you a socialist, a communist, or an anarchist? A. No, sir.

"Q. You have no associations or affiliations with that class of people, so far as you know? A. No, sir."

At the close of this examination neither party challenged the juror peremptorily, and he was accepted and sworn. It is not denied that when this occurred the defendants were still entitled to 142 peremptory challenges, or about that number.

When the juror Sanford was called he was first examined by counsel for defendants, and after some preliminary questions and answers, the examination, still by counsel for the defendants, proceeded as follows:

"Q. You know what case is on trial now, I presume? A. Yes.

"Q. Have you any opinion as to the guilt or the innocence of the defendants or any of them, of the murder of Matthias J. Degan? A. I have.

"Q. You have an opinion; you say you have formed an opinion somewhat upon the question of the guilt or innocence of these defendants, do you mean, or that there was an offense committed at the Haymarket by the throwing of the bomb? A. Well, I would rather have you ask them one at a time.

"Q. All right. Have you an opinion as to whether or not there was an offense committed at the Haymarket meeting by the throwing of the bomb? A. Yes.

"Q. Now, from all that you have read and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb? A. Yes.

"Q. You have an opinion upon that question also? A. I have.

"Q. Did you ever sit on a jury? A. Never.

"Q. I suppose you know something about the duties of a juror? A. I presume so.

"Q. You understand, of course, that when a man is on trial, whether it be for his life or for any penal offense, that he can only be convicted upon testimony which is introduced in the presence and the hearing of the jury? You know that, don't you? A. Yes.

"Q. You know that any newspaper gossip or any street gossip has nothing to do with the matter whatever, and that the jury are to consider only the testimony which is admitted by the court actually, and then are to consider that testimony under the direction, as contained in the charge of the court; you understand that? A. Yes.

"Q. Now, if you should be selected as a juror in this case to try and determine it, do you believe that you could exercise legally the duties of a juror—that you could listen to the testimony, and all of the testimony, and the charge of the court, and after deliberation return a verdict which would be right and fair as between the defendants and the people of the State of Illinois? A. Yes, sir.

"Q. You believe that you could do that? A. Yes, sir.

"Q. You could fairly and impartially listen to the testimony that is introduced here? A. Yes.

"Q. And the charge of the court and render an impartial verdict, you believe? A. Yes.

"Q. Have you any knowledge of the principles contended for by socialists, communists, and anarchists? A. Nothing, except what I read in the papers.

"Q. Just general reading? A. Yes,

"Q. You are not a socialist, I presume, or a communist? A. No, sir.

"Q. Have you a prejudice against them from what you have read in the papers? A. Decided.

"Q. A decided prejudice against them? Do you believe that that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism or anarchism, which really has nothing to do with the case? A. Well, as I know so little about it in reality at present, it is a pretty hard question to answer.

"Q. You would undertake—you would attempt, of course, to try the case upon the evidence introduced here—upon the issue which is presented here? A. Yes, sir.

"Q. Now, the issue, and the only issue which will be presented to this jury, unless it is presented with some other motive than to arrive at the truth, I think is, did these men throw the bomb which killed officer Degan? If not, did they aid, abet, encourage, assist, or advise somebody else to do it? Now, that is all there is in this case; no question of socialism or anarchism to be determined, or as to whether it is right or wrong. Now, do you believe that you can try it upon that theory and return a verdict upon that theory and upon that issue? A. Well, suppose I have an opinion in my own mind that they encouraged it?

"Q. Keep it—that they encouraged it? A. Yes.

"Q. Well then, so far as that is concerned I do not care very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand? A. Yes.

"Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you? A. No.

"Q. Now, when the testimony is introduced here and the witnesses are examined and cross examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief. Don't you think then you would be able to determine the question? A. Yes.

"Q. Regardless of any impression that you might have, or any opinion? A. Yes.

"Q. Have you any opposition to the organization by laboring men of associations, or societies, or unions, so far as they have reference to their own advancement and protection, and are not in violation of law? A. No, sir.

"Q. Mr. Sanford, do you know any of the members of the police force of the City of Chicago? A. Not one by name.

"Q. You are not acquainted with any one that was either injured or killed, I suppose, at the Haymarket meeting? A. No.

* * * * * * * *

"Q. Mr. Sanford, are you acquainted with any gentleman representing the prosecution—these three gentlemen, Mr. Grinnell, Mr. Ingham, Mr. Walker, and Mr. Furthman, who is not here at the present time? A. No, sir.

"Q. You are, I presume, not acquainted with any of the detective officers of the City of Chicago? A. Not to my knowledge.

"Q. Now, Mr. Sanford, if you should be selected as a juror in this case, do you believe that, regardless of all prejudice or opinion which you now have, you could listen to the legitimate testimony introduced in court and upon that and that alone render and return a fair and impartial, unprejudiced and unbiased verdict? A. Yes."

At the close of this examination on the part of the defendants, the juror was challenged in their behalf for cause, and the attorney for the State, after it was ascertained that all the peremptory challenges of the defendants had been exhausted, took up the examination of the juror; and as to this the record shows the following:

"Mr. Ingham: Mr. Sanford, upon what is your opinion founded—upon newspaper reports? A. Well, it is founded on the general theory and what I read in the newspapers.

"Q. And what you read in the papers? A. Yes, sir.

"Q. Have you ever talked with any one who was present at the Haymarket at the time the bomb was thrown? A. No, sir.

"Q. Have you ever talked with any one who professed, of his own knowledge, to know anything about the connection of the defendants with the throwing of that bomb? A. No.

"Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true? A. I have never expressed it exactly in that way, but still I have no reason to think they were false.

"Q. Well, the question is not what your opinion of that was. The question simply is—it is a question made necessary by our statute, perhaps— A. Well, I don't recall whether I have or not.

"Q. So far as you know, then, you never have? A. No, sir.

"Q. Do you believe that if taken as a juror you can try this case fairly and impartially, and render a verdict upon the law and the evidence? A. Yes."

At this stage of the examination the court remarked in reply to some suggestion of counsel as follows:

"The Court: The defendants having challenged for cause, which is overruled, can, of course, stand where they are without saying anything more; but the effect of that, in my judgment, is that they accept the juror because they can't help themselves. They have got no peremptory challenge; the challenge for cause is overruled, and, necessarily, the question now is for the State to say whether they will accept this juror or not. The common law is that all jurors not challenged, or to whom the challenge is not sustained, are the jurors to try the case. If they are not challenged for a cause which is sustained, and if they are not challenged peremptorily, then they are necessarily the jury to try the case. Now, in this instance, the defendants have no more peremptory challenges, and the challenge which they have made for cause is overruled; therefore, so far as the defendants are concerned, he is a juror to try the case."

This was accepted by both parties as a true statement of the then condition of the case, and after some further examination of the juror, which elicited nothing of importance in connection with the present inquiry, no peremptory challenge having been interposed by the State, Sanford was sworn as a juror, and the panel was then complete.

This, so far as we have been advised, presents all there is in the record which this court can consider touching the challenges of these two jurors by the defendants for cause.

In *Reynolds* v. *United States*, 98 U. S. 145, 156 [25:244, 247], we said "that upon the trial of the issue of fact raised by" a challenge to a juror, in a criminal case, on the ground that he had formed and expressed an opinion as to the issues to be tried, "the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. * * * It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record.

We come now to consider the objection that the defendant Spies was compelled by the court to be a witness against himself. He voluntarily offered himself as a witness in his own behalf, and by so doing he became bound to submit to a proper cross examination under the law and practice in the jurisdiction where he was being tried. The complaint is, that he was required on cross examination to state whether he had received a certain letter, which was shown, purporting to have been written by Johann Most, and addressed to him, and upon his saying that he had, the court allowed the letter to be read in evidence against him. This, it is claimed, was not proper cross examination. It is not contended that the subject to which the cross examination related was not pertinent to the issue to be tried; and whether a cross examination must be confined to matters pertinent to the testimony-in-chief, or may be extended to the matters in issue, is certainly a question of state law as administered in the courts of the State, and not of federal law.

Something was said in argument about an alleged unreasonable search and seizure of the papers and property of some of the defendants, and their use in evidence on the trial of the case. Special reference is made in this connection to the letter of Most about which Spies was cross examined; but we have not been referred to any part of the record in which it appears that objection was made to the use of this evidence on that account. And upon this point the Supreme Court of the State, in that part of its opinion which has been printed with the motion papers, remarks as follows:

"The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police and should then have moved to exclude or oppose its admission on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved."

Even if the court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and, therefore, no foundation is laid under this objection for the exercise of our jurisdiction.

As to the suggestion by counsel for the petitioners Spies and Fielden—Spies having been born in Germany and Fielden in Great Britain—that they have been denied by the decision of the court below rights guaranteed to them by Treaties between the United States and their respective countries, it is sufficient to say that no such questions were made and decided in either of the courts below, and they cannot be raised in this court for the first time. Besides, we have not been referred to any treaty, neither are we aware of any, under which such a question could be raised.

The objection that the defendants were not actually present in the Supreme Court of the State at the time sentence was pronounced cannot be made on the record as it now stands, because on its face it shows that they were present. If this is not in accordance with the fact, the record must be corrected below, not here. It will be time enough to consider whether the objection presents a federal question when the correction has been made.

Being of opinion, therefore, that the federal questions presented by the counsel for the petitioners, and which they say they desire to argue, are not involved in the determination of the case as it appears on the face of the record, we deny the writ.

Petition for writ of error is dismissed.

ELBRIDGE TUFTS, *Appt.*,
v.
DON C. TUFTS, Admr. of the Estate of ELMIRA P. TUFTS, Deceased.

(See S. C. Reporter's ed. 76–78.)

Variance between bill and proof.

In a suit in equity for relief on the ground of fraud, it is enough if the facts found are not materially and substantially different from those alleged in the bill.

[No. 26.]

Submitted Oct. 21, 1887. Decided Oct. 31, 1887.

APPEAL from the Supreme Court of the Territory of Utah. *Affirmed.*

The facts are stated by the court.

Messrs. **Ben Sheeks** and **J. L. Rawlins**, for appellant:

The material findings are not within the issues presented by the bill of complaint.

The defendant was arraigned upon specific charges of fraud, but was concluded by the court with findings of fraud not alleged.

The decree cannot be sustained on the ground of mistake, as a substantive head of equity jurisdiction. It is not framed in that aspect nor

will the findings support a decree on this ground.

Kerr. Fraud & M. 407; *Grymes* v. *Sanders*, 93 U. S. 61 (23: 801); *Glen* v. *Statler*, 42 Iowa, 107; *Butman* v. *Hussey*, 30 Me. 263; *Juzan* v. *Toulmin*, 9 Ala. 662; *Hill* v. *Bush*, 19 Ark. 552.

Mr. **Arthur Brown,** for appellee:

There is no foundation whatsoever for the alleged variance.

Where one person has been misled into signing a different paper from that which he supposed he was signing, and another person, so misleading him, has taken advantage of it, the former can either reform or set aside the instrument entirely. It is not necessary that the mistake be a mistake of both parties. A mistake of one party, of which the other knows and takes advantage, is a mistake and fraud also.

The complaint states a clear case entitling the plaintiff to relief by this court, in the form of a rescission.

Welles v. *Yates*, 44 N. Y. 525; *Hearst* v. *Pujol*, 44 Cal. 230; *Eaton* v. *Eaton*, 37 N. J. L. 108; *Case* v. *Case*, 26 Mich. 484.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity begun on the first of August, 1882, by Elmira P. Tufts, then in life, against Elbridge Tufts, her son, to set aside a deed executed by her to him, bearing date June 26, 1882, on the ground that it was obtained by fraud. The material averment in the complaint is that "defendant * * * promised the plaintiff in the month of June, 1882, if she would execute an agreement, which he then, on or about said June 26, 1882, had drawn up and read to plaintiff, * * * that the defendant would build the plaintiff, at his own expense, a nice brick house upon his, said defendant's lot of land, situated immediately east of and adjoining on the eastern portion of the above described lot of land, which was owned by the plaintiff, * * * and give her a life lease of the same to use to her own benefit, free from any and all expense to her during her natural life, said brick building to be commenced by defendant as soon as the plaintiff would sign said written agreement then drawn up by the defendant;" and that the deed was signed and executed under the belief, induced by the false and fraudulent statements of the defendant, that it was that agreement. At the hearing the court made, among others, the following finding of fact:

"That at the time of the execution of said deed plaintiff did not know that it was a deed of her property in question, but believed it to be a life lease of property belonging to the defendant, upon which she was agreeing to assist in building a house; that prior to the time of the execution of said deed there had been negotiations between the said plaintiff and the said defendant to the effect that the plaintiff should assist defendant with money to build a house upon lands of his own, and that the plaintiff should have a life lease of the same; that after such negotiations had taken place she directed defendant to prepare the proper papers; that defendant, instead of preparing the papers directed by plaintiff, prepared a warrantee deed of the land in question, and procured the signature of the plaintiff thereto; that the same was not read to the plaintiff, and she did not know the contents thereof; that there was no consideration for the same passed between the parties, and that the plaintiff signed the same under the belief that it was a paper relative to a life lease to her of the said land of the defendant upon which said building was to be erected; that the signature of the plaintiff to the said deed was procured by the fraud of the defendant; that the defendant never has attempted to build any such house as was contemplated by the agreement for the life lease."

Upon this finding a decree was entered declaring the deed null and void, and directing the defendant to reconvey to the plaintiff. From that decree this appeal was taken.

The objection now urged to the decree is, not that it is wrong upon the facts found, but that the findings make a different case from that alleged in the complaint. To this we cannot agree. The suit was brought to set aside the deed because it was executed in the belief, caused by the false and fraudulent statements of the defendant, that it was an agreement under which the plaintiff was to have a life lease of property belonging to the defendant, and not a deed conveying her own property absolutely in fee to him. That is substantially the finding of the court, and, in a suit in equity for relief on the ground of fraud, it is enough if the facts found are not materially and substantially different from those alleged in the bill.

The decree is affirmed.

CATHERINE HENDERSON, *Plff. in Err.*,
v.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(See S. C. Reporter's ed. 61-65.)

Liability of railroad company for loss—amended petition.

1. Where a passenger in a railroad car in attempting to close an open window next her seat, dropped out through the window, upon the railroad, a bag, which she had in her hand and custody, containing money and jewelry, of the value of which she had not informed the company, and she immediately told the conductor of the train of the loss and requested him to stop the train in order that she might get the bag, which he refused to do, and she dispatched a messenger from the next station, about three miles distant, to recover the bag, but found that it had been stolen and it and its contents were lost, *held*, that an action would not lie against the railroad company for the loss.

2. Where the action against the railroad company for such loss was dismissed, but before judgment was signed, plaintiff by leave of the court filed an amended petition, alleging that the railroad company received the bag and its contents as part of her luggage to be safely carried and delivered, and that the company did not so carry and deliver, *held*, under the practice in Louisiana, that it was within the power of the court to treat the amendment as a mere addition to the original petition and thus preclude the plaintiff from contesting a material fact within her own knowledge, which she had therein averred.

3. In an action on the common-law side of the circuit court, the pleadings and practice are governed by the law of the State.

[No. 27.]

Argued Oct. 21, 1887. Decided Oct 31, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

Reported below, 20 Fed. Rep. 430.

This case comes to this court upon the plaintiff's petition, and her amended or supplementary petition, and the defendant's exception (demurrer) thereto. Under the law of Louisiana, a defendant's exception to a plaintiff's petition is, in effect, a demurrer. It may be general or special.

The exception here is general, for it alleges that the plaintiff has no just and legal cause of action.

The plaintiff had passed the summer at Pass Christian, and was returning to her winter residence in New Orleans. She placed her jewels and money in a small leathern bag (a bag commonly carried in the hands of women) and entered defendant's car at Pass Christian, as a passenger for New Orleans. The train had started,—the bag with her jewels and money accidentally fell through the car window; the conductor of the train being close to her when the bag fell through the window she begged him to stop the train and let her get off; she told him that the contents of the bag were of great value. He refused to stop the train, carried her on to the next station, three miles away from her jewels and money,—they were stolen from the place where they had fallen before she could get a person back to them. Nothing prevented the stopping of the train, it could have been accomplished in a few seconds, and could have proceeded without waiting for her, and she could have retaken her property.

The facts are further stated by the court.

Mr. O. B. Sansum for plaintiff in error:

If the defendant, under the then existing circumstances, could not or ought not to have stopped the train, it ought to plead and prove the facts, but the court below has no right to declare, as matter of law, that it was not bound to stop.

So long as the defendant was ignorant of the presence of the plaintiff's jewels and money upon its premises, no duty in respect to them was cast upon defendant; but, so soon as defendant (the conductor authorized to act for it) knew that the money and jewels had accidentally fallen upon the road, then it was bound to do what a reasonably prudent person, acting for himself under the same or similar circumstances, would have done to prevent loss and damage. If, under the same circumstances, a reasonably prudent person acting for himself would have stopped the train and let the plaintiff depart from it to retake her property, then it was defendant's duty to do the same, and its failure to do it is *contra* the maxim *sic utere tuo, ut alienum non lædas.*

Butcher v. *London & S. W. R. Co.* 16 C. B. 13; *Richards* v. *London & S. C. R. Co.* 7 C. B. 839.

The carrier of passengers is a common carrier of the things kept in the railway carriage in the immediate custody (in the hands) of the passengers.

Butcher v. *London & S. W. R. Co. supra; Robinson* v. *Dunmore*, 2 Bos. & P. 416.

The court erred in sustaining defendant's exception to plaintiff's amended petition.

Mr. **Thos. L. Bayne,** for defendant in error:

Upon the hearing below, the court delivered an opinion which is reported in the Federal Reporter, vol. xx, p. 430.

In a note to this decision the editor of the Federal Reporter cited: *First Nat. Bk.* v. *Marietta & C. R. R. Co.* 20 Ohio St. 278; *Gleason* v. *Goodrich Transp. Co.* 32 Wis. 85; *Cohen* v. *Frost*, 2 Duer, 335; *Del Valle* v. *The Richmond*, 27 La. Ann. 90; *The R. E. Lee*, 2 Abb. U. S. 49; *The Crystal Palace* v. *Vanderpool*, 16 B. Mon. 307.

In *Clark* v. *Burns*, 118 Mass. 275, the court says: "The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers.

A watch, worn by a passenger on his person by day and kept by him within reach for use at night, whether retained upon his person or placed under his pillow, or in a pocket of his clothing hanging near him, is not so entrusted to their custody and control as to make them liable for it as common carriers.

The Crystal Palace v. *Vanderpool*, 16 B. Mon. 302; *Tower* v. *Utica & S. R. R. Co.* 7 Hill, 47; *Abbott* v. *Bradstreet*, 55 Me. 530; *Pullman Palace Car Co.* v. *Smith*, 7 Chic. L. N. 237; *Weeks* v. *New York, N. H. & H. R. R. Co.* 72 N. Y. 56.

The defendant owed no such duty to the plaintiff as that it was an insurer of the safe carriage of his securities, without knowledge or notice that he had them upon his person.

Rorer, R. R. p. 1276; *Tower* v. *Utica & S. R. R. Co.* 7 Hill, 47; *Whitney* v. *Pullman Palace Car Co.* 143 Mass. 244; *Del Valle* v. *The Richmond*, 27 La. Ann. 90; *The R. E. Lee*, 2 Abb. U. S. 49; *Woods* v. *Jones*, 34 La. Ann. 1086.

The Company would have been culpable in the highest degree if it had imperiled the lives of a whole train of passengers by stopping. The conductor has no discretion in such a case.

Hutchinson, Carriers, §§ 604–612.

The plaintiff cannot amend her petition by making allegations inconsistent with what she had averred therein. She could not thereby avoid the judicial admissions and averments of her first petition.

Stilley v. *Stilley*, 20 La. Ann. 55; La. Code Prac. art. 419; *Case* v. *Watson*, 22 La. Ann. 351; *Boatner* v. *Scott*, 1 Rob. (La.) 546; *Barrow* v. *Bank of Louisiana*, 2 La. Ann. 455; *State* v. *Judges*, 34 La. Ann. 1220.

The dismissal of a petition which discloses no cause of action disposes of the suit, and no amendment can then be allowed.

Hart v. *Bowie*, 34 La. Ann. 325.

Plaintiff by her own act contributed to any loss suffered by her. She retained her bag of valuables in her own hands while closing the window of the car, and the dropping of it out of the window was her own act.

Baltimore & P. R. R. Co. 95 U. S. 443 (24:508); *Chicago, R. I. & P. R. R. Co.* v. *Houston*, 95 U. S. 697 (24:542); *Childs* v. *New Orleans City R. R. Co.* 33 La. Ann. 155; *Murray* v. *Pontchartrain R. R. Co.* 31 La. Ann. 491.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action against a railroad corporation by a passenger to recover for the loss of a hand bag and its contents.

The plaintiff, a married woman suing by authority of her husband, alleged in the original petition that on October 25, 1883, the defendant, being a common carrier of goods and persons

for hire, received her into one of its cars as a passenger from her summer residence at Pass Christian in the State of Mississippi to her winter residence in New Orleans, having in her hand, and in her immediate custody, possession and control, a leathern bag of a kind usually carried by women of her condition and station in society, containing $5,800 in bank bills, and jewelry worth $4,075; that while the plaintiff, holding the bag in her hand, was attempting to close an open window next her seat, through which a cold wind was blowing upon her, the bag and its contents, by some cause unknown to her, accidentally fell from her hand through the open window upon the railroad; that she immediately told the conductor of the train that the bag contained property of hers of great value, and requested him to stop the train, and to allow her to leave the car and retake the bag and its contents; but he refused to do so, although nothing hindered or prevented him, and, against her protestations, caused the train to proceed at great speed for three miles to Bay St. Louis, where he stopped the train, and she despatched a trusty person to the place where the bag had fallen; but before he arrived there the bag with its contents was stolen and carried away by some person or persons to the plaintiff unknown, "and was wholly lost to the plaintiff by the gross negligence of the defendant as aforesaid."

The further averments of the petition, undertaking to define specifically the nature and effect of the obligation assumed by the defendant to the plaintiff, are mere conclusions of law, not admitted by the exception, in the nature of a demurrer, which was filed by the defendant, in accordance with the practice in Louisiana, upon the ground that the petition set forth no cause of action. The circuit court sustained the exception, and ordered the petition to be dismissed. 20 Fed. Rep. 430.

On the day the judgment was rendered, and before it was signed, it was amended, on the plaintiff's motion, by adding the words "unless the plaintiff amend her petition so as to state a cause of action within five days."

Within that time the plaintiff filed an amended petition, alleging that the defendant received the plaintiff as a passenger, and the bag and its contents as part of her luggage, to be safely kept and carried by the defendant as a common carrier to New Orleans, and there delivered to the plaintiff; that the defendant did not so carry and deliver; and that the things were lost by the negligence and improper conduct of the defendant, and not by any want of care on the part of the plaintiff.

The defendant excepted to the amended petition, because the plaintiff had no right to file one after the original petition had been dismissed as aforesaid, and because the amended petition was inconsistent with the original petition, especially in that the original petition alleged that the bag and its contents were held and kept by the plaintiff in her immediate possession, control and custody, whereas the amended petition alleged that the defendant received them as her luggage.

After argument on this exception, the order allowing the plaintiff to file an amended petition was modified by the court so as to provide that the amended petition should be deemed and should have effect only as an addition to the original petition; and the exception to the amended petition was sustained, and the action dismissed. The plaintiff sued out this writ of error.

The mere statement of the case is sufficient to demonstrate the correctness of the judgment below.

The facts alleged in the original petition constitute no breach or neglect of duty on the part of the defendant towards the plaintiff. She did not entrust her bag to the exclusive custody and care of the defendant's servants, but kept it in her own immediate possession, without informing the defendant of the value of its contents, until after it had dropped from her hand through the open window. Even if no negligence is to be imputed to her in attempting to shut the window with the bag in her hand, yet her dropping the bag was not the act of the defendant or its servants, nor anything that they were bound to foresee or to guard against; and after it had happened, she had no legal right, for the purpose of relieving her from the consequences of an accident for which they were not responsible, to require them to stop the train, short of a usual station, to the delay and inconvenience of other passengers, and the possible risk of collision with other trains.

This action being on the common-law side of the circuit court, the pleadings and practice were governed by the law of the State. Rev. Stat. § 914. By article 419 of the Code of Practice of Louisiana, "After issue joined, the plaintiff may, with the leave of the court, amend his original petition; provided the amendment does not alter the substance of his demand by making it different from the one originally brought." An amendment wholly inconsistent with the allegations of the original petition cannot be allowed. *Barrow* v. *Bank of Louisiana*, 2 La. Ann. 453. It is by no means clear that a petition, which has been dismissed as showing no cause of action, can be afterwards amended in matter of substance. *Hart* v. *Bowie*, 34 La. Ann. 323. But if the order allowing an amended petition to be filed could be lawfully made in this case, so long as final judgment had not been entered, it was equally within the power of the court to modify that order so as to treat the amendment as a mere addition to the original petition, and thus to preclude the plaintiff from contesting a material fact, within her own knowledge, which she had once solemnly averred.

Judgment affirmed.

DAVENPORT NATIONAL BANK, *Plff. in Err.*,
v.
BOARD OF EQUALIZATION OF DAVENPORT ET AL.

(See S. C. Reporter's ed. 83-86.)

Equal taxation—state and national banks—savings banks.

1. The Act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of the national bank

shall not be taxed at a higher rate than other moneyed capital in the hands of individuals.

2. It is only necessary that the system of state taxation of its own citizens, of its own banks and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Within these limits, the manner of assessing and collecting all taxes by the State is uncontrolled by the Act of Congress.

3. While deposits in savings banks constitute moneyed capital in the hands of individuals, yet they are not within the meaning of the Act of Congress in such a sense as to require that because they are exempted from taxation, the shares of stock in national banks must also be exempted.

[No. 31.]

Submitted Oct. 11, 1887. Decided Oct. 31, 1887.

IN ERROR to the Supreme Court of the State of Iowa. *Affirmed.*

Under the Statutes of the State of Iowa the shares in the national banks are taxable at their cash value; but the shares in the banks organized under the state laws—and known as savings banks—are not taxable at all. It is claimed that this is a discrimination unfavorable to the national banks and their shareholders, and repugnant to section 5219, R. S. U. S., which prohibits a State from taxing the national bank shares "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens;" and also repugnant to the Fourteenth Amendment, which declares that the State shall not deny to any person "the equal protection of the law."

The plaintiff appeared before the Board of Equalization of Taxes and asked that the taxes assessed under said statutes be canceled, and that the bank be taxed upon its capital (less its bonds and other nontaxables, and less its real estate, which is specifically taxed), the same as said savings banks are by the statutes taxable. The Board of Equalization refused to do this, and on appeal, the circuit court, and the supreme court, sustained the Board in its action.

Messrs. **A. J. Hirschl** and **W. T. Dittoe**, for plaintiff in error:

To tax a bank upon its capital is different from and less onerous than taxing it upon its shares.

Van Allen v. *Assessors*, 70 U. S. 3 Wall. 581 (18: 233); *Hubbard* v. *Supervisors*, 23 Iowa, 133; *Pollard* v. *State*, 65 Ala. 628.

Section 5219 protects the national banks, not only against discriminative rates of assessment, but also against discriminative methods and rules of assessment, and of valuation.

People v. *Weaver*, 100 U. S. 545-6 (25: 707); *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143 (25: 901).

Under section 5219, R. S. U. S., the State cannot tax national bank shares at a greater rate than is assessed upon "other moneyed capital in the hands of individuals," and shares in the incorporated state banks are such "other moneyed capital."

Hepburn v. *School Directors*, 90 U. S. 23 Wall. 484 (23: 112).

They are also the "like property similarly invested," referred to in *Adams* v. *Nashville*, 95 U. S. 22 (24: 370), quoting and construing the very words of section 5219.

If the national bank share is taxed higher than the state bank share, then the tax on the former should be reduced to the amount of the tax on the latter,

City Nat. Bank v. *Paducah*, 5 Cent. L. J. 347; S. C. Thomp. Nat. Bk. Cas. 300.

The national bank shares are entitled to all the benefits enjoyed by the state bank shares.

Pollard v. *State*, 65 Ala. 628; *Miller* v. *Heilbron*, 58 Cal. 133; *Loftin* v. *Citizens Nat. Bank*, 85 Ind. 341.

"As long as they (national banks) are allowed to stand on the same footing with the citizen and similar state institutions in the matter of taxation, they have no right to complain."

Boyer's App. Pitts. L. J. N. S. XIV, 429.

Consequently when the state bank share is, by statute, exempted from taxation, the holder of the national bank share can claim exemption for his.

As his tax is not void, but only voidable, he must appear before the Board of Equalization, otherwise he has no redress.

Supervisors v. *Stanley*, 105 U. S. 305 (26: 1044).

The shares in these Iowa savings banks are precisely similar to the shares in the national banks.

These (alleged) savings banks are such only in name; they are full fledged banks of discount and deposit; formidable rivals of the national banks, and transact a very heavy business. The two savings banks in Davenport have over $3,200,000 deposits, being nearly $2,000,000 more than all the three national banks together in said city. According to section 9, chapter 60, Acts 15th General Assembly (McClain's Annotated Statutes, pp. 311 *et seq.*), these savings banks "may discount, purchase, sell, and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security." By sections 20, 21, they have the monopoly; no one else can advertise as a savings bank.

This is evidently meant to be the general law, for section 31 allows any other bank to reincorporate as a savings bank by simply filing a declaration to that effect.

A savings bank cannot claim to be a charitable institution.

Sheren v. *Mendenhall*, 23 Minn. 92.

In construing said section 5219, it has been held that national bank shares can be taxed although other dissimilar moneyed capital is exempt, as for instance:

State and county bonds.

McLaughlin v. *Chadwell*, 7 Heisk. (Tenn.) 397.

Shares in insurance companies.

People v. *Commissioners*, 71 U. S. 4 Wall. 256 (18: 349).

Purchase money, mortgages, and judgments —especially where taxing them would make a double taxation.

Hepburn v. *School Directors*, *supra*.

Municipal bonds.

Adams v. *Nashville*, 95 U. S. 19 (24: 369).

And national bank shares can be taxed when state bank shares are not, provided, that the state by contract, made prior to the Act of Congress, did disable itself from taxing the state bank shares.

Lionberger v. *Rouse*, 76 U. S. 9 Wall. 473 (19: 724); *Richmond* v. *Scott*, 48 Ind. 571.

But in all the cases in which the question was raised, under said section 5219, whether national bank shares can be taxed differently from "other (similar) moneyed capital,"—viz., state

bank shares,—it has been held, without exception, that the national bank shares are (under said section 5219), entitled to all the privileges enjoyed by the shares in the state banks.

See *City Nat. Bank* v. *Paducah*, 5 Cent. L. J. 347; S. C. Thomp. Nat. Bank Cas. 300; *Pollard* v. *State*, 65 Ala. 628; *Miller* v. *Heilbron*, 58 Cal. 133; *Loftin* v. *Citizens Nat. Bank*, 85 Ind. 341.

The Fourteenth Amendment prohibits discriminative taxation, unless discrimination is necessary, owing to the different natures of the taxables.

San Mateo County v. *Southern Pac. R. Co.* 13 Fed. Rep. 722; *Santa Clara County* v. *Southern Pac. R. Co.* 18 Fed. Rep. 385.

Messrs. **L. M. Fisher, C. A. Ficke,** and **E. E. Cook,** for defendants in error:

By the laws of Iowa, all real and personal property not exempted from taxation by sections 797, 798 and 800, Code of Iowa, is liable to taxation.

Code of Iowa, § 801.

The only forms of moneyed capital exempted by the sections referred to are the moneys and credits of public corporations and of scientific, literary, benevolent and religious institutions, and societies devoted exclusively to their support.

Id. § 797.

There is no federal question involved in this case and the writ of error must be dismissed.

Austin v. *Aldermen*, 74 U. S. 7 Wall. 694 (19: 224).

Are savings bank shares taxable?

Savings banks are corporations.

15 Gen. Assem. chap. 60, § 1; McClain's Code, p. 311.

"The stock of corporations and companies shall be assessed at their cash value."

Code of Iowa, § 813.

Moreover, taxation is the rule and exemption the exception, in considering the liability of property to taxation. Statutes are construed strictly against exemption.

Henkle v. *Keota*, 68 Iowa, 334; *Davenport Water Co.* v. *Davenport*, 64 Iowa, 55.

There is no statute of Iowa exempting the shares of savings banks from taxation. The exemption is only claimed by plaintiff from the following provision of the savings bank law:

15th Gen. Assem. chap. 60, § 28, McClain's Code, p 319; *Cook* v. *Burlington*, 59 Iowa, 251.

"Nothing (against the power of taxation) is to be taken by inference or presumption." "Where a doubt arises as to the existence of restrictions, it must be decided in favor of the State."

Bank of Commerce v. *Tennessee*, 104 U. S. 493 (26: 810).

The capital stock and the shares may both be taxed and it is not double taxation.

Farrington v. *Tennessee*, 95 U. S. 687 (24: 560); *Hoge* v. *Richmond & D. R. R. Co.* 99 U. S. 348 (25: 303).

If savings bank shares are nontaxable, is there a substantial discrimination against national bank shares?

U. S. v. *Union Pac. R. R. Co.* 91 U. S. 72 (23: 224); *Lionberger* v. *Rouse*, 76 U. S. 9 Wall. 468 (19: 721); *Mercantile Nat. Bank* v. *New York*, 121 U. S. 138 (30: 895); *Davenport Nat. Bank* v. *Board of Equalization*, 64 Iowa, 144.

It is not absolute equality that is contemplated by the Act of Congress. A rule which rests upon the ground that exact uniformity or equality of taxation cannot, in the nature of things, be expected or attained under any system.

Boyer v. *Boyer*, 113 U. S. 701 (28: 1092); *Board of Comrs.* v. *Elston*, 32 Ind. 27; *Champaign County Bank* v. *Smith*, 7 Ohio St. 42; *People* v. *Home Ins. Co.* 29 Cal. 533; *People* v. *Commissioners*, 71 U. S. 4 Wall. 244 (18: 344).

The method of taxing trust companies does not operate to tax national bank shares at a greater rate than the capital of trust companies, notwithstanding trust companies may deduct their nontaxable securities.

Mercantile Nat. Bank. v. *New York*, *supra*.

Has a material portion of moneyed capital been exempted from taxation?

Boyer v. *Boyer*, 113 U. S. 689 (28: 1089); *Adams* v *Nashville*, 95 U. S. 19 (24: 369).

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa.

The question presented grows out of the allegation on the part of the Bank, which is a national bank located in Iowa, that the shares of its stock are taxed at a rate which is in excess of the taxes levied upon other moneyed capital of the State. The foundation of this allegation is that the statute of the State on this subject taxes savings banks, one of which is in the same town with the plaintiff, on the amount of its paid up capital, and does not tax the shares of those banks held by the individual shareholders. The case, passing through the proper stages in the state tribunals, was decided by the supreme court against the plaintiff.

The proposition of counsel seems to be, that the capital of savings banks can be taxed by the State in no other way than by an assessment upon the shares of that capital held by individuals, because, under the Act of Congress, the capital of the national banks can only be taxed in that way. It is strongly urged that in no other mode than by taxing the stockholders of each and all the banks can a perfect equality of taxation be obtained. The argument is not conclusive, if the proposition were sound; for the Act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of the national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that, if the capital of the national banks were taxed at a much lower rate than other moneyed capital in the State, the banks would have no right to complain, and the law in that respect would not violate the provisions of the Act of Congress for the protection of national banks.

It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their

owners. All that has ever been held to be necessary is that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the Act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the Act of Congress.

In the case before us the same rate per cent is assessed upon the capital of the savings banks as upon the shares of the national banks. It does not satisfactorily appear from anything found in this record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the national banks. It is not a necessary nor a probable inference from anything in this system of taxation that it should be so, and it is not shown by any actual facts in the record that it is so. If then neither the necessary, usual or probable effect of the system of assessment discriminates in favor of the savings banks against the national banks upon the face of the statute, nor any evidence is given of the intention of the Legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional.

The whole subject has been recently considered by this court in the case of *Mercantile Bank* v. *New York*, 121 U. S. 138 [30: 895]. In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the Act of Congress in such a sense as to require that because they were exempted from taxation the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in *Hepburn* v. *School Directors*, 90 U. S. 23 Wall. 480 [23: 112], it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt.

It is unnecessary to inquire whether the savings banks of Iowa are based upon principles similar to those of New York which were the subject of the opinion in *The Mercantile Bank* v. *New York*, for while in that case the savings banks were exempt from taxation, the Iowa Statute imposes a tax upon them equal to that imposed upon the shares of the national banks. The whole subject is so fully reviewed and reconsidered in that opinion, delivered less than a year ago, that it would be but a useless repetition to go farther into the question.

The judgment of the Supreme Court of Iowa is affirmed.

LORENZO BULL ET AL. *Plffs. in Err.*,
v.
FIRST NATIONAL BANK OF KASSON ET AL.

(See S. C. Reporter's ed. 105-112.)

Bank check, what is—implied contract—check, when overdue—demand—set-off—current funds.

1. A regular bill of exchange may be in form similar to a bank check. But when the instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party named of a specified sum of money, which is at the time on deposit with the drawee without designating a future day of payment, the instrument is to be treated as a check rather than as a bill of exchange and the liability of parties thereto is to be determined accordingly.

2. A check implies a contract on the part of the drawer that he has funds in the hands of the drawee for its payment on presentation. If it is dishonored, the drawer is entitled to notice, but is not discharged from liability for the want of such notice unless he has sustained damages by the omission.

3. A check is not treated as overdue merely because it has not been presented as early as it might be, or as a bill of exchange is required to be to charge the drawer or indorser or transferrer. A check is not due until it is demanded.

4. Until such demand, the purchaser for a valuable consideration, without notice of any demand in the hands of the drawer against the person to whom the check is payable, is protected against its set-off.

5. The negotiability of a check is not affected by the fact that it is payable "in current funds."

[No. 32.]

Submitted May 3, 1887. Decided Oct. 31, 1887.

IN ERROR to the Circuit Court of the United States for the District of Minnesota. *Reversed.*

Reported below, 14 Fed. Rep. 612.

Statement by *Mr. Justice* **Field:**

This case comes before this court on a certificate of division of opinion between the circuit and district judges holding the Circuit Court of the United States for the District of Minnesota. The action was upon two drafts, or bills of exchange (as they are termed in the record), each for $500, drawn by the First National Bank of Kasson in Minnesota upon the Ninth National Bank in New York City, and payable to the order of A. La Due, of which the following are copies:

"The First National Bank,
"$500. Kasson, Minn., Oct. 15, 1881.
"Pay to the order of Mr. A. La Due five hundred dollars in current funds.
"No. 18956. E. E. FAIRCHILD, Cashier.
"To Ninth National Bank, New York City.
"Indorsed: Pay to the order of M. Edison, Esq. A. La Due. M. Edison."

"First National Bank,
$500. Kasson, Minn., Oct. 15, 1881.
"Pay to the order of Mr. A. La Due five hundred dollars in current funds.
"No. 18754. E. E. FAIRCHILD, Cashier.
"To Ninth National Bank, New York City.
"Indorsed: Pay to the order of M. Edison, Esq. A. La Due. M. Edison."

The drafts or bills of exchange were immediately after their execution transferred by indorsement of the payee to one M. Edison, at Kasson, Minnesota. Edison was at the time largely indebted, and on the following day he absconded from Kasson, carrying the drafts

with him. These drafts he retained in his possession until March 24, 1882, when, at Quincy, in Illinois, he sold and indorsed them for a valuable consideration to the plaintiffs, who had no notice of any set-off to them. The plaintiffs then forwarded them to New York City, where, on the 27th of March, they were presented for payment to the drawee, the Ninth National Bank of New York; and payment was refused by it. The drafts were then protested for nonpayment, and notice thereof given to the drawer and indorsers.

In the meantime the First National Bank of Kasson, the drawer of the drafts, had become the owner of certain demands against Edison, which, under the Statute of Minnesota, could be legally set off against its liability on the drafts in the hands of Edison, and also in the hands of the plaintiffs, unless they were protected against such set-off as innocent purchasers of the paper before maturity, and without notice of the set-off. At the time the drafts were drawn, and at the time of their presentation for payment, the Ninth National Bank of New York had in its hands money of the drawer sufficient to pay them.

The action was tried by the court without the intervention of a jury by stipulation of parties, and the facts stated above are embodied in its findings. Upon these facts the following question of law arose; viz., Whether the said drafts, or bills of exchange, were to be regarded as overdue and dishonored paper at the time they were presented by the plaintiffs to the drawee for payment and payment refused, so as to admit the set-off.

Upon this question the judges were divided in opinion, and, upon motion of plaintiffs, it was certified to this court for decision. The circuit judge who presided at the circuit, being of opinion that the question should be answered in the affirmative, ordered judgment for the defendant. To review this judgment, upon the certificate of division of opinion, the case is brought here on writ of error.

Mr. **Wm. McFadon,** for plaintiffs in error:

A bank cashier's check of the kind sued on in this case is not a bill of exchange at all, but is a bank check and subject to the laws governing bank checks.

Harrison v. *Wright*, 100 Ind. 515; *Planters Bank* v. *Keesee*, 7 Heisk. (Tenn.) 200; *Planters Bank* v. *Merritt*, Id. 198; *Lester* v. *Given*, 8 Bush, 357; *First Nat. Bank of Cincinnati* v. *Coates*, 8 McCrary, 9; *Rosenthal* v. *Mastin Bank*, 17 Blatchf. 318; 2 Dan. Neg. Inst. § 1567.

Being bank checks, the drawer bank is not discharged by any length of delay in presentment, at least not unless said drawer can show actual loss or injury to himself by reason of such delay,—as for example, by the failure of the drawee in the interval,—and then the discharge would only be *pro tanto*.

Morse, Banking, 2d ed. 260, 281; *Merchants Bank* v. *State Bank*, 77 U. S. 10 Wall. 647 (19:1019); *Robinson* v. *Hawksford*, 9 Ad. & E. N. S. 52; *Cogswell* v. *Rockingham Ten Cent Sav. Bank*, 59 N. H. 43; *Stewart* v. *Smith*, 17 Ohio St. 85; *Murray* v. *Judah*, 6 Cow. 490; *Little* v. *Phœnix Bank*, 2 Hill, 425; 2 Dan. Neg. Inst. § 1632.

A bank check is never overdue and dishonored until presentment thereof has been made to the drawee for payment, and payment thereof been refused by the drawee.

Merchants Bank v. *State Bank*, *supra*; Story, Prom. N. 3d ed. § 491; *Lester* v. *Given*, 8 Bush, 360; Morse, Banking, 2d ed. 283; Chitty, Bills, 7th Am. ed. 322; *Murray* v. *Judah*, 6 Cow. 489; *Strong* v. *King*, 35 Ill. 18.

The instrument as to the drawer is not due for set-off until such presentation shall have been first made.

McGough v. *Jamison*, 107 Pa. 342; *Shute* v. *Pacific Nat. Bank*, 136 Mass. 488; *Munger* v. *Albany City Nat. Bank*, 85 N. Y. 580; *Bellows Falls Bank* v. *Rutland County Bank*, 40 Vt. 377.

The doctrine of presentation of a check to the drawee within a reasonable time is one governing between indorser and indorsee when the question is as to the liability of the indorsee; but, as between the holder of such check and the drawer, this doctrine has no application where the drawee has remained solvent and the drawer has lost nothing by the delay, the reason being that the drawer is treated as the principal debtor.

Murray v. *Judah*, and *Little* v. *Phœnix Bank*, *supra*; Morse, Banking, 260, 281; Bigelow, Bills & Notes, 116 and cases cited; *Stewart* v. *Smith*, 17 Ohio St. 85; 2 Dan. Neg. Inst. § 1632.

In determining what is a reasonable time, regard will always be had to the character of the instrument.

Story, Bills, § 472; Bayley, Bills, 5th ed. chap. 7, § 1, p. 236; Chitty, Bills, 8th ed. chap. 9, p. 414; *National Newark Bkg. Co.* v. *Second Nat. Bank of Erie*, 63 Pa. 406; *Nutting* v. *Burked*, 48 Mich. 245; *Montelius* v. *Charles*, 76 Ill. 307; *Robinson* v. *Ames*, 20 Johns. 152, 153; *Nichols* v. *Blackmore*, 27 Tex. 586; *Jordan* v. *Wheeler*, 20 Tex. 698.

Dealing as we are with bank drafts, there was no such delay in presentation in this case as was unreasonable.

Laws v. *Rand*, 3 C. B. N. S. (91 E. C. L.) 447; *Robinson* v. *Hawksford*, 9 Ad. & E. N. S. (58 E. C. L.) 51; *Mullick* v. *Radakissen*, 28 Eng. L. & Eq. 28; *Rothschild* v. *Corney*, 9 Barn. & C. 388; *Sanford* v. *Mickles*, 4 Johns. 225; Story, Prom. N. § 491; *Stewart* v. *Smith*, 17 Ohio St. 85.

Bank drafts are not due until presented to the drawee.

Shute v. *Pacific Nat. Bank*, 136 Mass. 487.

No construction should be given to any statutes of Minnesota, authorizing set-offs, which would impair the value of bank drafts as circulating medium.

Merchants Bank v. *State Bank*, *supra*; *Peoples Bank of Wilkesbarre* v. *Legrand*, 103 Pa. 314; *Shute* v. *Pacific Nat. Bank*, *supra*.

On a check drawn upon a bank in which the drawee has funds, the Statute of Limitations only begins to run from the time of presentation for payment to the drawee and payment by him refused.

Wood, Lim. ed. 1883, § 140; *Shute* v. *Pacific Nat. Bank*, 136 Mass. 488.

The drawer of a draft, by the issue thereof, ought to be held to be estopped from impairing, by any act of his own, the value of such draft in the hands of any subsequent holder thereof.

Mandeville v. *Union Bank of Georgetown*, 13 U. S. 9 Cranch, 9 (3:639); *Emanuel* v. *Atwood*, 6 Port. (Ala.) 384; Parsons, Merc. Law, 90; *German Sav. Inst.* v. *Adae*, 8 Fed. Rep. 109; *First Nat. Bank of Cincinnati* v. *Coates*, 8 Fed. Rep. 540; 2 Dan. Neg. Inst. § 1643; *Roberts* v. *Corbin*, 26 Iowa, 327.

The words "current funds" are equivalent to current money and do not destroy the negotiability of the instrument.

Laird v. *State*, 61 Md. 309; *Klauber* v. *Biggerstaff*, 47 Wis. 560, overruling *Platt* v. *Sauk County Bank*, 17 Wis. 226; *Howe* v. *Hartness*, 11 Ohio St. 449; 1 Dan. Neg. Inst. § 56, and many cases cited.

Mr. **Charles C. Willson,** for defendants in error:

An instrument to be a bill of exchange must be payable in money, in such coin or national currency as is by law a legal tender in the payment of debts.

Not being payable in money but in current funds they were not bills of exchange, and the circuit court had not jurisdiction of this action.

Ex Parte Imeson, 2 Rose, 225; Byles, Bills, 92; *Irvine* v. *Lowry*, 39 U. S. 14 Pet. 293 (10:462); *Fry* v. *Rousseau*, 3 McLean, 106; *Hasbrook* v. *Palmer*, 2 McLean, 10; *Jones* v. *Fales*, 4 Mass. 245; *Texas Land & Cattle Co.* v. *Carroll*, 63 Tex. 48; *Haddock* v. *Woods*, 46 Iowa, 435; *Conwell* v. *Pumphrey*, 9 Ind. 136; *Lindsey* v. *McClelland*, 18 Wis. 482; *McCormick* v. *Trotter*, 10 Serg. & R. 94; *Little* v. *Phœnix Bank*, 2 Hill, 425; *Platt* v. *Sauk County Bank*, 17 Wis. 226; 1 Dan. Neg. Inst. §§ 55–58.

The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferrer is subject does not extend so far, in the absence of statute, as to admit set-offs which might be available against the transferrer.

Burrough v. *Moss*, 10 Barn. & C. 559; *Whitehead* v. *Walker*, 10 Mees. & W. 696; *Oulds* v. *Harrison*, 28 Eng. L. & E. 524; 2 Dan. Neg. Inst. §§ 1435–1437.

In Minnesota, in an action arising on contract, defendant may set off any other cause of action arising also on contract and existing at the commencement of the action.

Minn. Gen. Stat. 1878, chap. 66, § 97; chap. 65, § 40; *Linn* v. *Rugg*, 19 Minn. 181; *Martin* v. *Pillsbury*, 23 Minn. 175; Dan. Neg. Inst. § 1437; *Bond* v. *Fitzpatrick*, 4 Gray, 89, 92.

The federal circuit courts follow the rule as established in the State where the action is brought.

Partridge v. *Phœnix Mut. Ins. Co.* 82 U. S. 15 Wall. 573–580 (21: 229, 230).

The Federal Circuit Court for the District of Minnesota held that the bank had the right to make the set-off when sued upon these drafts.

Bull v. *First Nat. Bank of Kasson*, 14 Fed. Rep. 612.

The Supreme Court of Minnesota also held, in a suit upon another of this series of drafts, that the set-off must be allowed.

La Due v. *First Nat. Bank of Kasson*, 31 Minn. 33.

The draft is not past due until a reasonable time has elapsed in which to present it for payment in the due course of business.

Minn. Gen. Stat. 1878, chap. 23, § 11.

In the following cases the delay without a statutory rule was held fatal:

14 days: *Walsh* v. *Dart*, 23 Wis. 334.

21 days: *Phœnix Ins. Co.* v. *Gray*, 13 Mich. 191.

5 months: *Sice* v. *Cunningham*, 1 Cow. 397.

1 year: *Hart* v. *Eastman*, 7 Minn. 74.

11 days was in time: *National Newark Banking Co.* v. *Second Nat. Bank of Erie*, 63 Pa. 404.

By their terms, these bills were payable on demand, without grace.

1 Dan. Neg. Inst. § 617, note 6.

If the bills were not presented in a reasonable time for payment, so as to charge the indorser, then under the same circumstances, set-off against the dilatory holder can be maintained as against his transferee.

1 Dan. Neg. Inst. §§ 611, 617, 467, 418, 469.

These drafts, being payable on demand, should have been presented in a reasonable time. If not so presented, they are deemed overdue.

Herrick v. *Woolverton*, 41 N. Y. 581; 1 Dan. Neg. Inst. § 611.

The certificate of division of opinion does not state or set forth a question of law, but a mixed question of both law and fact.

Williamsport Nat. Bank v. *Knapp*, 119 U. S. 360 (30: 446); *Saunders* v. *Gould*, 29 U. S. 4 Pet. 392 (7: 897); *U. S.* v. *Bailey*, 34 U. S. 9 Pet. 267 (9: 124); *Weeth* v. *New England Mortgage Co.* 106 U. S. 605 (27: 99); *California A. S. Paving Co.* v. *Molitor*, 113 U. S. 609, 615–617 (28: 1106, 1109); *Waterville* v. *Van Slyke*, 116 U. S. 699–704 (29: 772, 774).

Mr. Justice **Field** delivered the opinion of the court, as follows:

In the record, the instruments upon which the action is brought are designated as "drafts or bills of exchange." In a general sense, they may be thus designated; for they are orders of one party upon another for the payment of money, which is the essential characteristic of drafts or bills of exchange. They are also negotiable, and pass by delivery, and are within the description of instruments of that character in the Act of March 3, 1875, prescribing the jurisdiction of Circuit Courts of the United States. But, in strictness, they are bank checks. They have all the particulars in which such instruments differ or may differ from regular bills of exchange. They are drawn upon a bank having funds of the drawer for their payment, and they are payable upon demand, although the time of payment is not designated in them. A bill of exchange may be so drawn, but it usually states the time of payment, and days of grace are allowed upon it. There are no days of grace upon checks.

The instruments here are also drawn in the briefest form possible in orders for the payment of money, which is the usual characteristic of checks. A bill of exchange is generally drawn with more formality, and payment at sight, or at a specified number of days after date, is requested, and that the amount be charged to the drawer's account. When intended for transmission to another State or country, they are usually drawn in duplicate or triplicate, and designated as first, second or third of exchange. A regular bill of exchange, it is true, may be

in a form similar to a bank check, so that it may sometimes be difficult, from their form, to distinguish between the two classes of instruments. But when the instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party named of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check rather than as a bill of exchange, and the liability of parties thereto is to be determined accordingly. If the instrument designates a future day for its payment, it is, according to the weight of authorities, to be deemed a bill of exchange, when, without such designation, it would be treated as a check. *Bowen* v. *Newell*, 8 N. Y. 190.

The instruments upon which the action is brought being bank checks, the liability of the parties is determinable by the rules governing such paper. A check implies a contract on the part of the drawer that he has funds in the hands of the drawee for its payment on presentation. If it is dishonored the drawer is entitled to notice, but, unlike the drawer of a bill of exchange, he is not discharged from liability for the want of such notice unless he has sustained damage, or is prejudiced in the assertion of his rights by the omission. In *Merchants' Bank* v. *State Bank*, 77 U. S. 10 Wall. 647, [19:1019], this court said: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawee. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud."

Similar language is used by *Mr. Justice* Story with reference to the time when checks are to be regarded as due. In stating the differences in point of law between checks and bills of exchange, he refers to the rule that a bill of exchange taken after the day of payment subjects the holder to all the equities attaching to it in the hands of the party from whom he receives it. "But," he adds, "this rule does not apply to a check, for it is not treated as overdue, although it is taken by the holder some days after its date, and it is payable on demand. On the contrary, the holder in such a case takes it, subject to no equities of which he has not, at the time, notice; for a check is not treated as overdue merely because it has not been presented as early as it might be, or as a bill of exchange is required to be, to charge the drawer, or indorser, or transferrer. One reason for this seems to be, that, strictly speaking, a check is not due until it is demanded." Prom. Notes, § 491. See also *Re Brown*, 2 Story, 502, 513.

Accepting these citations as correctly stating the law, the question presented for our decision is readily answered. The drawer was in no way injured or prejudiced in his rights by the delay of Edison to present the checks. The funds against which they were drawn remained undisturbed in the hands of the drawee, and therefore, the drawer had no cause of complaint. The instruments in suit were not overdue and dishonored when presented for payment. Until then the plaintiffs, as purchasers for a valuable consideration without notice of any demand against Edison, in the hands of the drawer, were protected against its set-off.

The certificate of division of opinion presents to us only one question, and yet, to answer that correctly, we must consider whether the negotiability of the instruments in suit was affected by the fact that they were payable "in current funds." Undoubtedly it is the law that, to be negotiable, a bill, promissory note or check, must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. *Irvine* v. *Lowry*, 39 U. S. 14 Pet. 293 [10:462]; *Miller* v. *Austen*, 54 U. S. 13 How. 218, 228 [14:119, 123]. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term "current funds" has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words.

It follows from these views that the question certified to us must be answered in the negative. The judgment will, therefore, be *reversed and the cause remanded*, with directions to enter judgment for the plaintiffs upon the findings; and it is so ordered.

PARKER & WHIPPLE COMPANY ET AL., *Appts.*, v. YALE CLOCK COMPANY ET AL.

(See S. C. Reporter's ed. 87-104.)

Reissued letters patent—when invalid—question for the court—amended specification—Act of 1870—enlargement of claim—defense—general statement—void patent.

1. Reissued letters patent must be for the same invention.
2. Where it appears on a comparison of the two instruments, as matter of law, that the reissued

patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as the commissioner in granting a new patent exceeded his jurisdiction.

2. Whether a reissued patent is for the same invention as that embodied in the original patent or for a different one is a question for the court in an equity suit, to be determined as a matter of construction, on a comparison of the two instruments, aided, if necessary, by the testimony of expert witnesses.

4. The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee; but the invention must be the same. A patent cannot be amended so as to cover improvements which have come into use or been invented by others after its issue.

5. The last clause of section 53 of the Act of 1870 relates to the matter of evidence alone, and cannot enlarge the power of the commissioner in reference to the invention for which a reissue may be granted.

6. A patent cannot be reissued to enlarge the claim unless there has been a clear mistake, inadvertently committed, in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted.

7. It is a good defense in a suit on a reissued patent to show that the commissioner exceeded his authority in granting it.

8. The statement in the original specification of the object of an invention, in general terms, cannot have the effect of making the reissue one for the same invention as that of the original, when it otherwise would not be.

9. The invention described in the first eight claims of the reissued letters patent No. 10062, granted March 14, 1882, to Arthur E. Hotchkiss for improvements in clock movements, is different from that which was the subject of the original patent, and the statute in regard to reissues forbids such a radical transformation of the patent.

[No. 18.]

Argued Oct. 20, 1887. Decided Oct. 31, 1887.

APPEAL from the Circuit Court of the United States for the District of Connecticut. *Affirmed.*

Reported below, 21 Blatchf. 485.

The facts of the case are fully stated in the opinion.

Messrs. **Charles E. Mitchell** and *John K. Beach*, for appellants:

It is conceded that expanded claims, even within the limits of the original invention, are void if the application for correction is unreasonably delayed.

Miller v. *Bridgeport Brass Co.* 104 U. S. 350 (26: 783).

That a patent for a process cannot be reissued into a patent for a composition.

Giant Powder Co. v. *California Powder Works*, 98 U. S. 126 (25: 77).

That a patent for a machine cannot be reissued for a process of operating that class of machines.

James v. *Campbell*, 104 U. S. 356 (26: 786); *Heald* v. *Rice*, 104 U. S. 737 (26: 910); *Wing* v. *Anthony*, 106 U. S. 142 (27: 110).

That new matter cannot be introduced, such as would have the effect of changing the invention.

Giant Powder Co. v. *California Powder Works*, 98 U. S. 126, 138 (25: 77, 81).

Errors and inperfections may be corrected, and with that view the commissioner may allow the patentee to redescribe his invention.

Tucker v. *Tucker Mfg. Co.* 10 Off. Gaz. 464; *Gill* v. *Wells*, 89 U. S. 22 Wall. 2 (22: 699); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Bantz* v. *Frantz*, 105 U. S. 160 (26: 1013); *Corn-planter Patent*, 90 U. S. 23 Wall. 181 (23: 161); *Herring* v. *Nelson*, 14 Blatchf. 293; *Gage* v. *Herring*, 107 U. S. 640 (27: 601); *Moffitt* v. *Rogers*, 106 U. S. 423 (27: 76).

Surrenders are allowed in order that what was imperfect before may be made perfect, and in order that what was before ambiguous may be made clear and certain; and, for that purpose, the patentee may add whatever was substantially suggested or indicated in the original specifications, drawings, or Patent-Office model.

Stevens v. *Pritchard*, 10 Off. Gaz. 505; *Christman* v. *Rumsey*, 17 Blatchf. 155; *Potter* v. *Stewart*, 18 Blatchf. 562.

If the reissued patent does not, upon the face of the instrument, embrace anything not substantially described, suggested, or indicated in the specifications, drawings, or model of the original, the defense that the reissued patent is not for the same invention as the original must be overruled.

American Diamond Rock Boring Co. v. *Sheldon*, 17 Blatchf. 213; *Thomas* v. *Shoe Machinery Mfg. Co.* 16 Off. Gaz. 541; *Swain Turbine & Mfg. Co.* v. *Ladd*, 102 U. S. 408 (26: 184); *Miller* v. *Bridgeport Brass Co. supra; Matthews* v. *Boston Machine Co.* 105 U. S. 54 (26: 1022); *Clements* v. *Odorless Excav. App. Co.* 109 U. S. 641 (27: 1060); *McMurray* v. *Mallory*, 111 U. S. 97 (28: 365); *Turner* v. *Dover Stamping Co.* Id. 319 (28: 442. See also *Mahn* v. *Harwood*, 112 U. S. 354 (28: 665); *Torrent & Arms Lumber Co.* v. *Rodgers*, Id. 659 (28: 842); *Wollensak* v. *Reiher*, 115 U. S. 96 (29: 350); *Eachus* v. *Broomall*, Id. 429 (29: 419); *Kerosene Lamp Heater Co.* v. *Littell*, 18 Off. Gaz. 1009.

The validity of the reissue depends upon the fact whether the patents are for the same invention, and the identity of the invention must be determined by the drawings and specifications construed together.

Searls v. *Worden*, 21 Off. Gaz. 1955.

Mr. C. R. Ingersoll, for appellees:

The specification of the reissued patent is almost entirely of new matter; and the reissued patent is therefore void. There is nothing of patentable novelty in the inventions claimed by the first eight claims of the reissued patent.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of Connecticut, by the Parker and Whipple Company, a corporation of Connecticut, and Arthur E. Hotchkiss, against the Yale Clock Company, a corporation of Connecticut, and Henry C. Shelton, Frederick A. Lane, and Paschal Converse, directors of the latter Company. The suit is founded on reissued letters patent No. 10062, granted March 14, 1882, to Arthur E. Hotchkiss, for improvements in clock movements, on an application for a reissue filed July 19, 1881, the orginal patent, No. 221310, having been granted to Hotchkiss, November 4, 1879, on an application filed July 29, 1879, and a prior reissue, No. 9656, having been granted April 12, 1881.

The circuit court dismissed the bill, upon the ground that the invention described in the first eight claims of the reissue, which are the

claims alleged to have been infringed, was an invention of which no trace was to be found in the original specification, and was manifestly other and different from that which was the subject of the original patent, and that the statute in regard to reissues forbids such a radical transformation of a patent as was attempted in this case. 21 Blatchf. 485. The plaintiffs have appealed to this court.

The circumstances of this case are so well stated in the opinion delivered by *Judge* Shipman, holding the circuit court, that we adopt his language as follows:

"At the date of the invention, expensive clocks of tiny size were being made, which met with favor from the public. They were convenient and attractive, and the main object of the patentee (the original specification says a leading object) was to make a good time keeping clock of the like small size, which could be furnished to the public at the small price which characterizes the manufacture of Connecticut clocks. The clock was devised for this end, unquestionably with much study and painstaking, and I shall assume that the invention, as claimed in the reissue, was both novel and patentable. Much skill and ingenuity have been displayed in attacking and defending these contested points, but, as I think that a vital point of the plaintiffs' case depends upon the validity of the reissue, I shall confine myself to that question.

"The patentee, in his original specification, stated the nature of his invention as follows: 'This invention relates to that class of timekeepers in which a fixed annular rack or internally toothed wheel is employed to aid a spring barrel in rotating the train of wheels. The nature of said invention consists, partly, in the combination of a fixed internally toothed circular rack and a concentric going barrel or plate with a mainspring, a transmitting wheel rotating with said barrel, and a fixed clock movement. It also consists in arranging the operating parts of the timepiece on a fixed plate, and attaching the same to the back of the clock case by means of tongues which extend out from said plate through perforations in the back of said case. It also consists in providing said tongues with broad shoulders, which cause said plate to stand out from the back of the clock case, so as to leave space for the mainspring between them. It also consists in the combination of a mainspring having a perforated end with a lateral finger extending from the broad part of one of said tongues, whereby said mainspring is firmly held at its fixed end, yet easily detached. It also consists in the combination with a fixed plate, which confines the mainspring and supports the movement, of a rotating plate arranged in front of said fixed plate, and provided with a hub which extends through said fixed plate and is connected to the winding end of the mainspring. It also consists in adapting to and combining with the hub thus constructed, a key having a screw threaded winding part for engaging with said hub, and a recessed part for engaging with the prismatic end of the centre shaft. It also consists in constructing the annular rack or internally toothed wheel with an annular recess for receiving the pillar plate, and thereby economizing space. It also consists in constructing the pillar plate and pillars in one piece, and attaching said pillars to the front plate by twisting them. It also consists in substituting an automatic winding dog, operating like an escapement verge, for the click and spring ordinarily used. It also consists in constructing the case with an opening at the bottom and adapting the key and the adjusting nut of the pendulum ball to one another, so that the adjustment of the said ball may be effected conveniently from the outside of the case. It also consists in providing said ball with a spring which will force it down into place and with a guide which will prevent it from turning.' The twelve claims of the original patent were confined to these details thus enumerated in the specification.

"In March, 1880, the Parker & Whipple Company entered into a contract with the Yale Clock Company to manufacture the Hotchkiss clock, at a stipulated price per clock, the licensees furnishing the dies and tools for such manufacture. About 50,000 clocks were made by the defendants and delivered to the licensees between June 17 and December 27, 1880. During this period the defendant Frederick A. Lane, superintendent of the Yale Clock Company, made the infringing clock. It did not contain a single patented feature of the Hotchkiss clock, but in respect to every other leading feature the parts of the two clocks are interchangeable. The Lane clock was immediately patented, was put upon the market and is being manufactured by the Yale Clock Company.

"An examination of the Hotchkiss patent showed that the vital parts of the invention were not alluded to in the specification or in the claims. Perhaps the fact that the clock had three wheels and their position might have been understood by an expert, from drawing No. 6. That drawing was not made for the purpose of showing the wheels, and it is manifest, from the specification, that the patentee did not suppose they had anything to do with his invention, which he did suppose lay entirely in other parts of the clock. The model showed a completed clock, and contained whatever was and was not invented by Hotchkiss.

"In the specification of the second reissue, the patentee omitted the entire description which has been quoted, and inserted the following: 'My invention relates to an improvement in clock movements, the object being to make a clock movement which shall be simple and durable in its construction, of small initial cost in manufacture, and the several parts of which shall be relatively arranged in such manner that the movement may be inclosed in a small and compact case. To this end, the invention consists essentially in dividing the train into two parts; in arranging the divisions of the train in a frame having three plates; in providing an additional wheel and pinion between the escape wheel and centre wheel; in making the three wheels between the escape wheel and centre wheel with the same number of teeth and of the same size; in arranging the pivots of the three arbors, carrying the three like wheels and pinions, between the escape wheel and centre wheel, in the circumferences of circles which are concentric with the centre arbor;

and in other minor improvements, as the invention is hereinafter more fully described, and explained by reference to the drawings. In accordance with this statement, the plaintiffs' experts claimed, upon the trial, that the invention consisted generally in the division of the train into two parts, by means of a frame having three plates, the point of division being between the centre wheel and the centre pinion; and, secondly, in the arrangement, between the centre wheel and the escape wheel, of three wheels which are driven by the centre wheel, in the circumference of a circle which is concentric to the centre arbor, the three wheels being arranged on a semicircle concentric to the centre pinion. This general outline of the invention is stated with accuracy and completeness in eight claims of the reissue, four of which relate to the division of the train into two parts, in a frame having three plates, while the other four relate to the arrangement of the three wheels. The 10th and 11th claims relate to details which were specified in the original patent, but which are not used by the defendants. The defendants infringe the first eight claims.

"The position of the plaintiffs is that the invention of the reissue was the invention of Hotchkiss, and was shown in the model accompanying the original application for a patent, and that, therefore, the description in the reissue is not to be regarded as new matter, but as a correction of a misstatement in the description contained in the original specification.

"The defendants, making no point in regard to laches in applying for a correction of the original patent, deny the plaintiffs' premise and conclusion. They deny the premise, because they say that the original description limited the invention to that class of timekeepers in which a fixed annular rack or internally toothed wheel is employed to aid a spring-barrel in rotating the train of wheels, and that this construction only was shown in the model, and that the importance of the Lane invention consisted in the abandonment of the 'planet wheel' and the substitution therefor of the ordinary mainspring.

"If the premise was true, they deny the conclusion, because it is a fact, the truth of which is apparent, that, in the original specification and drawings, the patentee gave no hint that he regarded the construction described in any one of the first eight claims of the reissue as forming any material or immaterial part of his invention."

On these premises, the court said that "the eight claims which are in controversy are a total abandonment of the principles which are stated in the original patent to be those of the invention, and are an introduction into the reissue of a subject matter which has no relation to the original patent, except that each patent relates to clocks."

The original patent contained twelve claims, in these words:

"1. In combination with a fixed circular rack and a stationary clock movement, a plate rotated by the mainspring and carrying a device which connects the rack and movement, substantially as and for the purpose set forth.

"2. A perforated clock case back, in combination with a base plate for the movement, said base plate being provided with flexible claws, which may pass through the perforations in said clock case back, substantially as and for the purpose set forth.

"3. In combination with mainspring B, perforated at *b*, the lateral attaching finger *c* on flange C' of plate C, said parts being constructed and applied substantially as and for the purpose set forth.

"4. In combination with mainspring B, the fixed plate C and its flanges, C', forming a barrel for said spring, but allowing inspection of the latter between the flanges C', substantially as set forth.

"5. In combination with mainspring B and fixed plate C, the rotating plate F and its hub G, said hub extending through plate C for the attachment of the spring, substantially as set forth.

"6. In combination with ratchet V, a verge like automatic winding dog U, held in proper position for catching by the forward motion of said ratchet.

"7. In combination with a pillar plate, a fixed circular rack having an annular inner recess to receive said plate, whereby said rack serves also the purpose of attaching said plate, and the said parts are made to occupy the least possible space.

"8. In combination with a perforated front plate a rear pillar plate, having twisted tongues on the ends of its pillars, whereby said plates and pillars are clamped together, substantially as set forth.

"9. In combination with a pendulum rod and adjustable pendulum ball, a spring arranged to force said ball down against the adjusting nut.

"10. In combination with a pendulum rod and an adjustable pendulum ball, a spring fitted into a recess of said ball and operating to force the latter down against the said nut.

"11. In combination with the adjusting nut of a pendulum, a clock case bottom, perforated at A^2, and a key having a prismatic recess fitting said nut, whereby the height of the pendulum ball may be adjusted by the key from the outside of the clock case, substantially as set forth.

"12. In combination with a hollow internally threaded winding hub, G, a key having a screw threaded portion for engaging with said hub, and a prismatically recessed portion for passing through said hub and engaging with the center shaft."

The reissue contains ten claims, as follows:

"1. In a clock movement having a frame consisting of three plates suitably connected together, a train which is divided into two parts, a front part and a back part, the front part arranged between the front and middle plates of the frame, and the back part arranged between the middle and back plates of the frame, the point of division being between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute hand, as set forth.

"2. In a clock movement having a frame consisting of three plates suitably connected together, the middle plate of the frame, the said middle plate dividing the train into two parts between the centre wheel and centre pinion, the said centre wheel and centre pinion being ar-

ranged on the centre arbor carrying the minute hand, as set forth.

"8. In a clock movement, a frame consisting of three plates suitably connected together, the middle plate of which divides the train into two parts between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute hand, and the frame having the parts of the divided train arranged between its three plates, as set forth.

"4. In a clock movement having a frame consisting of three plates suitably connected together, a centre arbor carrying the minute hand and provided with a centre wheel and centre pinion, the wheel arranged between the front and middle plates of the frame, and the pinion arranged between the middle and back plates of the frame, as set forth.

"5. The improvement in a clock train, consisting of three wheels suitably fastened on arbors carrying pinions, and arranged between the escape wheel and its arbor carrying a pinion, and the centre arbor carrying the centre wheel and centre pinion, as set forth.

"6. The improvement in a clock train, consisting of three wheels having the same number of teeth, and the same diameters, suitably fastened on arbors, the pivots of which are arranged in the circumferences of circles concentric with the centre arbor, the several arbors carrying pinions having the same number of leaves and the same diameters, all the said parts arranged between the escape wheel and its arbor carrying a pinion, and the centre arbor carrying the centre wheel and centre pinion, as set forth.

"7. The improvement in a clock train, consisting in the arrangement of the pivots of the escape wheel arbor and of the pivots of the three arbors carrying the three wheels and the three pinions between the escape wheel arbor and the centre arbor carrying the centre wheel and centre pinion, in a semicircle, as set forth.

"8. In a clock movement, the combination, with a train divided into two parts, a front part and a back part, by the middle plate of a frame having three plates, the division being made between the centre wheel and centre pinion, the said centre wheel and centre pinion being arranged on the centre arbor carrying the minute hand, the escape wheel being arranged in the front part of the train and near the top of the frame, and the pivots of the front part of the train being arranged within a semicircle, of a pendulum attached to an arbor near the top of the frame and vibrating in a plane passing between the front and middle plates of the frame, as set forth.

"9. In a clock movement provided with a circular rack, the circular disk F, rotated by the mainspring and carrying the planet wheel E only, which connects the rack with the centre pinion as set forth.

"10. In combination with a pendulum rod provided with the plate S, fastened to the rod, a spring arranged on the rod, to hold the pendulum ball against the adjusting nut, as set forth."

The appellants contend that the first eight claims of the reissue do not specify any invention which is not contained in the clock described in the original patent and embodied in the model originally deposited in the Patent Office, and that the drawings of the original and of the reissued patent are substantially the same. On these premises it is argued for the appellants, that it is lawful to include in the claims of a reissue whatever is suggested, or substantially indicated, in the specification, model or drawings of the original patent, if the applicant was the original and first inventor thereof, and that such a reissue will, therefore, be for the same invention as that of the original patent.

Expressions in some opinions of this court, wrested from their context and interpreted in a different sense from that in which they were used, are cited to support these views; but the language of the court on the subject has steadily been to the contrary, and, as the question arises so distinctly in this case, and some misapprehension exists in regard to it, it seems proper to discuss it with some fullness.

The first statutory provision for the reissue of patents was made by the 3d section of the Act of July 8, 1832, chap. 162, 4 Stat. at L. 559. It provided for the reissue in certain cases "for the same invention." This provision of the Act of 1832 was superseded by section 13 of the Act of July 4, 1836, chap. 357, 5 Stat. at L. 122, which provided "that whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new; if the error has, or shall have, arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention."

This provision of the Act of 1836 was in turn superseded by section 53 of the Act of July 8, 1870, chap. 230, 16 Stat. at L. 205, which provided "that whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee." This provision of the Act of 1870 was enacted in the same language in section 4916 of the Revised Statutes, and was the provision of law in force when the reissue in the present case was granted.

It is thus seen that in all the statutes on the subject of reissues, the only authority granted to the commissioner is one to issue a new patent "for the same invention."

The provision of the Statute of 1836 has been before this court in numerous cases. In *Burr* v. *Duryee*, 68 U.S. 1 Wall. 531, 577 [17:650, 660], at December Term, 1863, this court, speaking by *Mr. Justice* Grier, said: "The surrender of valid patents, and the granting of reissued

patents thereon, with expanded or equivocal claims, where the original was clearly neither 'inoperative nor invalid,' and whose specification is neither 'defective or insufficient,' is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more 'available' for the suppression of all other inventions."

The case of *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 [20:83], was before this court at December Term, 1870. The answer set up, as a defense, that the reissued patents sued on were void, because not granted for the same invention as that embodied in the original patents. The court overruled the defense on the ground stated by it, p. 546 [39], that the original patents were not in evidence in the case. Notwithstanding this, the opinion, delivered by *Mr. Justice* Clifford, said: "Reissued letters patent must, by the express words of the section authorizing the same, be *for the same invention*, and consequently where it appears on a comparison of the two instruments, as matter of law, that the reissued patent is not for the same invention as that embraced and secured in the original patent, the reissued patent is invalid, as that state of facts shows that the commissioner, in granting the new patent, exceeded his jurisdiction. Power is unquestionably conferred upon the commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention and to include in the description and claims of the patent not only what was well described before, but whatever else was suggested or substantially indicated in the specification or drawings which properly belonged to the invention as actually made and perfected. Interpolations of new features, ingredients, or devices, which were neither described, suggested, nor indicated in the original patent, or patent office model, are not allowed, as it is clear that the commissioner has no jurisdiction to grant a reissue unless it be for the same invention as that embodied in the original letters patent, which necessarily excludes the right on such an application to open the case to new parol testimony and a new hearing as to the nature and extent of the improvement, except in certain special cases, as provided by a recent enactment not applicable to the case before the court. Corrections may be made in the description, specification, or claim where the patentee has claimed as new more than he had a right to claim, or where the description, specification, or claim is defective or insufficient, but he cannot under such an application make material additions to the invention which were not described, suggested, nor substantially indicated in the original specifications, drawings, or patent office model. * * * Letters patent reissued for an invention substantially different from that embodied in the original patent are void and of no effect, as no jurisdiction to grant such a patent is conferred by any Act of Congress upon the commissioner, and he possesses no power in that behalf except what the Acts of Congress confer. Whether a reissued patent is for the same invention as that embodied in the original patent, or for a different one, is a question for the court in an equity suit to be determined as a matter of construction, on a comparison of the two instruments, aided or not by the testimony of expert witnesses, as it may or may not appear that one or both may contain technical terms or terms of art requiring such assistance in ascertaining the true meaning of the language employed."

In these extracts from the opinion it is seen that the court adheres strictly to the view, that, under the statute, the commissioner has no jurisdiction to grant a reissued patent for an invention substantially different from that embodied in the original patent, and that a reissue granted not in accordance with that rule is void. In what is there said about redescribing the invention, and about including in the new description and new claims what was suggested or indicated in the original specification, drawings or patent office model, it is clearly to be understood, from the entire language, that the things so to be included are only the things which properly belonged to the invention as embodied in the original patent; that what that invention was is to be ascertained by consulting the original patent; and that, while the new description may properly contain things which are indicated in the original specification, drawings or patent office model (though not sufficiently described in the original specification), it does not follow that what was indicated in the original specification, drawings or patent office model is to be considered as a part of the invention, unless the court can see, from a comparison of the two patents, that the original patent embodied, as the invention intended to be secured by it, what the claims of the reissue are intended to cover.

In what was thus said in *Seymour* v. *Osborne* there is no warrant for the view, that, *ex vi termini*, what was suggested or indicated in the original specification, drawings or patent office model is to be considered as a part of the invention intended to have been covered by the original patent, unless the court can see, from a comparison of the two patents, that the invention which the original patent was intended to cover fairly embraced the things thus suggested or indicated in the original specification, drawings or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent.

The "recent enactment" referred to in *Seymour* v. *Osborne* is found in section 53 of the Act of July 8, 1870, in these words: "But no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid." This provision is now found in the same words, in section 4916 of the Revised Statutes. The last clause of it has no application to the present case, and, therefore, its proper construction need not be considered.

The case of *Gill* v. *Wells*, 89 U. S. 22 Wall. 1 [22:699], at October Term, 1874, arose under the Act of 1836. In that case, this court, speaking by *Mr. Justice* Clifford, said. p. 19 [708]: "Invalid and inoperative patents may be surrendered and reissued for the same invention, but Congress never intended that a patent which was valid and operative should be reissued merely to afford the patentee an opportunity to expand the exclusive privileges which it secures, to enable him to suppress subsequent improvements which do not conflict with the invention described in the surrendered patent. Evidence of a decisive character to negative the theory that such a practice finds any support in the Act of Congress, besides what existed before, is found in the new Patent Act," the Act of July 8, 1870, section 53, "which expressly provides that no new matter shall be introduced into the specification; and in case of a machine patent, that neither the model nor the drawings shall be amended except each by the other."

In the case of *Giant Powder Co.* v. *California Powder Works*, 98 U. S. 126 [25:77], at October Term, 1878, this court, speaking by *Mr. Justice* Bradley, said, p. 137 [81], in reference to the reissued patents in that case: "These reissues, being granted in 1872, were subject to the law as it then stood, being the Act of July 8, 1870, the fifty-third section of which (reproduced in section 4916 of the Revised Statutes) relates to the matter in question. It seems to us impossible to read this section carefully without coming to the conclusion that a reissue can only be granted for the same invention which formed the subject of the original patent of which it is a reissue. The express words of the Act are 'a new patent for the same invention;' and these words are copied from the Act of 1836, which in this respect was substantially the same as the Act of 1870. The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee; but the invention must be the same. So particular is the law on this subject, that it is declared that 'no new matter shall be introduced into the specification.' This prohibition is general, relating to all patents; and by 'new matter' we supposed to be meant new substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue. The Legislature was willing to concede to the patentee the right to amend the specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby, in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived. For such inventions he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the mean time. This, we think, is what the present statute means, and what, indeed, was the law before its enactment under the previous Act of 1836. If decisions can be found which present it in any different aspect, we cannot admit them to be correct expositions of the law. The counsel for the complainant refers us to and places special reliance on the last clause of section 53 of the Act of 1870, where it is said: 'But where there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake.' But this clause relates only to the evidence which may be employed by the commissioner in ascertaining the defects of the specification. It does not authorize him to grant a reissue for a different invention, or to determine that one invention is the same as another and different one, or that two inventions essentially distinct constitute but one. In this case, it is not necessary for us to decide, and we express no opinion as to the precise meaning and extent of the final clause of section 53, to which we have referred; as, whether it relates to all patents, or only to patents for machines. But as it relates to the matter of evidence alone it cannot enlarge the power of the commissioner in reference to the invention for which a reissue may be granted. That power is restricted, by the general terms of the section, to the same invention which was originally patented."

If, by "new matter," in section 4916 of the Revised Statutes, is meant such new substantive matter as might be the subject of another application for a patent, there was new substantive matter introduced into the specification of the reissue in the present case; for the description set forth in that specification as the foundation for the first eight claims in it, and those eight claims themselves, might have been the subject of another application for a patent at the time the original patent was applied for and taken out, leaving that patent valid and operative in respect to the claims it covered.

In the present case, the infringing clock was made by the defendant Lane more than six months before the reissue in suit was applied for. As stated by the circuit court in its opinion in this case, the Lane clock did not contain a single patented feature of the Hotchkiss clock, and it was immediately patented and put upon the market. This, therefore, is a case of the amendment of a patent so as to cover improvements not covered by the patent, and which came into use by others than the patentee and his licensee, free from the protection of the patent.

There is no evidence of any attempt to secure by the original patent the inventions covered by the first eight claims of the reissue, and those inventions must be regarded as having been abandoned or waived, so far as the reissue in question is concerned, subject, however, to the right to have made a new application for a patent to cover them; in other words those eight claims are not for the same invention which was originally patented.

In *Mahn* v. *Harwood*, 112 U. S. 354, 359 [28:665, 667], at October Term, 1884, it was said by this court, speaking by *Mr. Justice* Bradley: "In this very matter of reissued patents, it has

also been frequently decided that it is a good defense, in a suit on such a patent, to show that the commissioner exceeded his authority in granting it. Such a defense is established by showing that the reissued patent is for a different invention from that described in the original, inasmuch as the statute declares that it must be for the same invention."

The same view was taken in *Coon* v. *Wilson*, 113 U. S. 268, 277 [28: 963, 965], at October Term, 1884, a case substantially like the present one, where it was said: "Although this reissue was applied for a little over three months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent, by repeating that claim and adding others; where no mistake or inadvertence is show, so far as the short or sectional bands are concerned; where the patentee waited until the defendants produced their continuous band collar, and then applied for such enlarged claims as to embrace the defendants' collar, which was not covered by the claim of the original patent; and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original. As the rule is expressed in the recent case of *Mahn* v. *Harwood* [*supra*], a patent 'cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim and the application for a reissue is made within a reasonably short period after the original patent was granted.' But a clear mistake, inadvertently committed in the wording of the claim is necessary, without reference to the length of time. In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing, so ingeniously worded as to cover collars with continuous long bands and which have no short or sectional bands." See also *Ives* v. *Sargent*, 119 U. S. 652, 662, 663 [30: 544, 548].

Reference was made on the argument to language used by *Mr. Justice* Bradley, in delivering the opinion of this court in the case of the *Corn-planter Patent*, 90 U. S. 23 Wall. 181, 217 [23: 161, 168], where he said: "It may be remarked in passing, that, in our view, the several reissues are for things contained within the machines and apparatus described in the original patents." The reissues referred to were sustained by this court. There is nothing in the remark thus made to show that the court did not find the reissues to be for the same inventions as the original patents, consistently with the views contained in the other cases above referred to, or that the court did not follow those views in deciding that case.

Comment is made by the appellants upon the fact that the original specification states that the "mainspring occupies the whole back of the space occupied by the works, so as to give the greatest running power with the least possible expense of room, one of the leading objects of my invention being to render it possible to make a cheap, neat, and satisfactory timepiece of unusually small size;" and upon the further fact that the specification of the reissue states that the invention has for its object "to make a clock movement which shall be simple and durable in its construction, of small initial cost in manufacture, and the several parts of which shall be relatively arranged in such manner that the movement may be inclosed in a small and compact case." It is urged that every one of the claims of the reissue responds to the object of making a cheap and small but satisfactory timepiece. But this statement, in the original specification, of the object of the invention, in such general terms, cannot have the effect of making the reissue one for the same invention as that of the original, when it otherwise would not be. Such a general statement contained no intimation that the invention consisted in the matters covered by the first eight claims of the reissue.

The decree of the Circuit Court is affirmed.

JOHN A. COAN, *Plff. in Err.*,

v.

WILLIAM J. FLAGG.

(See S. C. Reporter's ed. 117-131.)

Patent for land—excessive surveys—Act of May 20, 1826—cession to State of Ohio—military tract—Virginia warrants—Ohio Agricultural and Mechanical College—letters as evidence.

1. The second section of the Act of July 7, 1838, 5 Stat. at L. 302, forbids the issuing of a patent upon a survey calling for a greater quantity of land than the party is entitled to by virtue of the warrant; and in such case, it being the duty of the department to refuse the patent, the right of the applicant is merely to withdraw his survey, and resurvey his location, excluding such surplus quantity.

2. The proviso in the Act of March 23, 1807, 4 Stat. at L. 92, cannot have the effect of establishing excessive surveys, whether by mistake or design, as binding on the government so as to vest an equitable estate in the holder of the warrant, and entitle him to a patent for the whole or a part of the survey.

3. The second section of the Act of May 20, 1826, 4 Stat. at L. 189, is limited in its operation to cases provided for by the preceding section and therefore ceased to operate after the dates therein mentioned.

4. The meaning of the Act of Feb. 18, 1871, seems to be to grant to the State of Ohio all the lands in the Virginia military district which had not, at that time, been legally surveyed and sold by the United States, in that sense of the word which conveys the idea of having parted with a beneficial title.

5. At the date of the Act of Feb. 18, 1871, the time within which it was competent to appropriate any of the lands to the satisfaction of warrants issued by the State of Virginia had expired. The trust had been satisfied and may be regarded as having been extinguished.

6. The fourth section of the Act of May 27, 1880, has the legal operation and effect of confirming and ratifying previous titles made by the Ohio Agricultural and Mechanical College, under the Act of Feb. 18, 1871.

7. It was essential to the vesting of any interest under an entry and survey within the Virginia military land district, made prior to January 1, 1852, that the survey should be returned to the Commissioner of the General Land-Office at Washington on or before that date; the failure to do so discharged the land from any claim founded on such location and survey.

8. Copies of official letters written by the Commissioner of the General Land-Office, sworn to by a witness who was a clerk in such office and ac-

quainted with the facts, are evidence of his decisions, when written by him to the parties interested.

[No. 21.]

Submitted Oct. 20, 1887. Decided Oct. 31, 1887.

IN ERROR to the Supreme Court of the State of Ohio. *Affirmed.*

Reported below, 38 Ohio St. 156.

Messrs. **Charles King, Wm. B. King, A. C. Thompson** and **N. W. Evans,** for plaintiff in error:

Under the proviso of 1807 a survey once made, no matter how informal, appropriated the land located and withdrew it from subsequent location.

McArthur v. *Dun*, 48 U. S. 7 How. 262 (12: 693); *Jackson* v. *Clark*, 26 U. S. 1 Pet. 628 (7: 290); *Galloway* v. *Finley*, 37 U. S. 12 Pet. 264 (9:1079); *Parker* v. *Wallace*, 3 Ohio, 490; *Stubblefield* v. *Boggs*, 2 Ohio St. 217; *Thomas* v. *White*, Id. 540; *Price* v. *Johnston*, 1 Ohio St. 394.

A surplus does not vitiate a survey.

Taylor v. *Brown*, 9 U. S. 5 Cranch, 249 (3: 92); *Beckley* v. *Bryan*, Sneed (Ky.), 91; *Johnson* v. *Buffington*, 2 Wash. (Va.) 116; *Holmes* v. *Trout*, 32 U. S. 7 Pet. 208 (8: 660); *Saum* v. *Latham*, Wright (Ohio), 309; *Gill* v. *Towler*, 3 Ohio, 209.

Either the title passed under the cession of February 18, 1871, or it is still in the United States, in trust for the owner of the survey.

If it be admitted that the cession of February, 1871, conveyed this land to the State of Ohio, and with the decision of the commissioner was equivalent to a patent, yet the equities of the owner of the survey can be asserted and protected.

Marquez v. *Frisbie*, 101 U. S. 473 (25:800); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 73 (20: 485); *Bird* v. *Ward*, 1 Mo. 398; *Shepley* v. *Cowan*, 91 U. S. 330 (23:424); *Danforth* v. *Morrical*, 84 Ill. 456.

A statement of results from an examination of the records is only competent as coming from the legal custodian of the records.

Polk v. *Wendell*, 18 U. S. 5 Wheat. 293, 310, 311 (5 L. ed. 92, 96).

Copies of letters sent to parties, in regard to the business of the General Land-Office, are but private memoranda of the office and are not competent evidence.

Griffin v. *Reynolds*, 58 U. S. 17 How. 611 (15:230); *Lyell* v. *Maynard*, 6 McLean, 15; *James* v. *Gordon*, 1 Wash. C. C. 333.

Copies of copies are never evidence.

Winn v. *Patterson*, 34 U. S. 9 Pet. 663 (9:266); Best, Ev. 485.

In grants by the public, nothing passes by implication.

Charles River Bridge v. *Warren Bridge*, 36 U. S. 11 Pet. 546 (9:823).

Nothing whatever passes but what is conveyed in clear and explicit language, etc.

Dubuque & P. R. R. Co. v. *Litchfield*, 64 U. S. 23 How. 88 (16:509).

If the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government.

Mills v. *St. Clair County*, 49 U. S. 8 How. 581 (12:1206); *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 513 (10:271); *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 745 (23:689).

Messrs. **W. A. Hutchins** and **George O. Newman,** for defendants in error:

Where both the entry and survey had been made prior to January 1, 1852, the failure to make return of the survey to the General Land-Office before that date would discharge the land from any claim founded on such location and survey and extinguish all rights acquired thereby.

Fussell v. *Gregg*, 113 U. S. 550–566 (28:993, 999).

If there had been no entry or survey, or if the entry and survey, or either of them, were defective, or were void, but the government had issued its patent granting the land, the title would pass, and the land could be treated in the broad sense as "sold" land.

Hoofnagle v. *Anderson*, 20 U. S. 7 Wheat. 212 (5:437); *Stubblefield* v *Boggs*, 2 Ohio St. 216; *Thomas* v. *White*, Id. 540.

The subsequent entry and survey is declared null and void, because Congress saw proper, having the power to do so, to so declare; second, because land already surveyed or patented is no longer land subject to entry and survey, and third, because the subsequent entry and survey of land already surveyed or patented is expressly prohibited.

Jackson v. *Clark*, 26 U. S. 1 Pet. 628 (7:294); *Price* v. *Johnston*, 1 Ohio St. 394; *Stubblefield* v. *Boggs*, and *Thomas* v. *White*, *supra*.

If the patent has been issued irregularly, the government may provide means for repealing it.

Miller v *Kerr*, 20 U. S. 7 Wheat. 1 (5:381); *Thomas* v. *White*, 2 Ohio St. 549.

Mr. Justice **Matthews** delivered the opinion of the court.

The judgment sought to be reviewed on the present writ of error was rendered by the Supreme Court of the State of Ohio in a proceeding begun by Flagg, the defendant in error, to quiet his title and possession to a certain tract of land lying in Nile Township, Scioto County, Ohio, within the Virginia military district, embraced within survey No. 15882. The judgment of the Supreme Court of Ohio in the case is reported as *Coan* v. *Flagg*, 38 Ohio St. 156.

On the 18th of February, 1871, Congress passed an Act to cede to the State of Ohio the unsurveyed and unsold land in the Virginia military district in said State, 16 Stat. at L. 416, which reads as follows:

"*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio be, and the same are hereby, ceded to the State of Ohio, upon the conditions following, to wit: Any person who at the time of the passage of this Act is a *bona fide* settler on any portion of said land may hold not exceeding one hundred and sixty acres, so by him occupied, by his pre-empting the same in such manner as the Legislature of the State of Ohio may direct."

The lands thus ceded were granted by the State of Ohio to the Ohio Agricultural and Mechanical College. The college claiming the lands in controversy to be embraced within this cession, for a valuable consideration sold and conveyed the same to Flagg, who entered into possession prior to the commencement of

this suit. Coan, the original defendant, claims title under:

1. Exchange military warrant No. 494, issued by the State of Virginia on the 16th day of June, 1840, to the children and heirs of Francis Gordon, a child and heir of John Gordon, the only heir of Thomas Gordon, who was a lieutenant of cavalry in the Continental line of Virginia troops in the Revolutionary War, for 500 acres of land to be laid off in one or more surveys;

2. An entry No. 15882, purporting to cover 500 acres of land under the foregoing warrant No. 494, made on December 18, 1849, by the said heirs of Francis Gordon and one David F. Heaton, an assignee of part of said warrant;

3. A survey under said entry No. 15882, purporting to contain 400 acres, 875 acres for the heirs of Francis Gordon, and 25 acres for said Heaton, made by said D. F. Heaton, a deputy surveyor of the district, on April 10, 1851, giving the metes and bounds of the land surveyed, which was duly recorded on December 26, 1851, in the district land-office at Chillicothe;

4. And mesne conveyances from the heirs of said Francis Gordon and said Heaton to Coan.

It is an undisputed fact, appearing on the record, that this survey No. 15882 embraces in fact 1682 acres.

The answer of Coan, the defendant below, contains the averment that "on the 26th of December, A. D. 1851, the said E. P. Kendrick, surveyor for said district, duly certified said survey, being numbered (the same as said entry) 15882, to the General Land-Office at Washington, D. C., for patent, and that said survey has ever since been on file in said office."

It is stated, however, in a letter addressed by the acting Commissioner of the General Land-Office to L. C. Heaton, the executor of David F. Heaton, then claiming title, dated June 18, 1878, and admitted in evidence, that survey No. 15882 was filed in that office for the purpose of obtaining a patent on the 26th of April, 1852. The same fact is recited in a letter from Willis Drummond, the Commissioner of the General Land-Office, dated October 26, 1871, also admitted in evidence, addressed to David F. Heaton, then claiming title. No patent has ever been issued on this entry and survey, for the reason, among others, given in the correspondence between the officers of the land department and Heaton, "that the same contained a large excess of land over and above the amount stated therein and actually due in virtue of said warrant exchange No. 494;" the amount of that excess being stated at 1282 acres. This was communicated in a letter from the Commissioner of the General Land-Office to L. C. Heaton, dated June 18, 1878, in which it was said that: "This office will not, of course, recognize the validity of any such survey as the foregoing, and must refuse, if there were no other objections, to carry the same into grant, and unless you deny the facts as above stated and wish to offer rebutting testimony, and be heard in reply, you will understand that the claim for patent in the case of said survey No. 15882 is rejected. Should you, however, dispute the correctness of the said resurvey, etc., and will at once advise this office of the fact, every reasonable opportunity will be afforded you to be heard in the case with such evidence as you may desire to present."

On July 11, 1878, the Commissioner of the General Land-Office, by a letter of that date, addressed to L. C. Heaton, informed him, in response to his application made in a letter of June 30, that ninety days from July 11th would be allowed to establish his claim to a patent upon this survey.

On October 10, 1878, the commissioner wrote to Heaton a letter containing the following: "You were advised on the 18th of June last of the rejection of your application for a patent in the case, but, at your request of the 30th of the same month, the matter was held open for the period above stated to afford you an opportunity to present rebutting testimony, etc. The allotted time having expired and nothing presented on your part to sustain the validity of the said survey, you are hereby advised that the rejection of the case, as stated in my said communication of the 18th June last, is now made definite and final, so far as this office is concerned." No further action was taken in the department on the subject.

It also appears that for the 100 acres not embraced in this survey, to make the 500 acres called for by warrant No. 494, another survey was made containing $517\frac{44}{100}$ acres, so that the whole amount of land embraced in the two surveys upon that warrant, nominally for 500 acres, actually embraced an excess of $1699\frac{44}{100}$ acres.

On the 27th of May, 1880, Congress passed an Act to construe and define the Act of February 18, 1871. The first and second sections of this Act are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Act ceding to the State of Ohio the lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio had no reference to lands which were included in any survey or entry within said district founded upon military warrant or warrants upon continental establishment; and the true intent and meaning of said Act was to cede to the State of Ohio only such lands as were unappropriated and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon continental establishment.

"Sec. 2. That all legal surveys returned to the land-office on or before March third, eighteen hundred and fifty-seven, on entries made on or before January first, eighteen hundred and fifty-two, and founded upon unsatisfied Virginia military continental warrants, are hereby declared valid."

The fourth section is as follows:

"Sec. 4. This Act shall not in any way affect or interfere with the title to any lands sold for a valuable consideration by the Ohio Agricultural and Mechanical College, grantee, under the Act of February eighteenth, eighteen hundred and seventy-one." 21 Stat. at L. 142.

On the 7th of August, 1882, Congress passed an Act in relation to land titles in the Virginia military district of Ohio, as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person in the

actual, open possession of any tract of land in the Virginia military district of the State of Ohio, under claim and color of title, made in good faith, based upon or deducible from any entry to any tract of land within said district founded upon military warrant upon continental establishment, and a record of which entry was duly made in the office of the principal surveyor of the Virginia military district, either before or since its removal to Chillicothe, Ohio, prior to January first, eighteen hundred and fifty-two, such possession having continued for twenty years last past under a claim of title on the part of said party, either as entry man, or of his or her grantors, or of parties by or under whom said party claims by purchase or inheritance, and they by title based upon or deducible from such entry by tax sale or otherwise, shall be deemed and held to be the legal owner of such land so included in such entry to the extent and according to the purport of said entry, or of his or her paper titles based thereon or deducible therefrom.

"Sec. 2. That so much of the Act approved February eighteenth, eighteen hundred and seventy-one, entitled 'An Act to Cede to the State of Ohio the Unsold Lands in the Virginia Military District in Said State,' and of an Act approved May twenty-seventh, eighteen hundred and eighty, construing said Act of February eighteenth, eighteen hundred and seventy-one, as conflicts with this Act, be, and the same is hereby, repealed." 22 Stat. at L. 348.

The Supreme Court of Ohio, in sustaining Flagg's title, decided:

1. That the entry and survey under which Coan claimed title did not invest the owners of the warrant, or their assignee, with an equitable interest in the lands surveyed as against the United States, for the reason that the excess of land surveyed beyond that covered by the warrant was so great as to make the survey fraudulent and void, and that consequently it was competent for Congress, at the date of the Act of February 18, 1871, to grant the lands at its pleasure.

2. That, without deciding the question whether the lands were granted to the Ohio Agricultural and Mechanical College by the terms of the Act of February 18, 1871, the fourth section of the Act of May 27, 1880, recognizes and ratifies Flagg's title as a purchaser from the Ohio Agricultural and Mechanical College for a valuable consideration.

These conclusions are contested by the plaintiff in error. In support of his contention, in regard to the first proposition, it is argued that a survey cannot be deemed void and of no effect merely on the ground of an excess beyond the amount called for in the warrant, because a different effect is required to be given to it by the provisions of the Act of Congress of July 7, 1838, 5 Stat. at L. 262, the second section of which declares that; "No patent shall be issued by virtue of the preceding section for a greater quantity of land than the rank or term of service of the officer or soldier, to whom or to whose heirs or assigns such warrant has been granted, would have entitled him to under the laws of Virginia and of the United States regulating the issuing of such warrants; and whenever it appears to the Secretary of War that the survey made by any of the aforesaid warrants is for a greater quantity of land than the officer or soldier is entitled to for his services, the Secretary of War shall certify on each survey the amount of such surplus quantity, and the officer or soldier, his heirs or assigns, shall have leave to withdraw his survey from the office of the Secretary of War and resurvey his location, excluding such surplus quantity in one body from any part of his resurvey, and a patent shall issue upon such resurvey as in other cases," etc.

We agree, however, with the Supreme Court of Ohio in holding that this provision of the law does not meet the difficulty. Whatever application the section may have, according to its terms, it is expressly limited to cases arising under the preceding section of the Act, which expired by its own limitation on the 10th of August, 1840, and although extended and revived by the first section of the Act of August 19, 1841, 5 Stat. at L. 449, it contained the sole authority for making and returning entries and surveys under Virginia military land warrants, and ceased for that purpose to have any operation on the 3d of March, 1857, by force of the Act of March 3, 1855, 10 Stat. at L. 701. So that the right to relief against excessive surveys granted by the second section of the Act of July 7, 1838, has not, at all events, existed since 1857. In addition, it is manifest that the second section of the Act of July 7, 1838, relied on, does condemn and forbid the issuing of a patent upon a survey calling for a greater quantity of land than the party is entitled to by virtue of the warrant; and in such cases, it being the duty of the department to refuse the patent, the right of the applicant is merely to withdraw his survey, and resurvey his location, excluding such surplus quantity. In the present instance, the patent was refused, and for that reason; but the applicant did not ask leave to withdraw his survey and cause a resurvey of the location, and so elected not to avail himself, if he had such right, of the provisions of this section.

It was further contended, however, upon this point, that Congress has recognized the validity of surveys within the district, notwithstanding the quantity embraced in them was excessive, by the proviso in the Act of March 26, 1807, 4 Stat. at L. 92, which reads as follows: "*Provided*, That no locations as aforesaid within the above mentioned tract shall, after the passage of this Act, be made on tracts of land for which patents had previously issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be considered as null and void."

But it was rightly considered, as we think, by the Supreme Court of Ohio, that the effect of this proviso, which, it was admitted, had been continued in force by subsequent enactments, was merely to withdraw, from subsequent entry and survey, lands actually surveyed, until the previous survey should be withdrawn or set aside, as between locators seeking to appropriate the same tract, and that it cannot have the effect of establishing excessive surveys, whether by mistake or design, as binding upon the government so as to vest an equitable estate in the holder of the warrant, and entitle him to a patent for the whole or a part of the survey.

Counsel for the plaintiff in error, however, claim in argument that the Supreme Court of Ohio erred upon this point in consequence of having overlooked the second section of the Act of May 20, 1826, 4 Stat. at L. 189. This section, however, as far as it goes, is identical with the second section of the Act of July 7, 1838, above quoted, which is a re-enactment of it, the Act of May 20, 1826, having expired by its own limitation. The first section of this Act extends the time for obtaining warrants until June 1, 1829, to complete locations thereon until June 1, 1832, and to return surveys and warrants to the Commissioner of the General Land-Office, in order to obtain patents thereon, until June 1, 1833, and the second section is limited in its operation to cases provided for by the preceding section, and, therefore ceased to operate after the dates therein mentioned.

Counsel for the plaintiff in error also refer to the decisions of this court in *Taylor* v. *Brown*, 9 U. S. 5 Cranch, 249 [3:92], and *Holmes* v. *Trout*, 32 U. S. 7 Pet. 171 [8:660], as supporting the propcsition that surplus land will not vitiate a survey; but those cases applied that principle only as between prior and subsequent locators, and do not sustain the proposition that upon such a survey the applicant is entitled, as of right, to obtain a patent from the United States.

The next question is, whether the Act of February 18, 1871, taken in connection with the Act of May 27, 1880, had the effect of vesting a complete legal and equitable title to these lands in Flagg. It is argued that the lands in question were not embraced within the terms of the cession to the State of Ohio used in the Act of February 18, 1871. The lands ceded to the State by virtue of that Act are described as those "remaining unsurveyed and unsold in the Virginia military district in the State of Ohio." The word "unsold," as used in the Act, it is claimed, and may be admitted to be, entirely inappropriate. No land within that district had ever been sold, in the literal sense of that word, nor was it subject to sale. It was held in trust by the United States, first, for the purpose of satisfying donations made by the State of Virginia to her officers and soldiers in the Revolutionary War, to whom warrants might be issued as a reward for services. The remainder, after the satisfaction of those bounties, was held by the United States for their own use. All of this military tract, therefore, not appropriated according to law to the first of these uses, belonged to the United States, to be disposed of in its discretion. It was competent for Congress to grant to the State of Ohio any of these lands not subject to the trust, and at the date of the Act of February 18, 1871, the time within which it was competent to appropriate any of the lands to the satisfaction of warrants issued by the State of Virginia had expired. The trust had been satisfied, and may be regarded as having been extinguished. Whatever of these lands, therefore, remained at that time, which had not been appropriated in accordance with the terms of existing law, so as to secure to the claimant a legal right to call for a patent, was subject to the disposal of the United States for its own use and according to its own pleasure. It is in view of this condition of things that the cession contained in the Act of February 18, 1871, must be considered and construed.

It is contended in argument by the plaintiff in error that the lands embraced and conveyed by the cession contained in the Act of February 18, 1871, and therein described as "unsurveyed and unsold," must be understood to mean those which had not at that time been appropriated under existing laws so as to prevent subsequent locations by other entries and surveys upon Virginia military land warrants. And as such appropriation was then forbidden, as respects subsequent locators, by existing laws, wherever the land had been actually surveyed, although the survey might have contained a surplus which would deprive the locator of his right to call for a patent for the whole quantity from the United States, the Ohio Agricultural and Mechanical College, claiming as grantee under the State of Ohio, cannot be considered as having any better or other rights than those of a subsequent locator. And from this the conclusion is deduced that the lands in controversy could not have passed by the terms of the Act of February 18, 1871. But this conclusion is not admissible. The State of Ohio, under the Act of February 18, 1871, was not in the position of a subsequent locator under existing laws; it was a grantee under the terms of a new law directly from Congress itself, and was not in the attitude of an applicant to the officers of the land department, under previous laws, asking to make a location upon lands which had been already withdrawn from subsequent location by an entry and an actual survey. Congress had dominion and an absolute power of disposal of all the lands in the Virginia military land district which at that time had not become legally appropriated by entry and survey, so as to entitle the locator, by virtue of his equitable estate actually vested under existing law, to call upon the officers of the land department to complete his legal title by the issue of a patent.

The meaning of the Act of February 18, 1871, therefore, seems to be to grant to the State of Ohio all the lands in the Virginia military district which had not at that time been legally surveyed and sold by the United States, in that sense of the word which conveys the idea of having parted with a beneficial title. The lands in controversy were within that description. They had been surveyed, it is true, in point of fact, but the survey was not lawful and valid as against the United States although it might operate to prevent a subsequent location under existing law. In point of fact, the officers of the land department refused to recognize the survey as binding, and rejected the application for the issue of a patent upon it. Upon this construction of the Act of February 18, 1871, the officers of the land department undoubtedly acted, as is evident from the terms of the Act of May 27, 1880. That Act was passed expressly for the purpose of construing and defining the Act of February 18, 1871, in order to change the interpretation which had in fact been put upon it. It declared that "the lands remaining 'unsurveyed and unsold' in the Virginia military district in the State of Ohio had no reference to lands which were included in any survey or entry within said district founded upon military warrant or warrants upon continental es-

tablishment," and that "the true intent and meaning of said Act was to cede to the State of Ohio only such lands as were unappropriated and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon continental establishment."

Supposing this legislative interpretation to mean that the unappropriated lands referred to were such as had not been included in any survey or entry founded upon a military warrant, whether that survey was legal or illegal under previous laws, nevertheless, we are of the opinion, with the Supreme Court of Ohio, that the fourth section of the Act must be held to have the legal operation and effect of confirming and ratifying previous titles made by the Ohio Agricultural and Mechanical College, under the Act of February 18, 1871. The fourth section declares that "This Act shall not in any way affect or interfere with the title to any land sold for a valuable consideration by the Ohio Agricultural and Mechanical College, grantee, under the Act of February 18, 1871." If the title of the Ohio Agricultural and Mechanical College, under the Act of February 18, 1871, was valid, the Act of May 27, 1880, giving for the future a new interpretation to that Act, could not have the effect of devesting its title. If, on the other hand, the title to lands sold by the Ohio Agricultural and Mechanical College, under claim of title by virtue of the Act of February 18, 1871, was unsupported by the terms of that Act, then section 4 of the Act of May 27, 1880, can have effect only as operating to confirm that title. This it was competent for Congress to do—no vested rights intervening—and this, in our opinion, is what they have done by the Act of May 27, 1880.

By the Act of August 7, 1882, 22 Stat. at L. 348, which, however, does not affect the present case, Congress found it necessary to go still farther and quiet the title of all persons claiming lands in the Virginia military district who had been in actual and open possession thereof for twenty years, under claim and color of title made in good faith, based upon, or deducible from, any entry founded upon a military warrant upon continental establishment, recorded in the office of the principal surveyor within the district prior to January 1, 1852.

We are, therefore, of opinion that the Supreme Court of Ohio did not err in either of the propositions on which its judgment was based.

There is another view which confirms this conclusion. It was decided by this court in the case of *Russell* v. *Gregg*, 113 U.S. 550 [28: 993], upon a careful and detailed review of all the legislation on the subject, that it was essential to the vesting of any interest under an entry and survey within the Virginia military land district, made prior to January 1, 1852, that the survey should be returned to the Commissioner of the General Land-Office at Washington, on or before that date, and that the failure to do so discharged "the land from any claim founded on such location and survey," and extinguished "all right, title, and estate previously acquired thereby." Such lands might, therefore, very properly be considered, in contemplation of law, as "unsurveyed." This continued to be the law until the passage of the Act of May 27, 1880, by the second section of which it was declared, "That all legal surveys returned to the land-office on or before March 3, 1857, on entries made on or before January 1, 1852, and founded upon unsatisfied Virginia military continental warrants, are hereby declared valid." The survey under which Coan claims title in the present case was not filed, as appears from evidence in the record, in the General Land-Office until April 26, 1852. It is contended by the plaintiff in error that it is otherwise admitted in the pleadings, on the ground that the answer of Coan averred, that, "on the 26th of December, A. D. 1851, the said E. P. Kendrick, surveyor for said district, duly certified said survey, being numbered (the same as said entry) 15882, to the General Land-Office at Washington, D. C., for patent, and that said survey has ever since been on file in said office." This is not a distinct and unequivocal averment of the fact that the survey had been filed in the General Land-Office on or before January 1, 1852, but only that it had been duly certified by the district surveyor prior to that date. But, construing it as claimed, it, nevertheless, was not admitted in the pleadings, the reply of the plaintiff expressly denying the validity of the entry and survey.

Objection is also made and was taken in the court below to the admission of the evidence on which the fact rests, that the survey was not filed until April 26, 1852, in the General Land-Office. This proof consists in copies of official letters written by the Commissioner of the General Land-Office to Heaton, then claiming title under the warrant and survey, reciting the fact, which copies were sworn to by a witness, formerly a clerk in the General Land-Office, and acquainted with the facts, he having, as such clerk, in fact written the originals himself for the Commissioner of the General Land-Office, by whom they were signed. We are not referred by counsel in argument to any authority in support of the objection, and we do not see upon what principle it can be maintained. The witness testified that at the time the letters were written he was the clerk in charge of the division relating to the Virginia military district, and that all of the decisions of the Commissioner of the General Land-Office were contained in letters written by him to the parties interested. We think the evidence was competent, and in fact it was uncontroverted.

We find no error in the judgment of the Supreme Court of Ohio. *It is therefore affirmed.*

HENRY E. DAVIS, Admr., of PHILIP B. FOUKE, *Appt.*,

v.

HETTIE ANN KEY, EXTX. of JOHN J. KEY.

(See S. C. Reporter's ed. 79–83.)

Action for accounting.

A partner cannot maintain an action against his copartner for an accounting under an agreement of partnership which has never been complied with by him and has never gone into effect.

[No. 7.]

Argued Oct. 18, 1887. Decided Oct. 31, 1887.

APPEAL from the Supreme Court of the District of Columbia. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **Henry E. Davis,** for appellant:

When the answer which is put in issue admits a fact and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon in avoidance must be proved.

Moore v. *Clements*, 73 U. S. 6 Wall. 299, 315 (18:786, 789); *Humes* v. *Scruggs*, 94 U.S. 24 (24: 52).

A partnership for a limited period cannot be dissolved at the mere pleasure of one of the partners, but may be dissolved for reasonable cause.

Cole v. *Moxley*, 12 West Va. 730; Story, Part. § 275 and notes.

There must be some special circumstances to justify a dissolution of a partnership before the term for which it was entered into has expired.

1 Lind. Part. 222.

Unless otherwise arranged, on a dissolution the division of partnership assets will follow the terms of the partnership agreement, and if there be no other agreement the division will be equal.

Story, Part. § 347, n. 4, § 349 and notes.

Messrs. **John Paul Jones,** and *Heber J. May*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought in the Supreme Court of the District of Columbia, in April, 1881, by Henry E. Davis, administrator *de bonis non* of Philip B. Fouke, deceased, against John J. Key. The object of the bill is to obtain an accounting from Key as to transactions between him and Fouke under an alleged partnership between them, entered into by a written agreement made September 24, 1869.

On the 10th of August, 1869, Key and Fouke, with one Hays and one De Castro, entered into a written agreement of copartnership, as follows:

"Articles of copartnership entered into between John J. Key, of the City of Terre Haute, State of Indiana; Philip B. Fouke, now, of the City of New Orleans, State of Louisiana; H. T. Hays and J. O. De Castro, both of the City of New Orleans, State of Louisiana.

"It is agreed between said parties that a copartnership is this day formed between them, for the purpose of prosecuting claims in behalf of the citizens of the United States of America against the Government of Mexico and of citizens of the Government of Mexico against the Government of the United States of America.

"It is agreed between said parties that the said Fouke, Hays and De Castro shall procure claims of citizens of the respective governments named against the other, and attend to taking the necessary proof, and that the said claims shall be sent to said Key, at Washington City, accompanied with a power of attorney from the claimant authorizing said Key to prosecute said claims, and authorizing him to receive from said governments any and all amounts that may be due and coming to them.

"That said Key shall retain all fees, as agreed on by said parties, and shall pay over to said parties, acting in the capacity of special attorneys, for that purpose, of the claimant, the amount due to them as such special attorneys, both for the amount awarded the claimant and for fees due Hays, Fouke, and De Castro in the case, either at Washington, New York, or New Orleans, as he may be directed from time to time by either Hays, Fouke, or De Castro, acting as the special agent of the claimant, whose power as such in all cases sent by them is, to all intents and purposes, recognized by the parties to this contract.

"That said Key shall retain, in all cases when no special direction is given, the portion due to said firm, paying over to the other parties at once, or accounting in such manner as they may from time to time direct, for the proportion of the fees so retained.

"It is agreed that all fees received under this copartnership shall be divided, one half part to said Key and the other half part to said Fouke, Hays, and De Castro.

"Said Key is to remain at Washington City, said Hays at New Orleans, said De Castro to be in the City of Mexico, and said Fouke is to render his services wherever they shall be needed.

"In witness whereof we have hereunto set our hands and seals this 10th day of August, 1869.

"JOHN J. KEY. [SEAL.]
"P. B. FOUKE. [SEAL.]
"HARRY T. HAYS. [SEAL.]
"J. O. DE CASTRO. [SEAL.]"

On the 24th of September, 1869, Fouke and Key executed the following agreement:

"Articles of copartnership entered into between Philip B. Fouke and John J. Key.

"It is agreed between said parties that a partnership be this day formed between them, for the purpose of practicing law in the City of Washington, District of Columbia, and that partnership shall be equal.

"It is agreed each party shall give their undivided attention to the business, and that said business embraces all matters pertaining to the profession of the law, including prosecution of claims against the Government of the United States, either before Congress or the court of claims. Neither party shall have the right to use the name of the firm except in such matters as pertain to the business of attorneys.

"It is understood and agreed that all sums received by said Key or Fouke under an agreement of partnership heretofore formed by said Key, Fouke, H. T. Hays, and J. O. De Castro shall be equally divided by said Fouke and Key.

"It is agreed that an account of expenses shall be kept between said parties pertaining to their business (except that part in prosecuting claims under the Treaty of July 4, 1868, between the United States and Mexico), and all sums received by either partner from their business, and all sums retained by either party, shall be entered on a book kept for that purpose, and the same shall be subject to the control of both.

"It is agreed that this copartnership shall continue until the 24th day of September, 1871, unless dissolved by mutual consent.

"In witness whereof we have, this 24th day of September, 1869, set our hands and seals.

"P. B. FOUKE. [SEAL.]
"JOHN J. KEY. [SEAL.]"

The bill alleges that certain business was conducted by Fouke and Key, pertaining to the profession of the law, and within the scope of the agreement of September 24, 1869, and that no accounting has been had in regard to it, although moneys were received by Key on account of it.

Two defenses are set up in the answer of Key: (1) that in April, 1870, Fouke accepted the appointment of Public Administrator for the Parish of Orleans, in the State of Louisiana, and thereafter resided in New Orleans, and did not practice law in the City of Washington, and that the copartnership formed by the agreement of September 24, 1869, was dissolved by the mutual assent of the parties; (2) that, by a written instrument, dated November 5, 1875, executed by Fouke and Key, and by Hays and De Castro, and by the clients interested in claims successfully prosecuted under the copartnership articles of August 10, 1869, all matters between Fouke and Key, in respect to such claims, were settled and adjusted.

A replication was filed to the answer, and proofs were taken, and the cause was heard in the first instance by the General Term. It dismissed the bill, and the plaintiff has appealed to this court.

It appears that Fouke never complied with the terms of the agreement of September 24, 1869. The copartnership was to continue until the 24th of September, 1871, unless dissolved by mutual consent. From April 2, 1870, until after the latter date, Fouke remained in New Orleans, discharging the duties of the office of public administrator there, did not practice law in the City of Washington, and did not give his undivided attention to the business of the copartnership. He returned to Washington in 1872 or 1873, and died there October 3, 1876, without having attempted to enforce the agreement of September 24, 1869. The evidence satisfies us that he regarded that agreement as never having gone into effect, or as having been canceled. We are also of opinion, that any claim under that agreement is inconsistent with the terms of the instrument of November 5, 1875, executed by Fouke and Key with other parties, so far as the matters covered by that instrument are concerned.

The decree of the court below is affirmed.

FRANCIS DOWNS, EXR. of WILLIAM CRAIG, Deceased, *Appt.*,

v.

EDWARD J. HUBBARD, Admr., etc., of THOMAS LEITENSDORFER, Deceased.

(See S. C. "*Craig* v. *Leitensdorfer*," Reporter's ed. 189-214.)

The Las Animas grant—suit in equity, when not maintainable—special tribunal—right of appeal.

1. A suit in equity to obtain the cancellation of an approved plat, delivered by the United States to an alleged actual settler, for a tract of land, part of the Las Animas grant, and to enjoin him from prosecuting any suit at law or in equity, on said plat as evidence of title, on the ground that it was illegal, and was wrongfully obtained, cannot be maintained by one who does not claim any part of the lands embraced in such plat, nor any equity therein, but who claims an undivided interest in the residuum of the grant that may remain after satisfying the claims of the actual settlers.

2. Nor can such suit be maintained on the ground that such approved plat, and the patent issued thereon, has cut off complainant's right to appeal from the decision of the register and receiver against himself on his own claim to an interest in said grant.

3. Under the terms of the Acts of June 21, 1860, 12 Stat. at L. 71, and of Feb. 25, 1869, 15 Stat. at L. 275, the ascertainment of who were actual settlers upon the Las Animas grant, and the proper limits of their settlement, and the adjustment thereof by surveys, were entrusted in the first instance to the determination of the register and receiver of the proper land district, and in case by law an appeal lies from their decision, then to those superior officers in the land-office and Department of the Interior to whom such an appeal might be taken; and as long as such alleged rights are in the course of adjudication by such special tribunal to which they are referred for settlement, the function of that tribunal cannot be displaced by courts of justice.

4. The right of appeal from the decision of the register and receiver is not hindered by the fraudulent character of the decision appealed from, and the appeal itself is the mode pointed out by law for the correction of any error in the decision complained of, whether that error has been produced by fraud and corruption, or by mistake.

[No. 1,]

Argued Oct. 12, 13, 1887. Decided Oct. 31, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado. *Reversed.*

Statement by *Mr. Justice* **Matthews:**

Under the Treaty with Mexico of Guadalupe Hidalgo, Cornelio Vigil and Ceran St. Vrain claimed title, under a Mexican grant made in 1843, to a large tract of land embraced within the Huerfano, Pisipa, and Cucharos Rivers to their junction with the Arkansas and Animas, known as the Las Animas grant, and supposed to cover and include about 922 square leagues, lying in the Territory of New Mexico, but within the limits of the present State of Colorado, and equivalent to four millions of acres.

By the Act to confirm certain private land claims in the Territory of New Mexico, approved June 21, 1860, 12 Stat. at L. 71, Congress confirmed the claim of Vigil and St. Vrain, but only to the extent of eleven square leagues to each of said claimants. By the second section of that Act it was provided "that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain the location shall be made as follows, namely: The survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the Surveyor-General of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section."

The fourth section of the Act provides "that the foregoing confirmation shall only be con-

strued as quitclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

This statute was amended by the Act of February 25, 1869, 15 Stat. at L. 275, 440, as follows:

"CHAP. XLVII.—An Act to Amend an Act Entitled 'An Act to Confirm Certain Private Land Claims in the Territory of New Mexico.'

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the exterior lines of the Cornelio Vigil and Ceran St. Vrain claims of eleven leagues each, subject to claims derived from said parties as confirmed by the Act of Congress approved twenty-first June, eighteen hundred and sixty, United States Statutes, volume twelve, page seventy-one, shall be adjusted according to the lines of the public surveys, as nearly as practicable, with the limits of said claims, yet in as compact a form as possible; and the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil and St. Vrain, holding possession under titles or promises to settle, which have been made by said Vigil and St. Vrain, or their legal representatives, prior to the passage of this Act, who may establish their claims within one year from the passage of this Act, to the satisfaction of the register and receiver of the proper land district, shall in like manner be adjusted according to the subdivisional lines of survey, so as to include the lands so settled upon or purchased, and the areas of the same shall be deducted and excluded from the adjusted limits of the claims of said Vigil and St. Vrain respectively; and the claims of all other actual settlers falling within the limits of the located claims of Vigil and St. Vrain shall be adjusted to the extent which shall embrace their several settlements upon their several claims being established either as preemption or homesteads, according to law; and for the aggregate of the areas of the latter class of claims the said Vigil and St. Vrain, or their legal representatives, shall be entitled to locate a like quantity of public lands, not mineral, according to the lines of the public surveys, and not to exceed one hundred and sixty acres in one section.

"Sec. 2. *And it be further enacted*, That it shall be the duty of the General Land-Office to cause the lines of the public surveys to be run in the regions where a proper location would place the said Vigil and St. Vrain claims, and that the expense of the same shall be paid out of any moneys in the treasury not otherwise appropriated; yet, before the confirmation of the said Act of June twenty-first, eighteen hundred and sixty, shall become legally effective, the said Vigil and St. Vrain, or their legal representatives, shall pay the cost of so much of said surveys as enures to their benefit respectively, and that all settlers of the said third class, whose claims may be adjusted as valid, shall have the right to enter their improvements by a strict compliance with the preemption or homestead laws.

"Sec. 3. *And it be further enacted*, That upon the adjustment of the Vigil and St. Vrain claims according to the provisions of this Act, it shall be the duty of the surveyor-general of the district to furnish proper approved plats to said claimants, or their legal representatives, and so in like manner to said derivative claimants, which shall be evidence of title, the same to be done according to such instructions as may be given by the Commissioner of the General Land-Office.

"Sec. 4. *And it be further enacted*, That immediately upon running the lines as provided in section second of this Act, the surveyor-general of said district shall notify the said Vigil and St. Vrain, or their agents or legal representatives, of the fact of such survey being made, and said claimants shall, within three months after notice of such survey, select and locate their said claims in accordance with such survey and the provisions of this Act and of the Act to which this is amendatory, so far as the same is not changed by this Act, and shall within said time furnish the surveyor-general with the description of such location, specifying the lines of the same. And the party failing to make such selection and location, in such manner and within such time, shall be deemed and held to have abandoned their claim, and their rights and equities under this Act, and the Act to which this is amendatory, shall cease and terminate.

"Sec. 5. *And be it further enacted*, That in case of the neglect or refusal of the said Vigil and St. Vrain, or either of them, to accept of the provisions of this Act and the Act to which this is amendatory, and to locate their said claims, as provided therein, no suit shall be brought or proceedings instituted in any of the courts of the United States, by such party or by any one claiming through or under them, to establish or enforce said claims, or for any cause of action founded upon the same, after six months from the passage of this Act."

The time fixed by section 1 of the last recited Act for establishing the derivative claims was extended by a Joint Resolution of April 28, 1870, 16 Stat. at L. 373, 663, by which it was directed that the Act should be so construed "As to authorize the presentation of such derivative claims within one year from the completion and approval of the subdivisional surveys contemplated by said Act of twenty-fifth February, eighteen hundred and sixty-nine."

In pursuance of the Act of February 25, 1869, and within the time limited by the Joint Resolution of April 28, 1870, there were presented to Irving W. Stanton and Charles A. Cook, the register and receiver at Pueblo, Colorado, claims on behalf of about thirty-nine derivative claimants to lands within the limits of the Las Animas grant, covering in all more than 183,553$\frac{55}{100}$ acres; among them was the claim of William Craig for 127,000 acres, and that of Thomas Leitensdorfer for about 16,000 acres, which were filed on the 23d of October, 1872. The register and receiver acted upon all the claims, rejecting that of Leitensdorfer and twenty-two others, amounting to more than 85,939$\frac{88}{100}$ acres. They decided favorably, in whole or in part, on thirteen claims. To twelve of these claimants they allowed 24,362$\frac{99}{100}$ acres; the remaining 73,251$\frac{55}{100}$ acres were awarded to Craig. The decisions of these officers upon these claims bear date February 23, 1874, and were immediately reported to the General Land-Office. Nineteen of the claim-

ants, whose claims had been rejected, and among them Leitensdorfer, appealed from the decisions in favor of Craig and against themselves, respectively. The Commissioner of the General Land-Office entertained the appeals, so far as to decide that an appeal would lie in such cases, and from that decision Craig appealed from the Commissioner of the General Land-Office to the Secretary of the Interior. This appeal was entertained, and the Secretary of the Interior rendered a decision sustaining the authority of the Commissioner of the General Land-Office to entertain and determine the appeals from the register and receiver.

About the 25th of May, 1875, Craig applied to the President for an order directing that the Surveyor-General of Colorado be required to issue a plat of the survey of the land awarded to Craig by the decision of the register and receiver. Being advised by the attorney-general, to whom the matter was referred, that under the terms of the Acts of Congress relating to the subject the decisions of the register and receiver were final, from which no appeal would lie to the commissioner (15 Ops. Attys-Gen. 94), the President, on March 2, 1877, made an order directing the Commissioner of the General Land-Office to instruct the Surveyor-General of Colorado to deliver to Craig an approved plat of the land adjudged to him by the register and receiver of the Pueblo land district, in the State of Colorado, dated February 23, 1874. The Commissioner of the General Land-Office, on March 7, 1877, instructed the Surveyor-General of Colorado to prepare a plat of the lands specified and awarded by the register and receiver to Craig.

Before that plat was delivered Leitensdorfer, on May 4, 1877, filed his bill in equity in the Circuit Court of the United States for the District of Colorado, against William L. Campbell, the Surveyor-General of the United States for Colorado, and Craig. In this bill he set out the matters above stated, and in addition thereto alleged that his own title was derived by mesne conveyances from Eugene Leitensdorfer, to whom Vigil and St. Vrain had conveyed an undivided one sixth of the entire grant to them, which would have amounted to about 632,724⅛ acres if the whole grant had been confirmed, but which he had reduced to twenty-five sections, amounting to about 16,000 acres, to correspond with the reduced grant as confirmed by Act of Congress.

The bill further alleged that the reduced tract thus claimed by the complainant before the register and receiver was in or near the valleys of the Las Animas or Purgatoire River and tributaries, in Pueblo land district, Las Animas County, Colorado, naming and identifying certain sections and half sections as composing it; and admitted that the claim of the complainant, as thus reduced, did not conflict on the ground with the derivative claim of Craig.

The bill further alleged that the complainant produced evidence before the register and receiver to establish, in addition to the preceding allegations of his bill, "the continuous inhabitancy and cultivation of his claim by himself since May, 1862, which inhabitancy and cultivation still continue."

The bill also alleged that the final delivery by the surveyor-general of the plat of survey of the derivative claims of Craig, as ordered by the President, would be merely a ministerial act of the surveyor-general, and therefore the subject of an injunction; that such plats, under section 3 of the Act of February 25, 1869, could only issue after the final adjustment of the whole of said confirmation of twenty-two leagues, and of the several derivative claims constituting the same, and that said plats, when so furnished, would be evidence of title, and would divest the United States of the fee simple in favor of the derivative claimants receiving such plats; "that the plat ordered to be delivered by the surveyor-general to or for Craig would leave no part of said confirmation applicable to complainant's claim or the claims of the other derivative claimants whose appeals are now pending before the commissioner, and would, in fact, preclude the commissioner from considering the appeals of complainant and of the other derivative claimants; that complainant's claim is not in conflict on the ground with Craig's claim, but is many miles distant, and the mass of the derivative claims under Vigil and St. Vrain, though greatly exceeding the quantity confirmed, are competitors for area, but not for specific locations; that for these reasons the delivery of Craig's plat, or of the plat of any derivative claim whatever, before the final decision by the commissioner and secretary of the said appeals now pending before the Commissioner, and the final adjustment by them of the whole mass of said derivative claims, would be against equity and the rights of complainant and other appellants in said appeals, and would inflict on complainant and said appellants irreparable injury."

The prayer of the bill was for a perpetual injunction to restrain the delivery of the plat and survey of the derivative claim of Craig "until the appeals of complainant and of the other derivative claimants under them, now pending before the Commissioner of the General Land-Office, shall be tried and finally adjudged on their merits, under the direction of the Secretary of the Interior, according to law, and until it shall appear by such final judgment that said Craig, or other derivative claimants under said Vigil and St. Vrain, or either, are entitled to plats as evidence of title;" and also for an injunction to the same effect in the mean time.

The bill also contained a general allegation to the effect that the register and receiver were corrupted by Craig, and fraudulently induced to make the award in his favor.

On the 21st of May, 1877, a temporary injunction was granted as prayed for, on certain conditions, one of which was, that the complainant, within thirty days, should "commence proceedings in the proper court of the District of Columbia, having for their object an order on the General Land-Office to hear and determine the appeals mentioned and described in the said bill of complaint as having been taken by the said complainant from the decision of the register and receiver of the land-office at Pueblo, in respect to the lands described in the said bill."

On the 25th of June, 1877, an affidavit was filed showing that, on the 19th of June, the complainant had cause to be filed in the Supreme Court of the District of Columbia a petition and affidavit for a *mandamus* against the

Commissioner of the General Land-Office, praying for a writ commanding him to proceed to hear and determine the said appeals.

On July 13, 1877, the present cause was heard on a demurrer to the bill, and on a motion to dissolve the injunction, when an order was made dissolving the injunction and sustaining the demurrer, with leave to the complainant to file an amended and supplemental bill, which he accordingly did. That bill, filed on October 6, 1877, reciting all the matters contained in the original bill, alleges in addition that, in the Supreme Court of the District of Columbia, on July 3, 1877, the motion of the complainant for a rule on the Commissioner of the General Land-Office to show cause why the writ of *mandamus* should not issue against him, to require him to proceed with the hearing of the appeals alleged to be pending before him, was denied by that court at special term, on the ground, among others, that no appeal lay to the Commissioner of the General Land-Office from such decisions, and that he did not appeal from said judgment because he was advised by counsel that no appeal would lie from such a judgment.

The bill further alleges that, after the dissolution of the injunction, the Commissioner of the General Land-Office delivered to Craig an approved plat of the survey of the lands according to the area allowed to him by the register and receiver at Pueblo.

The bill reiterates the charges of corruption and fraud as against Craig and the register and receiver in the original bill, and further shows, "that, for the reasons hereinbefore stated, said duplicate plats of defendant Craig are intrinsically illegal and void *ab initio*, and that Craig had, or has, no title to said lands, St. Vrain having sold his interest before Craig purchased; that the order of the President, which said plats are intended to enforce, is, also, for reasons hereinbefore stated, intrinsically illegal and void *ab initio*, and was granted under the erroneous belief by the President that no controversy existed respecting the quantity of land embraced in said plats; that said plats were issued in mistake of law and fact, and leave no land applicable to the derivative claims of your orator and the other said appellants before the Commissioner of the General Land-Office, and, in fact, prevent him from trying their appeals now lawfully pending before him, and are in the nature of a cloud on the titles of your orator and the said appellants to their respective derivative claims; and that your orator fears said duplicate plats, if left uncanceled, would cause irreparable mischief to him and to all the other said appellants before the said commissioner."

The prayer of the amended bill, therefore, is, that "the approved plats of the derivative claim of defendant, William Craig signed by defendant Campbell, on the 26th of May, 1877, be decreed void from the beginning, and that said defendant, William Craig, be forever enjoined from prosecuting any suit in law or equity on said approved plat or plats as evidence of title, or that Craig be adjudged as holding the same in trust for plaintiff and other derivative claimants, and that defendant, William Craig, and agents, and defendant, William L. Campbell, as United States Surveyor-General of Colorado, and his successors in office, and all under them, be ordered, within a time to be limited by this court, to deliver the said plats to the court, and that the said plats be thereupon canceled; and he prays for all other general and special relief applicable to the case."

To this amended and supplemental bill, Campbell and Craig filed separate demurrers. The demurrer of Campbell was sustained, and the bill as to him ordered to be dismissed. The demurrer of Craig was overruled, and thereupon, on the 7th of October, 1878, Craig filed his answer to the amended bill.

The answer of Craig denies the title of Leitensdorfer to any interest in the land, and asserts the title of Craig himself to the land awarded to him by the decision of the register and receiver; it denies all charges of fraud and corruption against them and himself; and claims that the award and decision of the register and receiver, under the Act of Congress of February 25, 1869, is final and conclusive, subject to no appeal to the Commissioner of the General Land-Office, or to the Secretary of the Interior, and sets up the decision and judgment of the Supreme Court of the District of Columbia, dismissing the application for a *mandamus*, as a conclusive judgment on the question.

A replication was filed to this answer, and the cause being put at issue a large amount of proof was taken, consisting of documentary evidence and the testimony of witnesses.

It further appears that after the 4th of March 1877, when a new administration came into office, an application was made to the Secretary of the Interior on behalf of the complainant, asking for a stay of proceedings under the order of the President, and that the matter might be reopened for hearing before the Commissioner of the General Land-Office on the appeal from the decision of the register and receiver. This application was referred to the attorney-general, who gave an opinion that the official acts of the officers of the preceding administration could not be reviewed by their successors in office. 15 Ops. Attys-Gen. 208.

On the 8th of January, 1878, a patent was issued by the United States to William Craig, and to his heirs and assigns forever, for the land included within the approved plat, in conformity, as it recites, with section 2447 of the Revised Statutes of the United States, and with the stipulation that, in virtue of the provisions of that section, the patent "shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

On January 30, 1879, before final hearing, the complainant dismissed the bill and amended bill so far as by the prayer it was sought to hold the defendant Craig liable as trustee for the complainant of the title to the lands conveyed to him.

The opinion and decision of the register and receiver in favor of Craig's claim recites the grounds of the award as follows: "His claim does not rest wholly upon the shadowy foundation of uncertain and vague promises, but is backed by conveyances which remove all sus-

picion or doubt from his asserted rights, and in our opinion cannot be postponed to any other claim than those above recited. If his claim rested on promises to settle only, it might be said that the promises dated as far back as 1855, and the month of March of that year; that he went on the land promised; that he offered his resignation in the Army in consequence of it; that it was not accepted; that in December, 1862, he was appointed agent for the grant by St. Vrain, and then again resigned, and was refused acceptance; that in the spring of 1863 he began the improvement of his land, finally got out of the Army in 1864, and moved on the land, where he has since resided continuously, and has expended $200,000 in improvements thereon; the patent deeds of St. Vrain showing the extent of his rights—deeds which appear to have been duly recorded soon after execution—thus preventing any one being deceived as to the property claimed by him."

The decision of the register and receiver against the claim of Leitensdorfer is based upon these grounds, viz.: that there is no sufficient proof of the paper title by which he claims an undivided one sixth of the original Mexican grant; that that paper title, even if proven, would not entitle him to anything as against actual settlers, but only to one sixth of any surplus which might be ascertained after satisfying the claims of that class; and that Leitensdorfer was not entitled to claim as an actual settler, even supposing that he had taken possession of a particular location, for the reason that he does not show himself to have acquired that possessory interest from either of the original grantees.

The cause having proceeded to final hearing, a decree was entered July 2, 1880, whereby it was "ordered, adjudged and decreed that the decision or award of the register and receiver of the land described in the bill and pleadings of date the 23d of February, 1874, in favor of the defendant, William Craig, is fraudulent and void; and it is further ordered, adjudged, and decreed, that the patent for the said lands issued to defendant, William Craig, on the 8th day of January, 1878, be and it is hereby declared and decreed to be null and void; and that the approved plat or plats delivered to defendant, William Craig, as evidence of title to the land described in the bill, by William Campbell, Surveyor-General, be and the same are hereby declared and decreed to be null and void." From that decree this appeal is prosecuted. Pending the appeal in this court, both parties having died, the cause has been revived in the names of their respective personal representatives.

Messrs. **Benjamin F. Butler** and **O. D. Barrett,** for appellant:

The trustee should be made either a coplaintiff or a defendant in the suit.

Dan. Ch. Pl. & Pr. 192.

As there is no residuum for the original grantees, there are no lands to which Leitensdorfer's interest can attach.

The fourth section of the Act of February 25, 1869, was not complied with.

The lands claimed are not within the boundaries of the original grant.

The court may examine the surveys to see for itself where the line would run.

Indianapolis & C. R. R. Co. v. *Stephens,* 28 Ind. 429; *Atwater* v. *Schenck,* 9 Wis. 161; *Prieger* v. *Exchange Mut. Ins. Co.* 6 Wis. 89.

All the interest in the grant has ceased.

The decision of the register and receiver is final in law.

United States v. *Ferreira,* 54 U. S. 13 How. 40 (14: 42); *Ex parte United States,* 84 U. S. 17 Wall. 439 (21: 696); *Johnson* v. *Towsley,* 80 U. S. 13 Wall. 72 (20: 485); *Butterworth* v. *United States,* 112 U. S. 50 (28:656); *Barnard* v. *Ashley,* 59 U. S. 18 How. 43 (15: 285).

The relief prayed for in the bill cannot be given, save in a suit brought in the name of the United States.

Act Feb. 25, 1869, 15 Stat. at L. 275; *Patterson* v. *Winn,* 24 U. S. 11 Wheat. 380 (6: 500); *St. Louis Smelting Co.* v. *Kemp,* 104 U. S. 644 (26: 878); *United States* v. *Schurz,* 102 U. S. 378 (26: 167); *Field* v. *Seabury,* 60 U. S. 19 How. 332 (15: 650); *United States* v. *Throckmorton,* 98 U. S. 70 (25: 97).

There is no proper party appellee in this case before the court, and the suit has abated.

Barribeau v. *Brant,* 58 U. S. 17 How. 43 (15: 84).

Leitensdorfer is disqualified, for want of any interest in the subject matter of the suit, to maintain it.

Vattier v. *Hinde,* 32 U. S. 7 Pet. 253 (8:676).

No trust can result to a grantor under his deed, which on its face is sufficient to convey the property absolutely.

Squire v. *Harder,* 1 Paige, 494; Williams, Real Prop. 157, note 1.

No parol evidence can be received to change or vary the effect of a deed.

1 Greenl. Ev. § 26, note 1; Perry, Tr. § 162; *Learned* v. *Tritch,* 6 Col. 432; *Whiting* v. *Gould,* 2 Wis. 552; Mitf. Eq. Pl. 78.

Courts of equity, in cases of alleged mistake or fraud, give relief only to one who proves himself to have been wronged by the fraud or mistake complained of. They do not sit to adjudicate questions of abstract right.

Marye v. *Parsons,* 114 U. S. 325 (29: 205); Story, Eq. Jur. § 203; *Vernon* v. *Keys,* 12 East, 632.

Messrs. John Paul Jones, F. P. Dewees and *D. W. Voorhees,* for Leann S. King, intervenor:

To constitute such actual fraud as will be sufficient to cancel the plats and patents to Craig, it is only necessary to show that there was collusion and design between him and the register and receiver to injure Leitensdorfer by depriving him of some right or otherwise impairing it.

Conard v. *Nicoll,* 29 U. S. 4 Pet. 291 (7: 862); *United States* v. *Arredondo,* 31 U. S. 6 Pet. 691 (8: 547).

Where there is an appearance of fraud, inadequacy of price becomes a strong argument against the purchaser.

Weitzell v. *Fry,* 4 U. S. 4 Dall. 218 (1: 807).

A decision procured by fraud cannot be the basis of any rights which can injuriously affect the plaintiff.

Johnson v. *Towsley,* 80 U. S. 13 Wall. 72 (20: 485); *Moore* v. *Robbins,* 96 U. S. 530 (24: 848); *Shepley* v. *Cowan,* 91 U. S. 330 (23: 424); *United*

States v. *The Amistad*, 40 U. S. 15 Pet. 518 (10: 826); *Lenox* v. *Notrebe*, Hemp. 251.

Complainant had the right to appeal from the decision of the register and receiver rejecting his claims.

Ex parte Zellner, 76 U. S. 9 Wall. 244 (19:665); *Ex parte United States*, 84 U. S. 17 Wall. 445 (21: 698); *Butterworth* v. *United States*, 112 U. S. 50 (28: 656); *Shepley* v. *Cowan*, 91 U. S. 340 (23: 427).

It is only when the government is directly interested in the result of the action that it is necessary that the suit to cancel a patent should be brought in the name of the United States.

Mullan v. *United States*, 118 U. S. 276 (30: 172); *Castro* v. *Hendricks*, 64 U. S. 23 How. 438 (16: 576); *Patterson* v. *Winn*, 24 U. S. 11 Wheat. 380 (6: 500); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87 (3: 665); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 84 (20: 487); *United States* v. *Throckmorton*, 98 U. S. 70 (25: 97).

Messrs. Robert H. Bradford and **Charles W. Hornor,** for appellee:

The court below had jurisdiction of this case.

Ober v. *Gallagher*, 93 U. S. 199, 206 (23: 829, 831); Story, Eq. 64 *k*; *Ward* v. *Todd*, 103 U. S. 327, 329 (26: 339, 340).

The court below had power to grant the relief sought.

Bagnell v. *Broderick*, 38 U. S. 13 Pet. 436, 450 (10: 235, 242); *United States* v. *Stone*, 69 U. S. 2 Wall. 525, 535 (17: 765, 767); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72, 87 (20: 485, 488); *Warren* v. *Van Brunt*, 86 U. S. 19 Wall. 646, 653 (22: 219, 222).

The right of Leitensdorfer is clear. His right to try his title before the commissioner and secretary is a legal right, created by statute.

Act July 4, 1836, § 1; 5 Stat. at L. 107; R. S. §§ 453, 441; *Maguire* v. *Tyler*, 66 U. S. 1 Black, 195, 202 (17: 137, 141); *Maguire* v. *Tyler*, 75 U. S. 8 Wall. 650, 667 (19: 320, 325); *Snyder* v. *Sickles*, 98 U. S. 203, 210–211 (25: 97, 101).

Equity will interfere by a proper proceeding, now that the executive power had exhausted itself.

Holloway v. *Whitely*, 71 U. S. 4 Wall. 522 (18: 335); *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 (19: 62); *Litchfield* v. *Register and Receiver*, 76 U. S. 9 Wall. 575 (19: 681); *Sampson* v. *Smiley*, 80 U. S. 13 Wall. 91 (20: 489); *Warren* v. *Van Brunt*, *supra;* Willard, Eq. 304, 307, ed. 1868; *Blodget* v. *Blodget*, 42 How. Pr. 19; 1 Story, Eq. §§ 328, 333.

The right of an equitable owner to file a bill to cancel, as a cloud on his title, a patent illegally issued by the United States is sustained by the opinions of Attorneys-General Wirt (1 Ops. 300, 458), Legare (4 Ops. 121), and Clifford (Id. 560).

Leitensdorfer had a right to sue. Dilatory pleas must be made *in limine litis*.

Livingston v. *Woodworth*, 56 U. S. 15 How. 546 (14: 809); *Yeaton* v. *Lynn*, 30 U. S. 5 Pet. 224 (8: 105); *Society Prop. Gospel* v. *Town of Pawlet*, 29 U. S. 4 Pet. 480, 501 (7: 927, 934); *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 450 (7: 189, 217).

Leitensdorfer had capacity to sue.

1 Ops. 300, 458, by Wirt; 4 Ops. 121, by Legare; Id. 560, by Clifford; *Seward* v. *Hicks*, 1 Har. & McH. 24; *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 436, 450 (10: 235, 242); and see *Shepley* v. *Cowan*, 91 U. S. 330, 340 (23: 424, 427), quoted and approved in *Moore* v. *Robbins*, 96 U. S. 530, 535 (24: 848, 850), by Miller, *J.*; *Lytle* v. *Arkansas*, 50 U. S. 9 How. 314 (13: 153); *Cunningham* v. *Ashley*, 55 U. S. 14 How. 377, 389 (14: 462, 467); *Barnard* v. *Ashley*, 59 U. S. 18 How. 43, 45 (15: 285, 286); *Newhall* v. *Sanger*, 92 U. S. 761 (23: 769); *Vance* v. *Burbank*, 101 U. S. 514, 518 (25: 929); *Moore* v. *Robbins*, 96 U. S. 530 (24: 848); *Western Pac. R. R. Co.* v. *United States*, 108 U. S. 510, 512 (27: 806).

Leitensdorfer had sufficient interest to maintain this suit.

Act Feb. 25, 1869, 15 Stat. at L. 275.

An executive, legislative or judicial confirmation of a land claim in the original owner's name, enures to an intermediate vendee, who, as the equitable owner, can, by bill, compel the nominal confirmee or his heirs to convey to complainant the legal title.

United States v. *Percheman*, 32 U. S. 7 Pet. 51, 97 (8: 604, 621); *United States* v. *Sutter*, 62 U. S. 21 How. 170, 182 (16: 119, 122); *Morehouse* v. *Phelps*, 62 U. S. 21 How. 294, 304–5 (16: 140, 143); and especially *Landes* v. *Brant*, 51 U. S. 10 How. 348, 374 (13: 449, 460).

Leitensdorfer's sale to Allen, *pendente lite*, did not cause this suit to abate.

Swann v. *Clark*, 110 U. S. 602, 607 (28: 256, 258); *Whiteside* v. *Haselton*, Id. 296, 300–301 (28: 152, 154); *Cromwell* v. *Sac County*, 94 U. S. 351, 360 (24: 195, 200).

A *pendente lite* assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned.

Ex parte S. & N. Alabama R. R. Co. 95 U. S. 221, 226 (24: 355, 357).

The decisions of the register and receiver are not final, and Leitensdorfer may appeal.

This is a public act.

Sedgw. Stat. & Const. L. 32, 33, ed. 1857; *Bass* v. *Fontleroy*, 11 Tex. 698; *Commonwealth* v. *Springfield*, 7 Mass. 9; *Mills* v. *St. Clair County*, 49 U. S. 8 How. 569 (12: 1201); *East Hartford* v. *Hartford Bridge Co.* 51 U. S. 10 How. 511 (13: 518); *Young* v. *Bank of Alexandria*, 8 U. S. 4 Cranch, 384 (2: 655); 1 Miss. 20; *Portsmouth Livery Co.* v. *Watson*, 10 Mass. 91; *Burnham* v. *Webster*, 5 Mass. 268; *Pierce* v. *Kimball*, 9 Me. 54; *United States* v. *Ferreira*, 54 U. S. 13 How. 40 (14: 42); *League* v. *De Young*, 52 U. S. 11 How. 185 (13: 657); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 (10: 559); *Mississippi* v. *Johnson*, 71 U. S. 4 Wall. 475, 498 (18: 437, 441); *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 (2: 60); *Kendall* v. *United States*, 37 U. S. 12 Pet. 524 (9: 1181); *Litchfield* v. *Register and Receiver*, 76 U. S. 9 Wall. 575, 577 (19: 681, 682); *Comegys* v. *Vasse*, 26 U. S. 1 Pet. 194, 212 (7: 108, 116); *Frevall* v. *Bache*, 39 U. S. 14 Pet. 95 (10: 369).

The President had no power to award the title to Craig, and that title was void.

Maguire v. *Tyler*, *supra;* 1 Attys-Gen. Ops. 624, 630, 636, 678, by Mr. Wirt; 2 Attys-Gen. Ops. 481, 507, by Roger B. Taney; 4 Attys-Gen. Ops. 341, by John Nelson; Id. 515, by John Y. Mason; 5 Attys-Gen. Ops. 275, 287, 630, by John J. Crittenden; 6 Attys-Gen. Ops. 226, by Caleb Cushing; 10 Attys-Gen. Ops. 526, 527, and 11 Attys-Gen. Ops. 14, by Edward Bates; 13 Attys-Gen. Ops. 28, by Ebenezer R. Hoar; Id. 387, by A.

T. Akerman; *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498, 513 (10:264, 271); *Williams* v. *United States*, 42 U. S. 1 How. 290 (11: 135).

If the President had a right to interfere, his action may be reviewed by the judiciary for errors of law.

Polk v. *Wendal*, 13 U. S. 9 Cranch, 87, 99 (3: 665, 669); *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, 643 (26: 875, 877); *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137, 163, 166 (2: 60, 69, 70); *Minnesota* v. *Batchelder*, 68 U. S. 1 Wall. 109, 115 (17: 551, 552); *Jones* v. *Bolles*, 76 U. S. 9 Wall. 364, 369 (19: 734, 736); *Shepley* v. *Cowan*, 91 U. S. 330, 340 (23: 424, 427); *Moore* v. *Robbins*, 96 U. S. 530, 533 (24: 848, 850).

Mr. Justice **Matthews** delivered the opinion of the court:

By reference to the provisions of the Act of 21st of June, 1860, 12 Stat. at L. 71, and of the Act of the 25th February, 1869, 15 Stat. at L. 275, it will appear that after the survey of the exterior lines of the Las Animas grant, the claims first to be provided for were those of all actual settlers holding possession under "titles or promises to settle" made by Vigil and St. Vrain, or their legal representatives, prior to the passage of the Act. It was required that those claims, within one year from the passage of the Act, should be established to the satisfaction of the register and receiver of the proper land district, when they were to be adjusted according to the subdivisional lines of survey so as to include the lands so settled upon or purchased. It follows, of course, that these were to be surveys of distinct locations, which might be widely separated from each other in different parts of the original Mexican grant, but, of course, within its exterior limits. The grant itself, however, having been confirmed only to the extent of twenty-two square leagues, it also follows that these surveys in their aggregate areas were not to exceed that quantity. If, however, there were other actual settlers within the limits of the original grant to Vigil and St Vrain, not claiming title from or under them, but merely by reason of their actual possession, their several settlements might be established either as preëmption rights or homesteads, according to law, but the quantities were not to be deducted from the twenty-two square leagues. If any part of this quantity of twenty-two square leagues should remain unexhausted by the claims of actual settlers holding possession under "titles or promises to settle" made by Vigil and St. Vrain, and, therefore, called in this record "derivative claims," any such surplus was to be located in two equal tracts, each of square form, in any part of the tract covered by the original grant, for the benefit of Vigil and St. Vrain, and their assigns or representatives.

It is conceded by all parties to this record, that, in point of fact, the claims of the first class, including Craig's, being those of actual settlers holding possession under titles or promises to settle made by Vigil and St. Vrain, exhausted the whole quantity of the grant as confirmed and reduced to twenty-two square leagues. The controversy now is, therefore, confined to the conflicting claims of this class.

It is further to be observed that the complainant Leitensdorfer lays no claim to any part of the lands embraced in the survey and plat, and covered by the patent issued to Craig; he does not allege or complain that any lands belonging in equity to him were awarded to another; he admits that he was not an actual settler upon and held no possession of any part of that tract. On the contrary, the possession which he does allege and the title which he asserts have reference to another and distinct tract of land, which, as he alleges, lies within the exterior boundaries of the original Las Animas grant, but several miles distant from any part of the tract allotted and patented to Craig. He, therefore, does not claim as a part of his case in equity that Craig holds the legal title to any lands in trust for him. The prayer of the amended bill, so far as it asserted any right to such relief, was expressly withdrawn, and has been abandoned by counsel in argument.

The case presented, therefore, by the complainant is not one of that class of which many instances may be found in the reports of the decisions of this court, where a defendant holding the legal title under a patent from the United States has been declared to hold that legal title merely as trustee for a complainant with a superior equity, and decreed to hold for or to convey to the true owner. The right of the complainant in this case to relief is supposed to rest upon different grounds. The injury which he alleges is that Craig wrongfully obtained from the register and receiver an award of lands to which he had no rightful claim, whereby the whole quantity of the confirmed grant has been reduced and absorbed so as to exclude the complainant from that share to which he was entitled. The wrong of which he complains is that Craig fraudulently and corruptly procured the award and decision of the register and receiver in his own behalf and against Leitensdorfer, and that the latter has been illegally cut off from his right to appeal from the decision of the register and receiver in favor of Craig and against himself, by the illegal and unauthorized issue and delivery to Craig by the surveyor-general of the approved plat of the survey of the lands awarded to him, confirmed by the subsequent issue of a formal patent relinquishing the title of the United States to the same tract. This is a short but accurate statement of the complainant's case as he presents it for examination and analysis, and for which we are to seek a rule of decision.

The fraud and corruption alleged against Craig, and which, for the purposes of the case, we are at present to assume to have been proved, as it was in fact found by the decree appealed from, do not necessarily vitiate Craig's claim of title nor establish that of Leitensdorfer. The charge is that Craig bribed the register and receiver to make the award which they did in his favor. It may, nevertheless, be true that the award ought so to have been made upon the merits. So the register and receiver may have been right in rejecting the claim of Leitensdorfer. This possibility is tacitly admitted, for the bill does not ask a declaration and decree that Craig has no valid claim, nor a decree establishing the claim of Leitensdorfer; and it is plainly not within the jurisdiction of the circuit court to grant any such relief, even if it were asked.

The ascertainment of what persons came with-

in the description of actual settlers under titles or promises to settle upon the Las Animas grant, and the proper limits of their actual settlement and possession and the adjustment thereof by suitable surveys, were entrusted by the Acts of Congress on that subject in the first instance to the determination of the register and receiver of the proper land district, and in case by law an appeal lies from their decision, then to those superior officers in the land-office and the Department of the Interior to whom such an appeal might be taken. The adjustment of these claims and their definition by the prescribed surveys and plats establishing them in their appropriate locations within the limits of the original grant, and all questions of possession, of boundary and of conflict constitute a part of the administration of the law confided to that branch of the Executive Department. The free course of that administration within the limits of the law cannot be interrupted or interfered with by the judicial power. Undoubtedly, private rights of great value and importance may be involved, and the exercise of executive discretion may require decisions in favor of some and against others in a conflict of interests and claims. But, as all these claims and titles and interests arise under the law, which refers their settlement to executive officers, that reference is itself a condition and qualification of the right, and the latter is altogether subject to its consequences. When the department has exercised its discretion and exhausted its function, the legal and equitable effect of what it has done or failed to do may be drawn in question when necessary to the determination of conflicting rights between private parties in a judicial proceeding; but as long as the alleged rights which are the subject of contention are in the course of adjudication by the special tribunal to which they are referred for settlement, the function of that tribunal cannot be displaced by courts of justice. And what the complainant in this case really asks for as his ultimate relief is that the way may be cleared for him to the exercise of the right of appeal, which he claims, from the adverse decision of the register and receiver to the Commissioner of the General Land-Office, by the removal of those obstructions which he alleges have been illegally interposed against him by the issue of the approved survey and plat by the Surveyor-General of Colorado upon the order of the President, in disregard and denial of his right of appeal, and the subsequent issue of the patent, in consequence of which the Commissioner of the General Land-Office and the Secretary of the Interior have decided that they are precluded from now entertaining the complainant's appeal. It is supposed that these obstructions are removed by the decree of the circuit court, which adjudges that the decision and award of the register and receiver in favor of Craig is fraudulent and void, and annuls and declares void the approved plat delivered to Craig by the Surveyor-General of Colorado and the patent issued to him for the same lands. The decree seeks to destroy the foundation and muniments of Craig's title to the particular lands described in the plat and patent, but it does not award those lands to any one else, and it does not assume to establish the title of Leitensdorfer to those which he claims. What is the effect of this decree? In any action brought by a stranger to this record against Craig for the recovery of the lands covered by his patent, this decree could not operate as evidence against him; it can only be effective by way of estoppel, and a stranger to the record cannot avail himself of an estoppel by which he is not himself bound. Nor can the decree be supposed to operate upon the record of the survey and plat and of the decision of the register and receiver as they remain recorded in the land department, so as to render them null and void, as if they had never existed, and bind and oblige the officers of the Department of the Interior to proceed in the administration of the law with reference to these lands as if nothing of that sort had taken place. The decree operates only *in personam* and *inter partes*. The courts have no control of the public records of the land department, nor supervision over the conduct of its officers, otherwise than as it can be exercised in appropriate cases by the writ of *mandamus;* besides which, to annul the decision of the register and receiver, if that were possible, would be to destroy the foundation of the complainant's appeal and restore the matter to the condition in which it was when all the claims were pending before the register and receiver. This result is not within the scope of the complainant's bill.

If, on the other hand, the operation of the decree is limited so as to cancel and annul the approved plat delivered by the surveyor-general and the patent issued thereupon, leaving the decision of the register and receiver to stand as the subject of an appeal to the Commissioner of the General Land-Office, supposed to be still pending, the case of the complainant for equitable interference does not seem to be bettered. For, in that event, what power has the circuit court, sitting in Colorado as a court of equity, to enforce and make effective the complainant's supposed right of appeal? The decree does not operate upon the officers whose action is invoked as necessary to secure the complainant's alleged rights. The process of a court of equity is not appropriate to the exigency, and the Circuit Court of the United States in Colorado has no jurisdiction, either at law or in equity, over the officers of the land department to compel them to entertain the appeal. Neither is there reason to suppose that the land department will on the basis of such a decree *sua sponte* proceed with the appeal as pending, or take such action on the application of the complainant.

The ground on which Mr. Schurz, as Secretary of the Interior, upon the advice of the Attorney-General, Mr. Devens, declined to reopen and rehear the case was that the matter had been finally acted upon by his predecessor in office. 15 Ops. Attys-Gen. 208. That fact remains, notwithstanding a decree in this case declaring the survey and plat and patent to Craig to be illegal and invalid. Such a declaration and decree operates only in the case and between the parties to this record. It does not operate, as has been already stated, upon the public records of the land department in which they are recorded, nor does it bind and oblige the executive officers of the government in control of that department. Such a decree, therefore, would grant to the complainant no

practical relief; it would be vain and nugatory.

The ground which it is claimed in argument justifies such a decree is, that, pending Leitensdorfer's appeal to the Commissioner of the General Land-Office, the delivery by the surveyor-general of the approved survey and plat, under the order of the President, was illegal and void, and that by reason thereof the subsequent issue of the patent could not operate as a confirmation or conveyance of the title. But if the order of the President, interrupting the course of the appeal in the land department, and the action of the officers of that department in compliance with it, were illegal and therefore void, they were and are of no force and efficacy, either at law or in equity, and are not binding on any succeeding incumbents of the offices of Commissioner of the General Land-Office or Secretary of the Interior. It follows that the case of the complainant, based upon his right to prosecute his appeal, is as complete without such a decree as with it. If the duty of the Commissioner of the General Land-Office to entertain and determine that appeal exists as contended, it is a legal duty. That duty is to take up, consider, and adjudge the rights of the parties in interest, and the entertaining of the appeal is a purely ministerial act, although the questions to be considered in the course of that appeal are to be resolved by the exercise of official discretion and judgment. Nevertheless, it is quite clear, as it has been oftentimes decided, that the duty of entering upon their consideration and proceeding to their determination, is strictly ministerial. The remedy in such cases is at law, by means of a writ of *mandamus*, and not in equity. *Ex parte Parker*, 120 U. S. 737 [30: 818]; *Ex parte Brown*, 116 U. S. 401 [29: 676]. If, to such a writ, issued by a competent court, the officer should make return that he was precluded from entertaining the appeal by reason of the prior action of a predecessor in office, under the order of the President, the question of the sufficiency of that return would be presented to the court issuing the writ, and would involve necessarily the adjudication of the questions mooted in this case. If such a return should, in such a tribunal, be adjudged to be sufficient, then the complainant would be without remedy, for the right which he claims, if it exists, is a legal right cognizable in courts of law, and not a right resting upon any equity within the jurisdiction of chancery courts. If, on the other hand, such a return in such a proceeding should be adjudged to be insufficient, then the complainant would have the remedy which he is here seeking, by a direct and effective process binding upon the parties whose conduct he is seeking to control. In either alternative, therefore, it is equally conclusive that the complainant cannot obtain, in this cause, the relief which he seeks, and which alone is adequate to the redress of the wrong of which he complains.

This conclusion is not disturbed or affected by the assumption that the decision and award of the register and receiver was obtained by corrupt and fraudulent practices for which Craig is responsible. The right of appeal from that decision to the Commissioner of the General Land-Office, if it exists in any case, is not hindered by the fraudulent character of the decision appealed from, and the appeal itself is the mode pointed out by law for the correction of any error that may be shown in the decision complained of, whether that error has been produced by the practice of fraud and corruption, or was merely an honest mistake. The proof of such fraud and corruption does not, as has been already stated, demonstrate error. The decision may be right, notwithstanding the fraud, and on the appeal Craig's title, as it now stands upon the approved survey and plat and the patent, may be adjudged to be valid, and any error in it we must assume will be corrected, whether fraudulent or innocent. The question of fraud, therefore, alleged against Craig and the register and receiver, in view of the relief asked, is immaterial.

There is an alternative in which it might be supposed that the question of fraud in procuring the decision of the register and receiver, and thereby obtaining the muniments of title on which Craig's claim now rests, might become material for determination in a judicial cause. That alternative is the supposition, contrary to that on which the complainant rests his case, that the decision of the register and receiver, the issue of the approved survey and plat, and of the patent based thereon, are final and conclusive upon the Department of the Interior, and not subject to the appeal taken to the Commissioner of the General Land-Office. It may be asked whether such a determination of inferior officers of the land department, involving private rights and interests of great magnitude and value, infected with fraud, is to be protected from attack by judicial process. We are told that "equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery." *Jones* v. *Bolles*, 76 U. S. 9 Wall. 364, 369 [19: 734, 736]. That equity will interfere by a proper proceeding where the executive power has exhausted itself. *Holloway* v. *Whiteley*, 71 U. S. 4 Wall. 522 [18: 335]; *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 [19: 62]; *Litchfield* v. *Register and Receiver*, 76 U. S. 9 Wall. 575 [19: 681]; *Sampson* v. *Smiley*, 80 U. S. 13 Wall. 91 [20: 489]; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485]; *Warren* v. *Van Brunt*, 86 U. S. 19 Wall. 646 [22: 219]. "That the officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions." *Shepley* v. *Cowan*, 91 U. S. 340 [23: 428]; *Moore* v. *Robbins*, 96 U. S. 530 [24: 848]. This doctrine is undoubtedly true, but its limitation is found in the statement that such rulings "may be reviewed and annulled by the courts when a controversy arises between parties, founded upon their decisions." The jurisdiction to determine such questions does not arise in the courts of the United States by virtue of any power of supervision given to them whereby they have a right to control, to correct, to reverse, and to dictate the procedure

and action of executive officers within the scope of the duties confided to them by law. No such power of revision is given, and none such can be exercised. Such a function is not judicial; it is administrative, executive, and political in its nature. The abstract right to interfere in such cases has been uniformly denied by judicial tribunals, as breaking down the distinction so important and well defined in our system between the several, separate, and independent branches of the government; and where the character of the interference sought falls within that designation, the application for it has been uniformly denied.

The case is different in a litigation between parties involving a contest of conflicting claims, where under some known head of jurisdiction definite relief or redress may be conclusively administered in favor of one and against the other party. In such cases, the right at law or in equity belongs to one or the other of the contestants; to which of the two it should be awarded is the judicial question involved. The solution of that question may depend upon the effect to be given, either at law or in equity, to some action or determination of the executive officers charged in the first instance with duties of administration in connection with the subject of the litigation, such as, for example, the officers of the land department in the administration of the system of law in reference to the public domain of the United States. It is in such cases that the question has most frequently arisen. In those cases it has, indeed, been held, as claimed, that if the executive officer has made a mistake of law in his administration; if he has exercised power without authority of law; if his determination has been procured by the fraudulent practices of one party upon the officer or upon the opposite party; or if the officer has himself fraudulently decided in favor of one and against the other, a court of justice will give effect to the rights of the parties as between themselves, notwithstanding the errors and the frauds alleged and shown. The principle is that "the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when considered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belonged to another, to give appropriate relief." *Moore* v. *Robbins*, 96 U. S. 530, 535 [24:848, 850]; *Shepley* v. *Cowan*, 91 U. S. 330 [23:424]; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20:485]; *Marquez* v. *Frisbie*, 101 U. S. 473 [25:800]; *Vance* v. *Burbank*, 101 U. S. 514 [25:929]; *Quinby* v. *Conlan*, 104 U. S. 420, 425 [26:800, 802]; *White* v. *Cannon*, 78 U. S. 6 Wall. 443 [18:928]; *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219, 228 [19:138, 141].

In *St. Louis Smelting Co.* v. *Kemp*, 104 U. S., 636, 647 [26:875, 879], it was said. "If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief; and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands."

And in *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219, 228 [19:138,141], the doctrine was stated in these terms: "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant enured in equity to the benefit of the plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways."

But if the court, by reason of other circumstances, is powerless to adjust and adjudge with final and conclusive effect the opposing claims of the litigating parties, so as to award to one what has been wrongfully given to another, then the mere circumstance that the official act of the executive authority is challenged for error of law or for fraud does not and cannot constitute the ground of an independent jurisdiction. It is only as necessarily incident to the proper decision of a case at law or in equity between parties regularly in court for a determination of their rights as between themselves that such questions can be discussed or decided. Where the whole force of the judgment is spent upon a mere declaration that the Act in question is void for want of authority, or voidable by reason of being infected with fraud, and it cannot consistently with known principles of law or equity go further by changing the relations between the parties to the suit towards each other, or towards the subject matter of the litigation, the case is not judicial. This is precisely the present case. Here a declaration by a decree that the decision of the register and receiver was fraudulent, and therefore voidable; that the action of the President in ordering the issue of the approved survey and plat by the Surveyor-General of Colorado, and its delivery in pursuance thereof, and the subsequent issue of the patent to Craig, were without warrant of law, and therefore void absolutely, does not decide the controversy raised by Leitensdorfer, nor settle and adjudge the rights of any of the parties thereto. Nor does it, as we have already shown, remove any obstacles which have been wrongfully and unjustly interposed by the defendant to the prosecution in another forum of the rights which the complainant seeks to recover. It is entirely inefficacious for any such result, because, as already intimated, if the acts complained of are, as complainant contends, void as being without

authority of law, then they can have no legal effect whatever, and cannot be set up by the officers of the Department of the Interior as reasons for refusing to entertain and determine the appeals of Leitensdorfer from the decision of the register and receiver to the Commissioner of the General Land-Office. If, in point of fact, such a right of appeal is secured to him by the law, and the officer whose duty it is to hear and determine it refuses without just reason so to do, the proper remedy is by a writ of *mandamus*, and not by a bill in equity.

But it is shown in this record that Leitensdorfer, in pursuance of an interlocutory order of the circuit court, and as a condition on which the original injunction was granted, in June, 1877, made his application to the Supreme Court of the District of Columbia for a *mandamus* against the Commissioner of the General Land-Office, to require him to proceed with the hearing of the appeals alleged to be pending before him, and that his application was denied by that court; and he alleges that he did not appeal from that judgment, because he was advised by counsel that no appeal would lie from such a judgment; but this is not sufficient to confer jurisdiction upon a court of equity. We are not called upon in this cause to decide whether the judgment of the Supreme Court of the District of Columbia at special term is or is not erroneous, nor whether an appeal would lie from it, nor whether by law Leitensdorfer is entitled to be heard before the Commissioner of the General Land-Office upon his appeal from the decision of the register and receiver. What we do say, and all we say, is that if he is entitled to such an appeal his remedy is not by a bill in equity.

For these reasons the decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the bill; and it is so ordered.

STATE OF MISSOURI, *ex rel.* GEORGE W. HARSHMAN, *Plff. in Err.*,
v.
JOHN WINTERBOTTOM ET AL.

(See S. C. "*Harshman v. Winterbottom*," Reporter's ed. 215-222.)

Collector's bond, when suable—settlement, a bar.

1. A creditor of a county cannot sue a collector of a county, and his sureties, on a bond given to the State, conditioned to pay over all state, county and other revenue collected, and to faithfully perform the duties of such office, for a breach of the condition of the bond.

2. A settlement made by the collector with the county court for the county taxes, and an acknowledgment of the county court that he was fully discharged from his obligation in that respect, is a bar to an action by a creditor of the county on the collector's bond.

[No. 8.]

Submitted Oct. 18, 1887. Decided Oct. 31, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. *Affirmed.*

The facts in the case are fully stated by the court.

Mr. **T. K. Skinker,** for plaintiff in error:

The plaintiff's warrants were entitled to be paid out of the first funds coming into the treasury of the county.

U. S. v. *Clark County*, 96 U. S. 211 (24:628); *Knox County Ct.* v. *U. S.* 109 U. S. 229 (27:914).

The Legislature cannot take away such a right.

Cooley, Const. Lim. 5th ed. 354, note; *Edwards* v. *Kearzey*, 96 U. S. 595 (24:793); *Ralls County Ct.* v. *U. S.* 105 U. S. 735 (26:1220); *U. S.* v. *Lincoln County Ct.* 5 Dill. 184.

The plaintiff is entitled to maintain this action.

Tracy v. *Swartwout*, 35 U. S. 10 Pet. 95 (9:359); *Steines* v. *Franklin County*, 48 Mo. 167; *State* v. *Laughlin*, 73 Mo. 443; *Amy* v. *Supervisors*, 78 U. S. 11 Wall. 136 (20:101); *St. Joseph F. & M. Ins. Co.* v. *Leland*, 3 Mo. (L. ed.) 94, 7 West. Rep. 314, 90 Mo. 177; *McCutchen* v. *Windsor*, 55 Mo. 158; See also *Schoettgen* v. *Wilson*, 48 Mo. 258; *Dritt* v. *Snodgrass*, 66 Mo. 286; *Lampert* v. *Laclede Gas Light Co.* 14 Mo. App. 376; *St. Louis County Ct.* v. *Fassett*, 65 Mo. 418; *Wilson* v. *Mayor of N. Y.* 1 Denio, 595; *Clark* v. *Miller*, 54 N. Y. 528; *Raynsford* v. *Phelps*, 43 Mich. 342; *Wasson* v. *Mitchell*, 18 Iowa, 153; *Hover* v. *Barkhoof*, 44 N. Y. 113; *Robinson* v. *Chamberlain*, 34 N. Y. 389; *Nowell* v. *Wright*, 3 Allen, 166; *Moulton* v. *Jose*, 25 Me. 76; *Harrington* v. *Ward*, 9 Mass. 251.

The collector and his sureties are liable on his official bond for any official act for which he may be sued personally.

R. S. 1879, § 2404; *State* v. *Shacklett*, 87 Mo. 280, 285; *State* v. *Powell*, 44 Mo. 436; *State* v. *Moore*, 19 Mo. 372; *State* v. *Davis*, 35 Mo. 406; *Cummings* v. *St. Louis*, 3 Mo. (L. ed.) 54, 7 West. Rep. 274, 90 Mo. 264; *People* v. *East Saginaw*, 33 Mich. 164; *Willard* v. *Comstock*, 58 Wis. 565; *Delaware County* v. *McClintock*, 51 Ind. 325; *Colburn* v. *Chattanooga*, 17 Am. Law Reg. 191; *Baltimore* v. *Gill*, 31 Md. 375; *Page* v. *Allen*, 58 Pa. 338; *Collins* v. *Ripley*, 8 Iowa, 129; *Whitaker* v. *Sumner*, 9 Pick. 308.

It is no defense that the County of Knox might sue. The county has sustained no substantial injury, and could recover, at most, nominal damages.

Olmstead v. *Brush*, 27 Conn. 580; *Taylor* v. *Mygatt*, 26 Conn. 191; *Paul* v. *Slason*, 22 Vt. 238; *Parker* v. *Kett*, 12 Mod. 472; *Pierce* v. *Benjamin*, 14 Pick. 356; *Cressey* v. *Parks*, 76 Me. 532; *Howard* v. *Cooper*, 45 N. H. 339.

Messrs. **John W. Dryden & Clinton Rowell,** for defendants in error:

To maintain an action for breach of duty by a public officer, the duty must be owing to plaintiff.

Harrington v. *Ward*, 9 Mass. 251; *State* v. *Harris*, 89 Ind. 363; *Dehn* v. *Heckman*, 12 Ohio, St. 183; *Ware* v. *Brown*, 2 Bond, 267; *Terrell* v. *Andrew County*, 44 Mo. 312; *State* v. *Todd*, 57 Mo. 218; *Kahl* v. *Love*, 37 N. J. L. 7-10; *Strong* v. *Campbell*, 11 Barb. 135; Cooley, Torts, 389, 394, note 1; Murfree, Off. Bonds, § 468; *Fish* v. *Kelly*, 17 C. B. N. S. 194; *National Savings Bank* v. *Ward*, 100 U. S. 202 (25:623).

A creditor has no such interest in debts due by others to his debtor, or in the debtor himself, as that he can maintain an action for a wrong done to his debtor, by reason of which the debtor is disabled from paying his debt to him.

State v. *Todd*, 57 Mo. 218; *King of Spain* v.

Oliver, 1 Pet. C. C. 276, 288; *Dale* v. *Grant*, 34 N. J. L. 148; *Anthony* v. *Slaid*, 11 Met. 290; *Cunningham* v. *Brown*, 18 Vt. 126; *Rockingham Mut. F. Ins. Co.* v. *Bosher*, 39 Me. 253; *Connecticut Mut. L. Ins. Co.* v. *New York & N. H. R. R. Co.* 25 Conn. 265.

The same principle applies (but with far greater force) which governs in suits of stockholders against directors and other officers of corporations.

Smith v. *Hurd*, 12 Met. 383; *Winter* v. *Baker*, 34 How. Pr. 133; *Smith* v. *Poor*, 40 Me. 415; *Hersey* v. *Veazie*, 24 Me. 9; *Kennebec & P. R. R. Co.* v. *Portland & K. R. R. Co.* 54 Me. 181; *Brown* v. *Vandyke*, 8 N. J. Eq. 795; *Abbott* v. *Merriam*, 8 Cush. 590; *Memphis* v. *Dean*, 75 U. S. 8 Wall. 73 (19: 328); *Brewer* v. *Boston Theatre*, 104 Mass. 378; *Greaves* v. *Gouge*, 69 N. Y. 156; *Wilkie* v. *Rochester & S. L. R. Co.* 12 Hun, 242; *Allen* v. *Curtis*, 26 Conn. 456; *Gardiner* v. *Pollard*, 10 Bosw. 690; *Butler* v. *Kent*, 19 Johns. 228.

The injury, if any, sustained by him was only the indirect and remote result of the Collector's wrongdoing, and not the direct and proximate result of it.

Cooley, Torts, 68, 69.

A cause of action is an entirety, and may not be divided.

See Chitty, Pl. 9th Am. Ed. p. 199, note 5; *Smith* v. *Jones*, 15 Johns. 229; *Willard* v. *Sperry*, 16 Johns. 121; *Colvin* v. *Corwin*, 15 Wend. 557; *Stevens* v. *Lockwood*, 13 Wend. 644; *Flaherty* v. *Taylor*, 35 Mo. 451.

Relator's injury, if any there were under the facts shown, was only one common to all the members of the community. The petition shows no special damage to him.

Smith v. *Hurd*, 12 Met. 387; *Gardiner* v. *Pollard*, 10 Bosw. 690; *Butler* v. *Kent*, 19 Johns. 228; *Memphis* v. *Dean*, *supra*.

That the collector gave acquittances to the taxpayers, and made settlements of his accounts with the county court, does not give relator a standing, if he otherwise has none.

State v. *Roberts*, 60 Mo. 402; *Marion County* v. *Phillips*, 45 Mo. 79; *Owens* v. *Andrew County Ct.* 49 Mo. 372; *State* v. *Roberts*, 62 Mo. 389; *Saline County* v. *Wilson*, 61 Mo. 237.

An act which does not itself amount to a legal injury cannot be actionable because done with a bad intent.

Cooley, Torts, 688-694; *Allen* v. *Curtis*, 26 Conn. 462.

The duty of collecting county taxes was one which Winterbottom owed to Knox County alone.

Davis v. *Bader*, 54 Mo. 168; *Logan* v. *Barton County Ct.* 63 Mo. 341; *People* v. *Ingersoll*, 58 N. Y. 1.

Mr. Justice **Miller** delivered the opinion of the court:

This is an action brought in the Circuit Court of the United States for the Eastern District of Missouri against John Winterbottom as principal, and the other defendants as sureties, on a bond given by Winterbottom to the State of Missouri as collector of the revenue of the County of Knox in said State. No copy of the bond is found in the record, but the allegation of the petition in regard to the substance of it is, "That on the 30th day of December, 1878, said Winterbottom, as principal, and the other defendants, as sureties, executed a bond, whereby they acknowledged themselves to be held and firmly bound unto the State of Missouri in the sum of one hundred thousand dollars, for the payment of which they bound themselves, their heirs, executors, and administrators; that said bond was conditioned that said Winterbottom should faithfully and punctually collect and pay over all state, county, and other revenue for two years next ensuing the first day of March, 1879, and should in all things faithfully perform all the duties of the said office of collector according to law, and that said bond was, on the day last aforesaid, approved by the said county court."

The petition also declares "That by law it was the duty of said Winterbottom, as such collector, to collect all county taxes of said county in money, except that he was authorized and required to receive any county warrants issued by said county, when presented to him by the legal holder thereof, in payment of any county tax existing against said holder and accruing to said county; that he was not required or authorized to receive any such warrant from any one other than the legal holder thereof, and not from such holder except in payment of a county tax assessed against him; that the legal holder of a county warrant is the person to whom the same is issued as payee, or to whom the same has been transferred by one or more assignments in full; that by law all county warrants must be made payable to a person therein named, and no county warrant can be made payable to bearer, and any county warrant payable to bearer is null and void."

The petition also alleges that Harshman, for whose use the action is brought, was the owner of two county warrants, one for the sum of $3,315.05 and the other for the sum of $6,821.74, with interest, which he had presented to the treasurer of said county for payment, and it was refused because there was no money in the treasury out of which they could be paid. This fact was certified on the back of the warrants, which the treasurer entered in his registry of warrants as required by the Statute of Missouri. This occurred on the 18th day of March, 1879, and the petition filed June 18, 1883, alleges that no part of said warrants has been paid though demand had been made for said payment. It is then alleged that Winterbottom, intending to prevent any money coming into the treasury of the county out of which these warrants could be paid, had, in the collection of the taxes, received other county warrants in payment, and had thus collected and given receipts to all the taxpayers for their taxes.

This action of Winterbottom, he alleges, was an unlawful violation of his duty as collector of the county and a breach of his official bond. He then describes with more minuteness the particulars in which this conduct was a violation of his official duty, alleging that by the law the collector had no authority to receive any warrant in payment of taxes which was not originally issued to the man who offered it in such payment, or was regularly assigned to him, and that even such holder could only use it to pay his own taxes. The petition alleges a disregard of this provision of the law by the

collector, who "did, during his said term of office, unlawfully and wrongfully receive from divers and sundry persons, in payment of taxes of said county, divers and sundry warrants of said county, the said persons not being the legal holders thereof, because the said warrants were in no case payable to such persons, and were in no case transferred to such persons by assignment in full, and said persons, not being entitled to pay the same in for taxes, because no taxes were assessed or existing against them; that said Winterbottom, upon receiving such warrants, gave receipts discharging from further payment the persons against whom said taxes were so assessed and existing, to an amount equal in each case to the amount of warrants so received; that from the 18th day of March, 1879, to the 1st day of March, 1881, said Winterbottom collected all the county taxes of and in said county in warrants as aforesaid, and not otherwise; that all the taxpayers of said county from whom any county taxes were due during said period have received from said Winterbottom full acquittances without the payment of any money, and without any payment except in warrants as aforesaid."

The petition then states "that the said Winterbottom, as required by law, once in each month during the said period, made settlements to the clerk of said county court of the county taxes so collected by him, and delivered to the treasurer of said county the said warrants so received as aforesaid; that the said Winterbottom, as such collector, and the said treasurer, at various times during the years 1879, 1880, and 1881, made settlements of their official accounts, as required by law, with the said county court, and the said treasurer exhibited to the said court, and filed with the clerk of said court, all the county warrants so received by the said Collector, and by him delivered to the said treasurer, and the said county court accepted and approved the settlements of the said Collector and the said treasurer, and approved the acts of the said Collector in receiving warrants in payment of taxes, as aforesaid, and ratified and confirmed the release and discharge of said taxpayers from payment of their taxes, as aforesaid, so that the same cannot again be demanded of them."

To this petition there was a demurrer, which being sustained by the circuit court, judgment was rendered for the defendants.

The assignments of error relate to this action of the court in sustaining the demurrer.

We are of opinion that the action of the court was right. While there are other reasons, perhaps, why this petition is insufficient to sustain the action, the two principal ones are: First, that the actual plaintiff, Harshman, for whose use this action was brought, shows no relation of contract or legal obligation, between Winterbottom and himself, on which he has a right to bring this suit.

Second, that the obligation of the defendants is to the State for the collection of the state taxes, and to the county for the collection of the county taxes. There are no state taxes in the case. The county taxes were collected and paid over to the county treasury in the class of current obligations of the county, which the law recognizes as valid payment of taxes, and the county court, to whom the obligation of accounting for the taxes collected, or for failure to collect taxes, was due, has settled with Winterbottom and accepted its own warrants issued upon the treasurer as a full and satisfactory payment and discharge of that obligation. This formal accounting and settlement between the county court and the defendant Winterbottom, as set out by the plaintiff himself in his own declaration, is one which the county court undoubtedly had a right to make; and, in paying over these county warrants to the treasury of the county, and in receiving the acknowledgment of the county court that he was fully discharged from his obligations in that respect, he presents a defense to this action which nothing in the declaration removes or invalidates. He had a right to receive county warrants in payment of taxes. The law in express terms declares it to be his duty to receive them. Whether they were received by him under the exact circumstances which the law directs, as to original ownership or assignment to the party who presented them, were matters for which he might have been called to account by the county court, and that body, in making the settlement with him, might possibly have had the power to reject warrants so received in making up the account; but, inasmuch as they were actual obligations of the county, payable out of the county funds, and receivable in discharge of taxes if properly tendered, the county court, which, by law, has full charge of all the financial operations of the county, could waive any such irregularity in the time and mode of presenting their own obligations, and credit the Collector with them in the account.

We are of opinion that this settlement with the county court is of itself a sufficient bar to the present action on the Collector's bond. If this were not so, and if, as the plaintiff's counsel contends, the payment of these taxes by the county warrants thus irregularly presented is void, then the taxpayer himself is not discharged. He had no more right to tender the county warrants in payment of his taxes, under the circumstances mentioned in the petition, than the Collector had to receive them. If the act is a void act as to the one it is a void act as to the other; and the right of the plaintiff to sue the taxpayer is much clearer than his right to sue the Collector, because the taxpayer owes his taxes yet, having never lawfully paid them, while the Collector has settled his accounts with the authority which had a right to accept these county warrants and has been discharged from further obligation. If he can sue the Collector on this official bond, and the sureties who are bound with him on that bond, why can he not sue the taxpayers? The obligation to pay taxes, and the obligation to pay the taxes when collected into the treasury, is the same and bears exactly the same relation to the right of Harshman to get his money out of the county treasury.

The truth is there is no contract or legal obligation of the Collector in that matter to Harshman. Harshman is a creditor of the County of Knox. He has no more right to interfere between that county and its Collector as to the manner in which that official shall discharge his duties, except perhaps in case of

fraud or conspiracy, or by way of *mandamus*, than he would have as a creditor of any individual to interfere between him and his debtors. Where such things are permitted at all it is by way of a garnishee process or attachment, which is regulated by statute, or by a bill in chancery. The proceeding here has nothing of that character. The want of privity between Harshman and the obligors in the bond on which they are sued is established by the decision of this court in *National Savings Bank* v. *Ward*, 100 U. S. 202 [25: 623].

It does not appear that if all the taxes had been paid in money which the plaintiff alleges were erroneously paid in warrants, that when that money was paid into the treasury the relator would have been entitled to any of it. The discretion of the county court, and indeed its obligation to provide for the current necessities of the county, could not be interfered with by any one to direct the payment of this money to that particular debt. We do not see, therefore, that he was damaged, certainly not damaged in a manner which the law can recognize, by the collection of these taxes in warrants instead of money. *East St. Louis* v. *Zebley*, 110 U. S. 321 [28: 162]; *Clay County* v. *McAleer*, 115 U. S. 616 [29: 482].

The judgment of the Circuit Court for the Eastern District of Missouri is affirmed.

FELIX A. MATHEWS, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 182-186.)

Salary of consul at Tangier.

A consular appropriation Act, which transfers the office of consul at Tangier from the third to the fifth class, and reduces the salary of the office to that of a consul of the latter class, repeals all previous enactments which placed such consul in a higher class.

[No. 959.]

Submitted Oct. 17, 1887. Decided Oct. 31, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The case is stated by the court.

Mr. **George A. King**, for appellant:

A statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the salary of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law.

United States v. *Langston*, 118 U. S. 389 (30:164).

Messrs. **A. H. Garland**, *Atty-Gen.* and **Ed. M. Watson**, *Assist. Atty-Gen.*, for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought by the appellant to recover from the United States the balance claimed to be due him on account of salary as Consul of the United States at Tangier, in the Barbary States, from July 1, 1882, to June 30, 1886. He entered upon the duties of that office July 19, 1870; was paid at the rate of $3,000 per annum up to June 30, 1882; and, thereafter, only at the rate of $2,000 per annum. He claims that he was entitled to receive the larger sum during the entire period of his service. The court of claims, being of opinion that the claimant had no cause of action, dismissed the petition.

The Act of August 18, 1856, regulating the diplomatic and consular systems of the United States, contained this provision: "That consuls-general, consuls, and commercial agents, appointed to the ports and places hereinafter specified in schedules B and C, shall be entitled to compensations for their services, respectively, at the rates per annum hereinafter specified in schedules B and C. * * * Schedule B. I. Consuls-General. * * * II. Consuls. * * * Barbary States: *Tangier*, Tripoli and Tunis, each three thousand dollars." 11 Stat. at L. 52, 54.

The same provision was carried into the Revised Statutes, section 1690.

The Act of June 11, 1874, making appropriations for the diplomatic and consular service for the year ending June 30, 1875, 18 Stat. at L. 66; Supp. Rev. Stat. 83, contained this provision: "That schedules B and C in section 8 of the Act entitled 'An Act to Regulate the Diplomatic and Consular Systems of the United States,' approved August 18, 1856, shall, from and after the first day of July next, read as follows: 'Schedule B. * * * The following consulates shall be divided into seven classes, to be known respectively as classes one, two, three, four, five, six, and seven, and the consuls at such consulates shall each be entitled to compensation for their services per annum at the rates respectively specified herein, to wit: Class one, four thousand dollars. Class two, three thousand five hundred dollars. Class *three*, three thousand dollars. Class four, two thousand five hundred dollars. Class five, two thousand dollars. Class six, one thousand five hundred dollars. Class seven, one thousand dollars. * * * Class III. * * * Barbary States: Tripoli, Tunis, *Tangier*.'"

The diplomatic and consular appropriation Act for the year ending June 30, 1876, 18 Stat. at L. 322, appropriated "for consuls-general, consuls, vice-consuls, commercial agents, and thirteen consular clerks $333,200, namely: * * * Class III. Barbary States: Tripoli, Tunis, *Tangier*." The effect of this Act was to leave the annual salaries of these officers as fixed by the Act of June 11, 1874. The appropriation Acts for the years ending June 30, 1877, and June 30, 1878, made no change. 19 Stat. at L. 171, 234.

But that of June 4, 1878, provides: "That the following sums be, and the same are hereby, appropriated for the service of the fiscal year ending June 30, 1879, out of any money in the treasury not otherwise appropriated, for the object hereinafter expressed, namely: * * * 'For salaries of consuls, vice-consuls, commercial agents, and thirteen consular clerks, $304,600, namely: * * * Class III, at $3,000 per annum. * * * Barbary States: Tripoli, Tunis, *Tangier*.' * * * And the salaries provided in this Act for the officers within named respectively shall be in full for the annual salaries thereof *from and after the 1st day of July,*

1878; and all laws and parts of laws in conflict with the provisions of this Act are hereby repealed." 20 Stat. at L. 91, 93, 98.

The appropriation Act for the year ending June 30, 1880, was the same as that for the previous year. 20 Stat. at L. 268. Those for the years ending June 30, 1881, and June 30, 1882, also appropriated an aggregate sum for consuls, vice-consuls, and commercial agents, keeping the consul at Tangier in "Class III, at $3,000 per annum," omitting, however, the provison—first put into the appropriation Act for the year ending June 30, 1879, and repeated in the Act for the year ending June 30, 1880—to the effect that the salaries for the officers therein respectively provided for, "shall be in full for the annual salaries thereof from and after the 1st day of July, 1878." 21 Stat at L. 133, 135, 339, 441. But the Act making appropriations for the year ending June 30, 1883, placed the office of consul at Tangier in the *fifth* class. Congress appropriated by that Act, "for salaries of consuls, vice-consuls, commercial agents, and thirteen consular clerks, $332,100, namely: * * * Class V, *at* $2,000 *per annum*. * * * Barbary States: *Tangier*." 22 Stat. at L. 128, 129, 131. Each of the appropriation Acts for subsequent years, covering the period here in question, contained the same language, keeping the office of consul at Tangier in "Class V, at $2,000 per annum," and differing from the former Acts only as to the aggregate amount appropriated for consuls, vice-consuls, commercial agents, and consular clerks; except, that the Act of March 3, 1887, contained the additional clause, that the sums thereby severally appropriated were to be "in full compensation for the diplomatic and consular service of the fiscal year ending June 30, 1888." 22 Stat. at L. 424; 23 Stat. at L. 227, 322; 112 Stat. at L. 480.

There is no foundation for appellant's claim. In *United States* v. *Langston*, 118 U. S. 389, 394 [30: 164, 165], we said that "A statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law." The present case does not come within that rule; for the consular appropriation Acts for the fiscal years ending June 30, 1883, 1884, 1885, and 1886, while recognizing the division made by the Act of 1874 of consulates into classes, put the office of consul at Tangier in "Class V, *at* $2,000 *per annum*." In other words, during the whole period covered by the claim in suit, the consul at Tangier was in the fifth class, and there was in force an Act of Congress declaring that consuls of that class should receive $2,000 per annum; in other words, that sum should be in full compensation for his services each year. The only possible object of transferring the office of consul at Tangier from the third to the fifth class was to reduce the annual salary of that officer to the sum fixed for the annual salaries of consuls of the latter class. The error in the argument in behalf of the appellant is that he gives no effect whatever to the words "at $2,000 per annum," to be found in every appropriation Act covering the period in question. But, clearly, those Acts, placing this consul in the fifth class, at $2,000 per annum, repealed, by necessary implication, so much of previous enactments, including that of June 11, 1874, as placed the consul at Tangier in the third class, at $3,000 per annum. The argument to the contrary is not at all aided by the circumstance that the diplomatic and consular appropriation Act of March 3, 1887, for the first time after the passage of the Act of June 11, 1874, expressly declared that the sums thereby appropriated should be "in full compensation" for the services therein mentioned. That Act was passed after the decision in *Langston's Case*, and the words "in full compensation" were introduced therein, out of abundant caution, to preclude any doubt in the future as to the intention of Congress.

Judgment affirmed.

JOHN FINN, *Appt.*, v. UNITED STATES.

(See S. C. Reporter's ed. 227-233.)

Limitation of claim against the United States—court of claims—judgment thereof.

1. A claim against the United States must, except where the claimant is under a disability specified in the statute, be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government, or it will be barred.

2. The general rule that a party making a defense of the Statute of Limitations must plead the statute, if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States.

3. A judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the Statute of Limitations is erroneous.

[No. 1008.]

Submitted Oct. 17, 1887. Decided Oct. 31, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The case is stated by the court.

Mr. **Thos. C. Fletcher**, for appellant:

The claim is not barred by the Statute of Limitations.

Lippitt v. *United States*, 14 Ct. Cl. 148, affirmed in 100 U. S. 663 (25:747); *Green* v. *U. S.* 18 Ct. Cl. 93, 107; *McClure* v. *U. S.* 19 Ct. Cl. 18; *Williams* v. *U. S.* 15 Ct. Cl. 514, 519, § 1063, R. S.

Messrs. Atty-Gen. **Garland** and **Heber J. May**, *Asst. Atty-Gen.*, for appellee:

Section 3477 of the Revised Statutes has always been strictly construed in applying it to the assignment of claims, or any part, share, or interest therein, against the United States.

McCord v. *U. S.* 9 Ct. Cl. 155; *Burke* v. *U. S.* 18 Ct. Cl. 231; *McKnight* v. *U. S.* Id. 292; *Kellogg Bridge Co.* v. *U. S.* 15 Ct. Cl. 111; *Bailey* v. *U. S.* Id. 490; *Buffalo Bayou B. & C. R. R. Co.* v. *U. S.* 16 Ct. Cl. 238; *Flint & P. M. R. R. Co.* v. *U. S.* 18 Ct. Cl. 420; *St. Paul & D. R. R. Co.* v. *U. S.* Id. 405; *U. S.* v. *Gillis*, 95 U. S. 407 (24:503); *Spofford* v. *Kirk*, 97 U. S. 484 (24:1032).

The court of claims is without jurisdiction under section 1069, Revised Statutes.

Lippitt v. *U. S.* 14 Ct. Cl. 148; *Green* v. *U. S.* 18 Ct. Cl. 98, 107; *McClure* v. *U. S.* 19 Ct. Cl. 18; *U. S.* v. *Lippitt*, 100 U. S. 668, 669, (25:749).

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff seeks judgment in this case against the United States for the sum of $15,678, as the value of certain horses and mules which he claims to have purchased for, and delivered to, the United States, at their special instance and request, on or about October 14, 1863. He also asks interest from that date, on said sum, at the rate of 6 per cent per annum, until his demand is paid. The claim was never presented to any executive department of the Government until July 3, 1874, on which day it was filed in the office of the Quartermaster-General. That officer decided adversely to it, and transmitted it to the accounting officers of the treasury. It was disallowed by the Third Auditor of the Treasury, June 14, 1879, and in that ruling the Second Comptroller concurred. But on the 20th of July, 1886, the Second Comptroller ordered the case to be opened for newly discovered evidence produced by the claimant; and, on the 13th of August, 1886, the claim, with all the vouchers, papers, proofs, and documents pertaining thereto, was transmitted by the Secretary of the Treasury to the court of claims, under section 1063 of the Revised Statutes. The petition in the present suit was filed in that court on the 13th of October, 1886; and, after a hearing upon the merits, it was dismissed.

The Government contends here that the judgment should be affirmed, because it appears that the claim was not put in suit by the voluntary action of the claimant, within six years after it first accrued, nor presented at the proper department within six years after suit could have been commenced thereon in the court of claims.

The Act of February 24, 1855, establishing the court of claims, invested it with authority to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either House of Congress." 10 Stat. at L. 612, § 1. This Act did not authorize judgment to be entered against the United States, nor fix a period within which parties must assert their claims against the Government. The court was, however, required to report to Congress the cases upon which it acted, stating the material facts established by the evidence, with its opinion thereon. § 7.

But the Act of March 3, 1863, 12 Stat. at L. 765, enlarged the jurisdiction of the court, and, among other things, provided for an appeal from its final judgment, in certain cases, to this court, and "that in all cases of final judgments by said court, or on appeal by the said supreme court, where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment," etc. The tenth section of that Act is in these words: "Sec. 10. That every claim against the United States, cognizable by the court of claims, shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this Act, within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this Act shall not be barred if the petition be filed in the court, or transmitted as aforesaid, within three years after the passage of this Act: *And provided further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively." R. S. § 1069.

By an Act of Congress, approved June 25, 1868, 15 Stat. at L. 76, it was made lawful "for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or when any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant. And the Secretary of the the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described or limited in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court of claims, for trial and adjudication: *Provided, however*, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject matter and character, the said court of claims might, under existing laws, take jurisdiction, on such voluntary action of the claimant. And all the cases mentioned in this section, which shall be transmitted by the head of any executive department, or upon the certificate of any auditor or comptroller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations; and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States, shall be allowed in the manner now provided by law. The amount of the final judgments or

decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropriation exists, the same shall be paid in the same manner as other judgments of said court." R. S. §§ 1063–5.

All these statutory provisions are carried, with but slight change of words, into chapter 21 of title 13 of the Revised Statutes.

In *U. S.* v. *Lippitt*, 100 U. S. 668, 669 [25:749], it was held that "Limitation is not pleadable in the court of claims against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued; that is, within six years after suit could be commenced thereon against the Government. Where the claim is of such a character that it may be allowed and settled by an executive department, or may, in the discretion of the head of such department, be referred to the court of claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases the statement of the facts upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously, and in due time, been presented at the proper department for settlement." "These views," the court said, "find support in the fact that the Act of 1868 describes claims presented at an executive department for settlement, and which belong to the classes specified in its seventh section as *cases* which may be transmitted to the court of claims. 'And all the *cases* mentioned in this section, which shall be transmitted by the head of an executive department or upon the certificate of any auditor or comptroller, shall be *proceeded* in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations,' with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the Act, commenced against the Government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the court of claims, they are to be 'proceeded in as other cases pending in said court.'" See, also, *Ford* v. *U. S.* 116 U. S. 213 [29:608]; *U. S.* v. *McDougall*, 121 U. S. 89 [30:861].

We are of opinion that the claim here in suit —although by reason of its character "cognizable by the court of claims"—cannot properly be made the basis of a judgment in that court. As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. *Nichols* v. *U. S.* 74 U. S. 7 Wall. 126 [19:127]. It appears from the finding of facts that more than ten years had expired after the claim first accrued before it was presented to the proper department for settlement; and more than six years after the passage of the Act of 1868 (R. S. §§ 1063, 1064), which authorized the head of an executive department to transmit to the court of claims, for adjudication, any claim which involved disputed facts or controverted questions of law, or the decision of which would affect a class of cases, or furnish a precedent for future action. Consequently, in any view, this claim belonged to the class which, under the express words of the Act of 1868 (R. S. § 1069), were "forever barred," so far, at least, as the claimant had the right to a judgment in that court against the United States. The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that—except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government. Under the appellant's theory of the case, the Second Comptroller could open the case twenty years hence, and upon the claim being transmitted by the Secretary of the Treasury to the court of claims, that court could give judgment upon it against the United States. We do not assent to any such interpretation of the statutes defining the powers of that court.

The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States. An individual may waive such a defense, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the court of claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

The judgment is affirmed.

SAMUEL FLOYD HOARD ET AL., *Appts.*,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY.

(See S. C. Reporter's ed. 222–227.)

Grant to railroad company—condition of—specific performance—purchasers at foreclosure sale—when not bound.

1. A grant of land to a railroad company, expressed to be on condition that if the land so conveyed should cease to be used for railroad purposes by the company, its successors or assigns, the estate thereby granted should revert to the grantor, his heirs or assigns, although signed by the railroad company, contains no contract or covenant that it will build its road through the land conveyed nor that it would continue it there.

2. If there were such a contract, the railroad

company had the right to change its route before being built and to abandon it afterwards, and if the plaintiff is injured by this change his remedy is by an action at law for damages, and not by a bill in equity for specific performance.

3. Persons who purchased the railroad at a mortgage foreclosure sale did not thereby become obliged to perform the obligation, or pay the debts, of the railroad company.

4. In this case the grantor provided his own remedy for a breach of the condition in the conveyance, that the land should revert to him, his heirs or assigns.

[No. 17.]

Argued Oct. 19, 20, 1887. Decided Nov. 7, 1887.

APPEAL from the District Court of the United States for the District of West Virginia. *Affirmed.*

The case was heard in the court below upon the original bill and a demurrer thereto. The demurrer was sustained and the bill dismissed. From this decree the complainant appealed. The further facts are stated in the opinion.

Mr. **Enoch Totten,** for appellant:

The abandonment of the established line by the defendant Company was a violation of the contract rights of the appellant, for which he is entitled to relief in an equity court.

Warner v. *Sandusky, M. & N. R. R. Co.* 39 Ohio St. 70; *Chapman* v. *Mad River & L. E. R. R. Co.* 6 Ohio St. 120; *Baltimore & S. R. R. Co.* v. *Compton*, 2 Gill, 20; 1 Rorer, R. R. 274.

Mr. **William J. Robertson,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is a bill in chancery brought by Charles B. Hoard against the Chesapeake and Ohio Railway Company in the District Court of the United States for the District of West Virginia.

The main object of the bill, so far as it can be ascertained, is to enforce specifically the contract set out in writing between the complainant and the Chesapeake and Ohio Railroad Company, which is made an exhibit to the bill, and purports to have been executed on the 28th of July, 1873. The first part of the instrument professes to be a deed of conveyance, whereby, in consideration of the sum of $1,000 in hand paid, the receipt of which is acknowledged, the complainant sold and conveyed to the Chesapeake and Ohio Railroad Company several pieces of land in the Town of Ceredo, in the State of West Virginia, which are minutely described, and which seem to be parts or parcels of land laid out in town lots by the plaintiff, through which it was expected the road of the Company would be located. This grant is expressed to be on the condition that in the event the property so conveyed should cease to be used for railroad purposes by the company, its successors or assigns, the estate thereby granted shall revert to the grantor, his heirs or assigns.

There was also a covenant that the complainant was to have leave and permission to connect a single siding or branch with the tract of the railroad at a point near the Ceredo Hotel, owned by him, and that the company would erect lawful fences and protect said tracks. There is no contract or covenant in this agreement, although it is signed by the railroad company, that it would build its road along and through the property so conveyed, and certainly no contract that it would continue it there, because one of the conditions is that if it should cease to use the road there the title to the land should revert to the grantor. Yet the main foundation of the relief sought in this action is based upon the allegation of a covenant in this contract, that the railroad company would build their road over the grounds designated in this conveyance, and the relief asked is that the Railway Company shall now be compelled, although they have for ten or twelve years been using the track through other grounds than these, to abandon that and construct their road through the lots mentioned in this contract and continue the same.

The prayer of the bill for relief is "that the Chesapeake and Ohio Railway Company be made a party defendant to this bill; that process may issue; that defendant may be compelled to answer the same; that the contract of 28th July, 1873, be specifically enforced; that the defendant may be compelled to permanently maintain, establish, and run its road through the Village of Ceredo, as specified in the contract, and to erect and maintain a depot and place for the convenient and regular receipt and delivery of freight and passengers in the Town of Ceredo, near Ceredo Hotel; that it may be decreed to pay to the complainant the sum of $1,000, with interest from the date of the contract; that it may be decreed to do and perform all and everything covenanted to be done and performed by the railroad company by the contract aforesaid; that the defendant may be inhibited, restrained and enjoined from all further proceedings in the condemnation case pending in this court in the name of the *Chesapeake and Ohio Railway Co.* v. *Hoard et al.* And after the answer shall have come in, and the cause shall have been fully heard, that defendant be perpetually enjoined, inhibited, and restrained from running its cars, engines, and trains over the complainant's land on the present location of their road, and as now constructed."

It will be perceived by this statement of the case that the defendant in this suit is not the Chesapeake and Ohio Railroad Company with whom the plaintiff made his contract, but the allegation of the bill on this subject is that the "Chesapeake and Ohio Railroad Company" was sold out under a mortgage foreclosure, and that the purchasers by virtue of the law of West Virginia became a corporation by the name of "The Chesapeake and Ohio Railway Company," the present defendant, "and entitled to all the works, property, estate, rights, franchises, and privileges theretofore owned and possessed by the Chesapeake and Ohio Railroad Company, and subject to all the restrictions imposed by law upon said last named company."

The bill also contains allegations that, while the first company never built its road through any part of the Town of Ceredo, the present Company defendant did build its road through that town, but selected a route somewhat different from that which embraced the lots conveyed by plaintiff to the first corporation; that afterwards the second Corporation instituted proceedings in the proper court for the condemnation of the land over which its line did run, which proceeded to a report of the commission ordered to examine and assess the value of the land taken, and the damages; that this assess-

ment was reported at $1,075, in favor of the plaintiff in this suit for land taken by the new Company for the new route, and that this sum was paid into court. It appears that the plaintiff in this suit had notice of these matters, and, as the exhibits show, consented to the appointment of the assessors, but that after the report was made he objected to it, and demanded a jury. He also filed a pleading, in which he set up the contract already mentioned as a bar to the condemnation or taking of the property under the authority of the action of the commission. In this condition of affairs the case for condemnation was removed on the application of the Railway Company into the District Court of the United States, where, after some additional proceedings, the present bill was filed.

It also appears that the present defendant deposited the sum awarded to Hoard with the clerk of the state court, under the jurisdiction of which the condemnation was had, and that this money has, by order of the United States court, been placed in the hands of the clerk of that court, and that the defendant has built and been using its road over the property thus condemned for ten or twelve years. The bill also contains an allegation that the $1,000 recited in the contract as the consideration for the conveyance was never actually paid, although the deed acknowledges its receipt.

A demurrer was filed to this bill, which, on hearing, was sustained, and the bill dismissed, and from this decree of dismissal the present appeal is taken.

It is very clear that the bill presents no feature which justifies or requires the interposition of a court of equity.

First. The contract with the Chesapeake and Ohio Railroad Company contains no such covenant for laying the track of that company through the lands purchased of plaintiff as his bill alleges. Therefore, if even that company was defendant in this suit, there is nothing which the court could specifically compel it to do found in this contract.

Second. If there were such a contract, both the law and this contract contemplates the right of the railroad company to change its route before being built, and to abandon it afterwards, and if the plaintiff is injured by this change, the remedy is clearly by an action at law for damages.

Third. The present defendant, the Railway Company, is not shown to be under any obligation to perform the covenant of its predecessor, the railroad company, which is set up here as a matter of specific performance. The persons who purchased the railroad at the mortgage foreclosure sale did not thereby, under any statute of the State (Act of Feb. 1, 1871, Sess. Laws, p. 91), or any contract of which we are aware, become obliged to pay the debts and perform the obligations of the railroad company. *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176 [29: 121]. They bought the property of that company and its franchises; but if, as such purchasers, they thereby became bound to pay all the debts and perform all the obligations of the corporations whose property they bought, it would put an end to purchases of railroads. The plaintiff provided his own remedy for what has happened by the condition in his conveyance, that the land should revert to him, his heirs or assigns, in the event of which he now complains.

As regards the sum to which he would be entitled for the taking of the lots or parts of them where the railroad now runs by the defendant Company, the law has provided him with the remedy, which is still in the hands of the court in the proceedings for condemnation. If the money paid into court is insufficient, he is probably entitled to a further trial by jury. If it is a sufficient compensation, the money awaits him when he is ready to accept it.

The bill makes no case for the interposition of a court of equity, and the decree of the court dismissing it is therefore affirmed.

MORRIS RICHTER, *Appt.*,
v.
GEORGE JEROME, Survivor, etc., ET AL.

(See S. C. Reporter's ed. 233-249.)

Acts of trustee—foreclosure by trust company—binds bondholders—reforeclosure—parties—equities, how adjudicated.

1. Where a trustee acts in good faith, whatever binds him in any legal proceeding which he begins and carries on to enforce the trust, to which the *cestuis que trust* are not actual parties, binds them. Whatever forecloses a trustee, in the absence of fraud or bad faith, forecloses them.

2. Where a trust company began its suit for the foreclosure of its mortgage, and sold under the decree in that suit all the interests, legal and equitable, which it held in the land as trustee for the bondholders, and distributed the proceeds, all the rights which the trust company, as trustee, had in the land passed to the purchaser at the sale; and the sale not only binds the trust company as trustee, but binds a bondholder who has received his share of the proceeds of the sale, without complaint and without objection.

3. If the decree, or the sale under it, was in fraud of the right of the bondholders, their remedy is by a direct proceeding to set aside the sale or decree, and to proceed anew with another foreclosure of the mortgage, and not to undertake to reforeclose what has been fully foreclosed before under a decree which remains in force.

4. To such a suit, for foreclosure the bondholders are not necessary parties. They are represented therein by their trustee and are bound by the decree so long as it stands unreversed.

5. Equities, which were proper subjects for adjudication in the foreclosure suit, if they existed, and which formed part and parcel of the security which was then enforced, if not excepted from the sale, passed by it.

[No. 25.]

Argued Oct. 20, 1887. Decided Nov. 7, 1887.

APPEAL from the Circuit Court of the United States for the Western District of Michigan. *Affirmed.*

The facts of the case are stated in the opinion.

Messrs. J. P. Whittemore, **Don M. Dickinson** and *John S. Seymour*, for appellant:

The former foreclosure, decree and sale, created no estoppel to the present suit.

Koehler v. *Black River Falls Iron Co.* 67 U. S. 2 Black, 715 (17: 339); Fonb. Eq. § 11; *Penn* v. *Baltimore*, 1 Ves. Sr. 444; *Massie* v. *Watts*, 10 U. S. 6 Cranch, 148 (3: 181); *Van Ness* v. *Hyatt*, 38 U. S. 13 Pet. 300, 301 (10: 171); *Hart* v. *Sansom*, 110 U. S. 154 (28: 102); *Gay* v. *Parpart*, 106 U. S. 679 (27: 256); *Morsell* v. *First Nat. Bk.* 91 U. S. 357 (23: 436); *Freedman's Sav. & T. Co.* v. *Earle*, 110 U. S. 710 (28: 301).

Even though the equity of the mortgagor had been stated in the former bill, it would have given the court no jurisdiction in respect of it, without Ayer being made a party defendant to that bill.

Cunningham v. *Macon & B. R. R. Co.* 109 U. S. 446 (27: 992).

Where the court is made, by its decree, to authorize a breach of trust, the presumption is that the court has been imposed upon, and the decree is void.

Sheldon v. *Aland*, 8 P. Wms. 110; *Kennedy* v. *Daly*, 1 Sch. & Lef. 376.

Mr. **Walter D. Davidge,** for appellees:

The case is one where an ultimate assignee of the parties of the second part utterly fails to show that as between the parties to the contract performance should be decreed. The alleged assignment created no privity between the subsequent assignees and Anthony.

Simms v. *Guthrie*, 13 U. S. 9 Cranch, 25 (3: 644); *Mallow* v. *Hinde*, 25 U. S. 12 Wheat. 193, 196 (6: 198); *Findlay* v. *Hinde*, 26 U. S. 1 Pet. 241, 246 (7: 128, 130); Waterman, Spec. Perf. §§ 68, 69, 13; *Willard* v. *Taylor*, 75 U. S. 8 Wall. 557 (19: 501); *Marble Co* v. *Ripley*, 77 U. S. 10 Wall. 339 (19: 955).

The case is one utterly wanting in that equity which entitles a party to the extraordinary remedy by suit for specific performance. The following authorities sustain these views:

Waterman, Spec. Perf. chap. XIV; *Brashier* v. *Gratz*, 19 U. S. 6 Wheat. 528 (5: 322); *Pratt* v. *Carroll*, 12 U. S. 8 Cranch, 471 (3: 627); *Colsen* v. *Thompson*, 15 U. S. 2 Wheat. 336 (4: 253); *Dorsey* v. *Packwood*, 58 U. S. 12 How. 126 (13: 921); *Boone* v. *Missouri Iron Co.* 58 U. S. 17 How. 340 (15: 171); *Holt* v. *Rogers*, 38 U. S. 8 Pet. 420 (8: 995); *Marble Co.* v. *Ripley*, *supra*.

The complainant has made no offer of performance.

Waterman, Spec. Perf. §§ 438, 445; *Dorsey* v. *Packwood*, 58 U. S. 12 How. 126 (13: 921); Pollock, Torts, 452, 3; *Graham* v. *La Crosse & M. R. R. Co.* 102 U. S. 148 (26: 106).

An equity such as the one here claimed is not assignable.

Graham v. *La Crosse & M. R. R. Co. supra*; *Mitchell* v. *Homfray*, L. R. 8 Q. B. Div. 587.

By exercising an election to take one of two inconsistent rights, the person so electing abandons the other.

Sanger v. *Upton*, 91 U. S. 56 (23: 220); *People's Bank* v. *Manufacturers' Nat. Bank*, 101 U. S. 181 (25: 907).

The objection of laches is fatal to a doubtful and constructive trust like the present.

McKnight v. *Taylor*, 42 U. S. 1 How. 168 (11: 88).

Mr. E. W. Meddaugh, for defendants, the Ayers:

The foreclosure decree, having embraced the identical interest in respect of which this bill seeks relief, is a bar to complainant's recovery, unless procured by fraud.

Jones, R. R. Secur. § 361; *Campbell* v. *Texas & N. O. R. R. Co.* 1 Woods, 368; *Shaw* v. *Norfolk County R. R. Co.* 5 Gray, 162; *Richards* v. *Chesapeake & O. R. R. Co.* 1 Hughes, C. C. 29; Story, Eq. Pl. § 94.

And it is no less a bar because entered by consent of the parties.

Bank of Commonwealth v. *Hopkins*, 2 Dana, 395; *Dunn* v. *Pipes*, 20 La. Ann. 276; *Fletcher* v. *Holmes*, 25 Ind. 458; *Chamberlain* v. *Preble*, 11 Allen, 370; *Derby* v. *Jacques*, 1 Cliff. C. C. 425; *Holmes* v *Rogers*, 13 Cal. 191; *Gifford* v. *Thorn*, 9 N. J. Eq. 782; *Edgerton* v. *Muse*, 2 Hill (S. C.), 51; *Brown* v. *Sprague*, 5 Denio, 545; *Nashville, C. & St. L. R. Co.* v. *U. S.* 113 U. S. 266 (28: 973).

The creditors of a corporation may combine for the purpose of protecting themselves by purchasing its property when legally brought to sale, provided it is no part of the agreement to prevent competition or to use any unfair advantage.

Sahlgaard v. *Kennedy*, 18 Fed. Rep. 248, 249.

Neither Averys, Wild & Conant nor the canal company could have enforced specific performance against Anthony, as neither was in condition to fulfil the vendees' obligation.

Marble Co v. *Ripley*, 77 U. S. 10 Wall. 340, 358 (19: 955, 961); *Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 465 (7: 228); *Boone* v. *Missouri Iron Co.* 58 U. S. 17 How. 340, 343 (15: 171, 173); *Colson* v. *Thompson*, 15 U. S. 2 Wheat. 336, 342 (4: 253, 256); *Thompson* v. *Bruen*, 46 Ill. 125, 130; *Russell* v *Nester*, 46 Mich. 290.

There is no longer in the courts of the United States any doubt about the right to raise the question of laches by demurrer.

Landsdale v. *Smith*, 106 U. S. 391 (27: 219); *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 836); *Harwood* v. *Cincinnati & C. A. L. R. R. Co.* 84 U. S. 17 Wall. 79 (21: 558).

All the estate of the bankrupt, real and personal, and all his rights in equity and choses in action vest in the assignee.

Erwin v. *U. S.* 97 U. S. 392 (24: 1065); *Glenny* v. *Langdon*, 98 U. S. 22 (25: 44); *Trimble* v. *Woodhead*, 102 U. S. 647 (26: 290); *Phelps* v. *McDonald*, 99 U. S. 298 (25: 473); *Hodgson* v. *Sidney*, L. R. 1 Exch. 313.

The failure of the assignee to sue would not transfer his right of action to the creditor of the bankrupt.

Trimble v. *Woodhead*, 102 U. S. 649 (26: 290).

The right to complain of a fraud is not a marketable commodity.

Graham v. *La Crosse & M. R. R. Co.* 102 U. S. 148, 155, 6 (26: 106, 109); *Sahlgaard* v. *Kennedy*, 18 Fed. Rep. 249; *Brush* v. *Sweet*, 38 Mich. 575, 578; *De Hoghton* v. *Money*, 2 L. R. Ch. App. Cas. 164; *Hill* v. *Boyle*, L. R. 4 Eq. Cas. 260.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit in equity brought by Morris Richter, the appellant, and the case made by the bill and its exhibits is in substance this:

In 1864 the Portage Lake and Lake Superior Ship Canal Company was organized as a corporation under the laws of Michigan to build a ship canal from the most westerly point of Portage Lake through a neck of land, called "The Portage," to Lake Superior. In 1865 and 1866 Congress made two grants of land to the State of Michigan, of 200,000 acres each, to aid in this work, and both these grants were transferred by the State to the canal company. The company afterwards executed three mortgages on the lands so granted, to secure bonds amounting in all to $2,000,000.

On the 3d of March, 1863, Congress granted the State other lands, containing in the aggregate 220,000 acres and upwards, to aid in building a military road, called in the pleadings a "wagon road," from Fort Wilkinson, Copper Harbor, Michigan, to Fort Howard, Green Bay, Wisconsin. By the terms of this grant thirty sections could be sold at once, and thereafter thirty sections as each ten miles of road was completed. If the road was not completed in five years no further sales could be made, and the unsold lands were to revert to the United States. 12 Stat. at L. 798, chap. 104, § 3. On the 6th of May, 1870, this time was extended until January 1, 1872. 16 Stat. at L. 121, chap. 93.

In 1868, Francis W. Anthony contracted with the State to build the road, and in consideration thereof was to receive "all the benefits, emoluments, rights and interests arising from" the land grant. He was to have at once the first thirty sections authorized to be sold, and as any continuous ten miles (afterwards changed to two miles) was completed he was "entitled to apply for and receive a certificate for the number of sections granted to aid in the construction" thereof. In August, 1870, thirty miles of the road had been completed, and $47,958\frac{85}{100}$ acres of land were conveyed to him therefor in fee.

In November, 1870, as is alleged in the bill, about eighty miles of the road had been completed, and 153,000 acres of land earned, including that which had been patented, but Anthony had exhausted his financial resources and credit, and was in debt to the amount of $30,000. Being in this condition he went to New York to get money. While there, as is alleged, he entered into a verbal arrangement with the stockholders and directors of the canal company to raise the necessary funds to complete both the canal and the road, by which he was to transfer to Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, all his rights under the road contract, including the $47,958\frac{85}{100}$ acres patented lands; the canal company was to change its name to the Lake Superior Ship Canal, Railroad and Iron Company; the directors of the canal company, as individuals, were to subscribe $2,000,000 to its capital stock, and pay their subscription by their warranty deed of 200,000 acres of the road lands; and thereupon the canal company was to issue bonds to the amount of $3,500,000, secured by a mortgage to the Union Trust Company of New York, "to raise money for the Portage Lake Canal enterprise and for the wagon-road enterprise.

On the 25th of April, 1871, Anthony entered into a contract with Perez J. Avery, Alfred Wild, J. Edwin Conant, and William L. Avery, by which he agreed to sell to them, and they agreed to buy from him, all the wagon road lands at seventy-five cents an acre, to be paid for as follows:

"Thirty-six thousand ($36,000) dollars within thirty days from this date.

"Eight thousand ($8,000) dollars by the fifth day of June.

"Eight thousand ($8,000) dollars by the fifth day of July.

"Eight thousand ($8,000) dollars by the fifth day of August.

"Eight thousand ($8,000) dollars by the fifth day of September.

"Eight thousand ($8,000) dollars by the fifth day of October.

"Eight thousand ($8,000) dollars by the fifth day of November; all in the year 1871, and the balance in three payments; one of one quarter of the whole amount, in six months from November first, 1871; and one of like amount, payable on the first of Nov., 1872; and the other of one half the whole amount, payable on the first day of November, 1873; the last three payments to be secured by the joint and several notes of the parties of the second part, with the bonds of the Lake Superior Ship Canal, Railroad and Iron Company, at 60 per cent, assigned as collateral to said notes."

The contract of Anthony for building the road was transferred by him to the purchasers, "with all the rights, privileges, powers, and claims arising from the same," and he agreed to convey all the lands for which he then held patents as soon as the $36,000 were paid. The lands which had been earned and not patented, amounting, with those patented, to 150,000 acres, "more or less," were to be conveyed as soon as title should be obtained, and Anthony was to go on and complete the road and convey the remainder of the lands as fast as they were earned and he got title thereto. Upon the execution of a deed for the lands which had already been earned, but not then patented, the purchasers were to assign to Anthony, as security for the six monthly payments of $8,000 each, $72,000, at par, of the bonds of the canal company, he agreeing to surrender $12,000 of them as each monthly payment of $8,000 was made. Upon the conveyance of the lands which had not then been earned, but which were to be earned by the completion of the road, the purchasers were to execute notes for the price, in accordance with the terms of their agreement, and secure them with the bonds of the canal company, at 60 per cent on the face value of such bonds.

On the first of May, 1871, Perez J. Avery, Alfred Wild, and J. Edwin Conant, three out of the four purchasers of the lands from Anthony under this contract, executed a deed to the canal company, in which, after reciting that they were the owners in fee of 220,000 acres of land granted to the State of Michigan to build the road, and had subscribed for five hundred shares of the capital stock of the company, to be paid for by a conveyance of 200,000 acres of such land, they did, in consideration of the stock, convey to the company in fee simple, with full covenants of warranty, "all and singular those two hundred and twenty thousand acres of land, being the same granted by Act of Congress of the United States, entitled 'An Act Granting Lands to the States of Michigan and Wisconsin to Aid in the Construction of a Military Road from Fort Wilkinson, Copper Harbor, Keweenaw County, in the State of Michigan, to Fort Howard, Green Bay, in the State of Wisconsin,' approved March 3, 1863; which said lands are fully described and designated on the maps and record books of the office of the register of the land-office at Marquette, Michigan, and to which records and maps reference is hereby made for a fuller and more perfect description of said lands, saving

and reserving from the operation of this deed twenty thousand acres of land, to be selected by taking the sections reserved in their order as they come, commencing at the Wisconsin State line, and taking the sections on both sides of said road far enough north to get twenty thousand acres of land."

On the same day that this deed was delivered, the company executed to the Union Trust Company of New York a deed of trust covering the two land grants to the canal company, "and also two hundred thousand acres of land, situate, lying, and being in said State of Michigan, subscribed to the capital stock of the party of the first part, and fully and particularly described in a full covenant deed made by Perez J. Avery, Alfred Wild, and J. Edwin Conant, and their wives, dated on the first day of May, A. D. 1871, conveying said last mentioned two hundred thousand acres of land" to secure a proposed issue of bonds to the amount of $3,500,000. Of this amount of bonds $1,300,000 were issued by the trustee to the directors of the canal company with the usual certificate of security thereon. The bill then alleges that the directors of the canal company and Anthony, upon the faith and credit of these bonds, raised in open market $36,000 in money, which was paid over to Anthony on his contract for the sale of the lands, and afterwards $16,000 more, which was used in the same way. The remainder of the $1,300,000 "were sold or pledged in the open market of New York and elsewhere, and money raised thereon and applied to the use and benefit of said Lake Superior Ship-Canal, Railroad and Iron Company."

On the 25th of May, 1872, a bill was filed against the canal company for the foreclosure of its mortgage on the lands embraced in the first congressional grant, and on the third of July, 1872, for the foreclosure of that on the lands in the second grant. On the fifth of July, 1872, another bill was filed for the foreclosure of the third mortgage executed by the company, which covered all the lands in both grants. Then on the 19th of June, 1875, the Union Trust Company filed its bill to foreclose the mortgage which was executed to that company May 1, 1871, and covered both the land grants and the 200,000 acres embraced in the conveyance of Avery, Wild, and Conant. The same solicitor appeared for the plaintiff in each of the several foreclosure suits. On the 27th of August, 1872, the canal company was declared a bankrupt, and thereafter George Jerome and Fernando C. Beaman, its assignees, became parties to the litigation.

In the bill filed by the Union Trust Company for the foreclosure of its mortgage, the issue of the $1,300,000 of bonds was set out, and the following allegations made in respect to the "wagon road lands," so called.

"That of the 200,000 acres mortgaged to the complainant, in addition to said 400,000 acre land grants, it is claimed that said company has no title, save to $47{,}958\frac{85}{100}$ acres, and that the title to the remainder has been patented to other parties. Complainant annexes hereto a list of said last named lands, to wit, of said $47{,}958\frac{85}{100}$ acres, marked Exhibit 'C.' "Complainant is informed and believes that said lands are worth about $3 per acre, or about $150,000; that said lands are known as the 'wagon road lands,' and were acquired from the State of Michigan by one Francis W. Anthony, and were conveyed to said bankrupt company mortgagee. Exhibit 'C' is a copy of the list on file in the office of the Secretary of State of Michigan, being certificate of purchase No. 1 of military road land under Act No. 20 of the laws of 1864, approved February 4. That March 4, 1873, Henry S. Wells, a bondholder secured by complainant's said mortgage, filed his bill in this court, impleading, among others, said Francis W. Anthony, said assignees, and this complainant, and sought by said bill to subject the said 'wagon road lands,' other than said $47{,}958\frac{85}{100}$ acres, to the lien of complainant's mortgage, and to prevent their conveyance by the State to third parties, and afterwards such proceedings were had that the relief sought was denied. That in article ten of a cross bill, filed by said assignees in this court September 13, 1878, said assignees state that certain stockholders of said bankrupt had contracted to buy lands to the amount of 200,000 acres, parcel of a larger amount granted by the State of Michigan for the construction of a military wagon road, and, assuming to be owners, had conveyed the same to the said bankrupt; that said grantors had acquired title to only about 49,000 acres, and only about that amount became vested in said bankrupt, and that the residue had been patented by the State of Michigan to other parties and lost to said corporation; and that said assignees made the same statement substantially in their answer to a bill by this complainant to foreclose said mortgage in the said district court, which bill was discontinued."

The prayer so far as it related to the road lands, was, "that said $47{,}958\frac{85}{100}$ acres of land known as 'wagon road lands' may also be sold; and that all the estate, right, title, and interest of the defendants in the rest and residue of said 200,000 acres of wagon road lands may be sold," and the proceeds applied to the payment of the outstanding bonds. The decree, which was entered March 18, 1877, established the lien of the Union Trust Company mortgage on the $47{,}958\frac{85}{100}$ acres of wagon road lands to which the canal company had title, and, as to the rest, found as follows: "That the title to the remainder of said wagon road lands passed from the State of Michigan to third parties, so that, as to the same, the said Union Trust mortgage covers only a possible equity, which equity in the residue of said 200,000 acres of wagon road lands, is also a security for said 1300 bonds." It was then ordered, among other things, that "the equity of redemption or other right or interest of said mortgagor corporation in the residue of said wagon road lands" be sold with the other mortgaged property, including the $47{,}958\frac{85}{100}$ acres to pay the bonds.

Under this decree the mortgaged property was sold in June or July of 1877 to Albon P. Man and Nathaniel Wilson, and this sale confirmed in due course of practice. Soon afterwards, Man and Wilson released to James C. Ayer, then in life but since deceased, the right to or equity of redemption in all the 200,000 acres of wagon [road] lands which had not been actually conveyed to Anthony, and by him to the purchasers from him, and by them to the canal company.

The present bill was filed on the 12th of July, 1882, by Morris Richter, as "the holder, as purchaser in good faith," of two hundred and thirty of the thirteen hundred bonds secured by the Union Trust Company mortgage, against the Union Trust Company, the assignees in bankruptcy of the canal company, and the widow, heirs, devisees, and trustees under the will of Ayer, then deceased. Richter had received on each of his bonds, from the master, the sum of $9 as his share of the proceeds of the Union Trust Company foreclosure. No other payment of principal or interest had ever been made. The bill charges in substance that Theodore M. Davis, receiver of the Ocean National Bank, being the holder of 910 of the various issues of the bonds of the canal company as security for a debt of the company to the bank of about 50 per cent of the face of the bonds, J. Boorman Johnston & Co., holding 200 of one of the issues of bonds as security for a debt of the company of about 80 per cent of the amount of the bonds and James A. Ayer & Co., of which James C. Ayer was the principal proprietor, holding 760 of the various issues of bonds as security for a debt of the company of about 50 per cent of the amount of the bonds, formed a syndicate at the instance of Davis, and "agreed to pool their bonds and debts aforesaid for the common interest of said syndicate, and to run down the value of said bonds upon the market, and to wreck the enterprise aforesaid." By the fraud and connivance of the members of this syndicate, as is alleged, "the legal title to the whole of said pledged bonds was procured," before May 27, 1872, "at a mere fraction of their face value." This being done, the syndicate, on the 27th of May, 1872, caused proceedings to be commenced for the foreclosure of the first of the land-grant mortgages, and on the 3d of July, 1872, similar proceedings for the foreclosure of the second of that class of mortgages, and on the 5th of the same month for the third. The bill then alleges that before these suits were begun the directors of the canal company had proceeded so far with negotiations for raising money for their enterprise that "a successful conclusion was assured on a basis of satisfactory title of said 600,000 acres of land being found in said * * * canal company, and on the value of said property being verified as represented by report of agents for that purpose, who had been delegated by foreign capitalists to investigate to that end, of which promised success the said syndicate having been advised, they, the said members of said syndicate, set themselves about thwarting the success of said negotiations, and accomplished their purpose" by buying over Anthony from his allegiance to the canal company under his contract with the Averys, Wild, and Conant, furnishing the money necessary to complete the wagon road contract, and getting the title to the unpatented lands in Ayer. This scheme was accomplished, and lands amounting in the aggregate to something more than 173,000 acres were conveyed to Ayer—153,000 acres in 1873, and the remainder in 1875. To induce Anthony to come into the scheme he was paid a bonus of $20,000 by Ayer, and furnished the money necessary to complete his contract for building the road. The date of this transaction does not appear, except, generally, that it was in 1872. This, as is alleged, prevented the canal company from raising money, and the syndicate, with the intent to secure to Ayer the title to the "residue of said wagon road lands," "enlisted the said Union Trust Company of New York in their designs, and procured the said Union Trust Company * * * to allow * * * Alfred Russell, the solicitor of the said syndicate, upon the retainer of said syndicate, to foreclose the said Union Trust mortgage in the interest of said syndicate, but with the understanding that such foreclosure should be conducted * * * for the protection of the aforesaid legal title to the said residue of said wagon road lands in the said James C. Ayer, as far as practicable and possible under the decree to be obtained therein."

The bill then alleged in substance that the suit for foreclosure was begun and carried on for this purpose among others, and that Ayer got the mortgage title to the residue of the lands under the decree in that way and pursuant to that understanding. And finally it was alleged that the decree rendered in the cases under which the title was got "was not, in fact, an adjudication of the said court upon consideration of the pleadings and proofs in the said several causes which, as appears by said decree, were heard and decided together, but was, in fact, a decree drawn by the said Alfred Russell, solicitor of the syndicate aforesaid, and submitted to by compulsion by those representing collateral interests therein, and assented to by the Union Trust Company of New York aforesaid in collusion with the syndicate aforesaid through their solicitor aforesaid, and by the said George Jerome and Fernando C. Beaman, assignees in bankruptcy of said ship canal company aforesaid, through ignorance of the rights and equities of the said last mentioned corporation against the legal title of the said James C. Ayer to the said residue of the said wagon road lands beyond the 47,000 and odd acres which were actually sold under said decree; and said Jerome and Beaman were actually misled as to the lien of the said Union Trust mortgage upon said residue of said wagon road lands by the collusion, neglect, and failure of the said Union Trust Company, in its foreclosure bill aforesaid, to make said James C. Ayer a party defendant, charging the legal title to said lands in his hands with a trust for the payment of said mortgage, and by the collusive concession in said foreclosure bill that the title to said residue of said wagon road lands had been lost to the said ship canal company and taken out from under the lien of said mortgage by reason of a grant thereof to third parties by the State of Michigan, whereby the lien of said mortgage had been lost, and hence the said Jerome and Beaman, seeing no interest which they could conserve by opposing said decree as drawn, and insisted on by said Russell, consented to said decree as proposed by said Russell, and said decree was entered accordingly by consent as aforesaid, and so it was represented to the judge, who allowed the same to be entered without opposition or argument or consideration, and it was signed accordingly."

The prayer of the bill is "that your orator may be allowed by this court to have the bene-

fit of said decree herein set forth as 'Schedule D,' hereto, in behalf of your orator, and any other holders of said 1,800 bonds secured by the said mortgage to the said Union Trust Company of New York, who are *bona fide* holders of said bonds in said decree mentioned; and that in behalf of your orator and said bondholders the said residue of 200,000 acres of wagon road lands so deeded to said Jas. C. Ayer in his lifetime, as heretofore stated, may be by the decree of this court charged in the hands of said widow and heirs, or of said trustees, with a trust for the payment of the unpaid portion of said 1,800 bonds and interest thereon; and that the said residue of said land be sold under the decree and direction of this court to pay the moneys remaining due upon said unpaid bonds, or so much thereof as shall be necessary to that end,—subject, however, to the lien of the said widow and heirs, or of said trustees under the will of the said James C. Ayer, for all money advanced by said James C. Ayer in completion of said wagon road land contract, as the same shall be ascertained upon an accounting of the same, with interest, as the same shall appear upon an accounting thereof."

The Union Trust Company failed to appear, and as to it the bill was taken *pro confesso*. The other defendants demurred to the bill, and, upon hearing, the demurrer was sustained and the bill dismissed. From a decree to that effect this appeal was taken.

We are unable to find any authority for granting the relief which is sought in this case. The bill was not filed to set aside the decree in the suit brought by the Union Trust Company to foreclose its mortgage. On the contrary, the complainant asks in express terms to have the benefit of that decree, so that, as we suppose, he may keep the money he has got as his share of the proceeds of the sale under it. Neither is it sought to hold the Union Trust Company accountable for its alleged misconduct and breach of faith in the proceedings for the foreclosure of the mortgage. Nor is the suit brought to obtain a specific performance of the contract between Anthony and the Averys, Wild, and Conant, nor to recover back the money paid by the canal company on that contract over and above what was necessary to pay for the lands which had been patented to Anthony, and which were actually sold under the Union Trust Company decree for the benefit of the complainant and the other bondholders.

But it is, if we understand it correctly, a suit to charge the wagon road lands, now in the hands of the legal representatives of Ayer, with a trust in favor of bondholders as security for the amount due them respectively, subject only to a lien for the moneys actually advanced to enable Anthony to complete his contract for building the road and thus become entitled to patents.

There can be no doubt that the mortgage by the canal company conveyed to the Union Trust Company, as trustee for the bondholders, all the interest in the lands which was conveyed to the canal company by the warranty deed of Perez J. Avery, Wild, and Conant; but that was no more than the interest which those grantors acquired by the contract with Anthony. As their deed was with covenants of warranty, any title which they afterwards acquired under the Anthony contract would enure to the benefit of the bondholders through the trust company as their trustee holding for their benefit, and as their representative. All the rights the bondholders have or ever had in the mortgage, legal or equitable, they got through the trust company, to which the conveyance was made for their security. As bondholders claiming under the mortgage, they can have no interest in the security except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them. *Kerrison* v. *Stewart*, 93 U. S. 155, 160 [23:843,845]; *Corcoran* v. *Chesapeake & O. Canal Co.* 94 U. S. 741, 745 [24:190,191]; *Shaw* v. *Little Rock & Ft. S. R. Co.* 100 U. S. 605, 611 [25:757,758]. Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them. This is the undoubted rule.

Here the trust company began its suit for the foreclosure of its mortgage, and has sold under the decree in that suit all the interests, legal and equitable, which it held in the land as trustee for the bondholders, and distributed the proceeds, the complainant receiving his share without complaint and without objection. All the rights which the trust company, as trustee, had in the lands at the time of the mortgage passed to the purchaser at the sale. That sale, it is conceded, binds the trust company as trustee, and therefore it binds the complainant as a bondholder. If the decree or the sale under it was in fraud of the rights of the bondholders, their remedy is by a direct proceeding to set aside the sale or the decree, and to proceed anew with another foreclosure of the mortgage, and not to undertake to reforeclose what had been fully foreclosed before, under a decree which remains in force.

But it is said that the original foreclosure was of no effect, because neither Anthony nor Ayer was a party to the suit, and the rights of the trust company and its beneficiaries under the mortgage were neither set forth with certainty in the bill nor found in the decree. No relief was sought either against Anthony or Ayer. The sole purpose of the bill was to sell the interest of the mortgagee in the lands, whatever that interest might be. To a suit for that purpose neither Anthony nor Ayer was a necessary party, because it was not important to them who held the rights that were to be sold, and such a sale would not affect them. The canal company, or its assignees in bankruptcy, were parties to the suit, and, instead of objecting, as they might, to a sale of the property without a more specific adjudication as to what was to be sold, consented to it. The bondholders were represented in the suit by their trustee, and are bound by the decree so long as it stands unreversed, and is not set aside or vacated.

The argument of counsel for the appellants seems to proceed on the ground that there are two equities growing out of the mortgage to the trust company, which may be dealt with in two separate suits as they are separate and distinct in their character. One he calls the mort-

gagor's equity, consisting of the rights of the canal company in the lands growing out of the contract by Anthony for their sale to the Averys, Wild, and Conant. This equity, if we understand counsel correctly, it is conceded was sold under the proceedings for foreclosure, and now belongs to the purchaser. The other he denominates the "bondholders' equity," and it arises out of the purchase by Ayer from Anthony of his rights under the contract with the State of Michigan for building the wagon road when he (Ayer) had knowledge of the former contract under which the canal company could have perfected its title to the unpatented lands included in the mortgage if he had not interfered. Under this equity counsel say they now seek to recover for the bondholders "only the profits which Ayer made by stepping into Anthony's shoes in the premises."

We are unable to see how these two equities, if there are two, can be separated in the way contemplated. They both grow out of the canal company's rights under the contract between Anthony, and the Averys, Wild, and Conant. If the canal company could not recover from Ayer, neither the bondholders nor their trustee in the mortgage can. The title upon which their right of recovery rests, if such a right ever existed at all, was in the trust company, as the trustee of their security, at the time the original foreclosure was had, and it was part of the mortgagor's equity which was sold. It was then what this bill seeks to make it now, part of the security of the bondholders under the trust company mortgage, and being such it passed with the rest to the purchaser at that sale.

Something is also said in the argument about the equitable claims of the bondholders upon Ayer as the successor of Anthony, growing out of the false representations made to them as to the title of the lands covered by the mortgage when they paid the money and took their bonds; but all such claims come from the mortgage, as to which, in all proceedings for foreclosure, they are represented by their trustee when its interests are not in conflict with theirs. All the equities now asserted were proper subjects for adjudication in the former suit if they existed. They formed part and parcel of the security which was then enforced, and, not being excepted from the sale, passed by it.

This makes it unnecessary to consider whether there was such fraud on the part of Anthony as to charge the lands in the hands of Ayer, even if the trust company were now proceeding against him under the mortgage.

The decree is affirmed.

UNITED STATES, *Plff. in Err.*, *v.* PHILADELPHIA AND READING RAILROAD COMPANY.

(See S. C. Reporter's ed. 113-117.)

Charge to jury—opinion of court—suit for taxes.

1. On trial by jury in the courts of the United States, the trial judge may aid the jury by giving them his opinion upon questions of fact provided he submits those questions to their determination.

2. In an action by the United States against a railroad corporation, for unpaid taxes under the Act of June 30, 1864, as amended by the Act of July 13, 1866, an assessment is not required, nor, if made, conclusive upon either party.

3. Where there had been a settlement of the demand between the United States and the company twelve years before, upon an assessment then made by a government officer, and a payment of the tax thus ascertained, *held*, that it was not error in the trial judge to express his opinion to the jury that, under the circumstances, and the acquiescence of the Government for that period in the correctness of the amount, they should not find for the plaintiff, he, at the same time instructing them that the court did not desire to control their finding, and that the question was one for them to determine.

[No. 30.]

Argued Oct. 25, 1887. Decided Nov. 7, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

The facts of the case appear in the opinion.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error:

The tax sued for accrued under section 122 of the Act of the 30th of June, 1864, 13 Stat. at L. 284, as amended by the Act of July 13, 1866, 14 Stat. at L. 138.

Section 3213, Revised Statutes, which is a re-enactment of a part of the Act of July 13, 1866, 14 Stat. at L. 111, authorizes the collection of the taxes under this Act by suit in any proper form of action.

Dollar Savings Bank v. *U. S.* 86 U. S. 19 Wall. 227, 240 (22:80, 82); *U. S.* v. *Tilden*, 9 Ben. 368-394.

The gross receipts were taxable at the rate of 2½ per cent under section 103.

14 Stat. at L. 135; also 13 Stat. at L. 275.

A settled account concludes nothing as to items not stated in it.

Perkins v. *Hart*, 24 U. S. 11 Wheat. 237-256 (6:463, 468).

If there was any substantial evidence to sustain the issue on part of the plaintiff, it should have been submitted to the jury.

Otis v. *Watkins*, 13 U. S. 9 Cranch, 339, 357 (3:752, 758); *Bergner* v. *Thompson*, 74 Pa. 172; *Madara* v. *Eversole*, 62 Pa. 160-165.

Messrs. **Thomas Hart, Jr.,** *William Ward* and *Geo. R. Kaercher*, for defendant in error:

The case cited from 9 Benedict is that of the *United States* against *S. J. Tilden*. The defendant showed that he had made returns of his income for the years in question, was assessed, and paid the tax assessed. The plaintiff demurred, and the question simply was whether the causes of action were barred by the facts of former assessment and payment. See page 387. The court sustained the demurrer on the ground that the former assessment was no bar to a subsequent action. The court simply held that the former assessment was not a conclusive adjudication upon the United States. The cases of *U. S.* v. *Little Miami, C. & X. R. R. Co.* 1 Fed. Rep. 700; *U. S.* v. *Halloran*, 14 Blatchf. 1; and *U. S.* v. *Hazard*, 22 Int. Rev. Rec. 300, decide no more. All of them were based upon the cases of the *Dollar Savings Bank* v. *U. S.* 86 U. S. 19 Wall. 227 (22:80); and *Clinkenbeard* v. *U. S.* 88 U. S. 21 Wall. 65 (22:477).

The court may give its opinion on the evidence to the jury. *Games* v. *Dunn*, 39 U. S. 14 Pet. 322 (10:476); *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 238 (24:434); *Eastern Transportation Line* v. *Hope*, 95 U. S. 302 (24:479);

Knickerbocker L. Ins. Co. v. *Trefz*, 104 U. S. 197 (26:708); *Bonner* v. *Herrick*, 99 Pa. 220; *Johnston* v. *Commonwealth*, 85 Pa. 54; *Bitner* v. *Bitner*, 65 Pa. 347; *Ditmars* v. *Commonwealth*, 47 Pa. 335; *Kilpatrick* v. *Commonwealth*, 31 Pa. 198; *Porter* v. *Seiler*, 23 Pa. 424; *Repsher* v. *Watt-son*, 17 Pa. 368; *Sailor* v. *Hertzogg*, 10 Pa. 296.

Mr. Justice **Gray** delivered the opinion of the court:

Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination. *Vicksburg & M. R. R. Co.* v. *Putnam*, 118 U. S. 545 [30:257]; *St. Louis, I. M. & S. R. Co.* v. *Vickers*, 122 U. S. 360 [30:1161] The judge who presided at the trial of this action did not exceed his rightful power in this respect.

The action was brought by the United States against a railroad corporation to recover $40,844.19, for unpaid taxes on undivided profits from June 30, 1864, to November 30, 1867, under the Internal Revenue Act of June 30, 1864, chap. 173, § 122, as amended by the Act of July 13, 1866, chap. 184. 13 Stat. at L. 284; 14 Stat. at L. 138. The trial proceeded upon the rule established by previous decisions of this court, that an assessment is not required by the Act, nor, if made, conclusive upon either party, and that in an action to recover the tax the controlling question is not what has been assessed, but what is by law due. *Dollar Savings Bank* v. *U. S.* 86 U. S. 19 Wall. 227 [22:80]; *Clinkenbeard* v. *U. S.* 88 U. S. 21 Wall. 65 [22:477].

The president of the Corporation testified that in 1868 the United States made a demand upon the Company for some $350,000 alleged to be due for such taxes for the same period; that the Company resisted the demand, and through him as its counsel contended that it had already paid more than was due, and was entitled to a considerable credit for items really belonging to construction, though charged to income in the form in which its accounts were made up; that the Company opened all its books to the officers of the Government, and after full investigation by them, and arguments in behalf of both parties before the assessor of internal revenue for the district, occupying several weeks, the officers of the Company and the assessor agreed upon a settlement and adjustment of the demand for the sum of $39,797.61, which the Company thereupon paid, and for which it took the following receipt:

"United States Internal Revenue, Collector's Office,

"District of Pennsylvania, July 28, 1868.

"Received of Philadelphia & Reading R. R. Co. forty-one thousand eight hundred & seven $\frac{61}{100}$ dollars, for excise tax on—

"Gross receipts	$2,010 00
"Profits over dividends	39,797 61
"Total	$41,807 61

"May, 1868, being amount assessed on June list for July 1st, '64, to Nov. 30, 1867.

"JOSEPH G. KLINE, Deputy Collector."

The only witness called by the United States was an internal revenue agent, who testified that in November, 1879, he examined the defendant's books and accounts, the defendant giving him every facility that he desired; and that the result of his examination showed that the gross amount of the tax for the period in question was $85,532.60, and that, deducting an overpayment of $4,890.80 in 1869 on the "renewal fund," (which the Commissioner of Internal Revenue had since held not to be taxable), and deducting also the payment of $39,797.61 in 1868, there was $40,844.19 still due; that he made up the gross amount by charging the Company with the total receipts from its road, and with rent received from another corporation, and crediting it with all the working expenses, the "renewal fund," interest paid on mortgages of real estate and on bonded debt, dividends paid to stockholders, and the United States tax and the state tax on such dividends; and that he did not know how the sum of $39,797.61 was made up.

In the course of a long examination and cross examination, he testified that he made no allowance for interest paid by the Company on its funded debt, and that by his mode of statement the Company was taxed upon every dollar expended for interest, even if some of that interest was exempt from taxation; that where the Company paid a dividend to stockholders, and assumed the payment of the government tax on the dividend, he computed the dividend tax upon the whole dividend declared, and not merely upon the amount actually paid to the stockholders; that the fiscal year of the Company ended with November 30, and that, in computing the tax for the five months from June 30 to November 30, 1864, he credited the Company with five twelfths only of the "renewal fund" for the year ending November 30, 1864, and of the United States tax and the state tax on dividends, and of the annual dividend estimated as aforesaid, although, before June 30, 1864, there was no tax on surplus profits, and money spent in construction was not taxable.

Each of these points was contested by the defendant, it is not pretended that any of them have been determined by judicial decision, and it might well be inferred that they had all been taken into consideration in the settlement between the assessor and the Company in 1868.

The bill of exceptions further states that the Government offered in evidence "all the books of the Philadelphia and Reading Railroad Company, referred to, as well as the statements and reports, and closed." But it contains no description of those books, statements and reports, except as they are mentioned in the testimony of the internal revenue agent.

Such being the case on trial, the judge, in charging the jury, and referring them to the testimony given before them by the president of the Company on the one side and by the witness for the Government on the other, might justly and properly say to them, as he did: "From the assessment made by the Government's officer in 1868, the payment of the money in

pursuance of it, and the acquiescence of the Government in what was thus done for so long a period—nearly twelve years—a presumption arises that the assessment then made was correct, and that the money paid covered the defendant's entire liability for taxes upon surplus earnings between the periods embraced. The burden is thus cast upon the plaintiff to repel the presumption by evidence that the assessment was erroneous, and, in view of the circumstances, the evidence should be such as to satisfy the mind fully in this respect." "Whether the Government has proved mistake by the testimony of the witness referred to—there is no other testimony tending to prove it—is for you to determine. In submitting this question, however, it is proper to say that, in the judgment of the court, it would be unsafe and therefore unjust to find error in the assessment and settlement under the evidence before you, and consequently to render a verdict against the defendant for the large sum of money claimed, as the plaintiff asks you to do. In other words, while the court does not desire to control your finding, but submits the question to you, it is of opinion that you should not, under the circumstances, find for the plaintiff."

Judgment affirmed.

UNITED STATES, *Appt.*,

v.

DENNIS W. MULLAN.

(See S. C. Reporter's ed. 186-189.)

Pay of navy officers—when graduated.

1. One who, at the time of the passage of the Act of March 3, 1883, chap. 97, 22 Stat. at L. 473, and of July 15, 1870, chap. 295, § 3, 16 Stat. at L. 330, was a lieutenant-commander who had served as an officer in the Regular Navy, from Sept. 21, 1860, by continuous service in various positions, is entitled to the graduated pay given by the latter Act.

2. Where an officer has entered the service but once, that entry is to be taken as the last entry within the meaning of the statute.

[No. 1072.]

Submitted Oct. 26, 1887. Decided Nov. 7, 1887.

APPEAL from the Court of Claims. *Affirmed.*

The facts of the case appear in the opinion.

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** for appellant.

Messrs. **John Paul Jones** and **Robert B. Lines,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the United States from a judgment of the court of claims, for the sum of $356.08, in favor of Dennis W. Mullan. Mullan is an officer in the Regular Navy, who has served continuously therein since September 21, 1860, on which day he was appointed acting midshipman. He was appointed acting ensign, October 21, 1863; master, May 10, 1866; lieutenant, February 21, 1867; and lieutenant-commander, March 12, 1868. He was paid for all of his services in those capacities, in accordance with the laws in force at the time they were performed. In addition, he claimed to be entitled to the benefit of the provisions of the Act of March 3, 1883, chap. 97, 22 Stat. at L. 473, which reads as follows: "And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the Regular or Volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the Regular Navy in the lowest grade having graduated pay held by such officer since last entering the service; *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers; *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the Volunteer Army or Navy."

The court of claims held that Mullan was entitled to $356.08 under that Act. The amount is not questioned by the Government, if the court of claims decided the question of law correctly. Graduated pay for various ranks in the Navy was given by the Act of July 15, 1870, chap. 295, § 3, 16 Stat. at L. 330, now section 1556 of the Revised Statutes. At the time of the passage of the Act of 1883, Mullan was a lieutenant-commander, who had served as an officer in the Regular Navy from September 21, 1860, by continuous service; and, while he held the rank of lieutenant-commander, graduated pay was given by statute to officers of that rank and other officers. By the provisions of the Act of 1883, he is to be credited with his actual time of service, and is to receive all the benefits of that service in all respects in the same manner as if all of that service had been continuous in the lowest grade having graduated pay held by him since last entering the service.

It is contended on the part of the United States that the Act of March 3, 1883, applies to officers serving in the Regular Navy only when their term of service has not been continuous. The view is urged, that the expression "since last entering the service" implies that the officer, to be entitled to the benefit of the statute, must have entered the service more than once. But we think that this is an overstrained interpretation. Mullan entered the service once. It was his last entry as well as his first entry. Where an officer has entered the service twice, the second entry is the last entry, and that entry is to be taken in applying the statute to his case; but where an officer has entered the service but once, that entry is to be taken as the last entry, within the meaning of the statute. So, too, the expression, "as if all said service had been continuous," is not to be held to confine the benefits of the statute to a service which has been noncontinuous. The expression is satisfied by considering it as an extension of the benefits of the statute to interrupted, noncontinuous service, and by crediting the officer with the actual time of such service, as if it had been continuous service. Otherwise, the statute cannot be carried out. It says that "all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the Regular or Volunteer Army or Navy, or both;" and the benefits of such actual service

are to be received, where the service has been continuous, in the Regular Navy.

The judgment of the Court of Claims is affirmed.

SMITH AND GRIGGS MANUFACTURING COMPANY, *Appt.*,

v.

DELIA SPRAGUE, Admrx. of LEONARD A. SPRAGUE, Deceased.

(See S. C. Reporter's ed. 249-267.)

Public use of invention—when defeats right to a patent—burden of proof—patent for making buckle levers, how far void.

1. The use of an invention, by the inventor himself, or by another person under his direction, by way of experiment and in order to bring the invention to perfection, is not such a public use as under the statute defeats his right to a patent.

2. Where the substantial use is not for that purpose, but is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, and such use is public, and for more than two years prior to the application, it will defeat a right to a patent.

3. Where the defense to an action for infringement is the alleged prior public use, for more than two years, of an invention, and where such defense is met only by the allegation that the use was not a public use because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee should be full, unequivocal and convincing.

4. Patents issued to Leonard A. Sprague, for improvements in machines for making buckle levers, as to certain claims are held void by reason of a prior public use of the invention covered thereby for more than two years before the date of the application.

[No. 29.]

Argued Oct. 24, 1887. Decided Nov. 14, 1887.

APPEAL from the Circuit Court of the United States for the District of Connecticut. *Reversed.*

Opinion below, 12 Fed. Rep. 721.

The facts are fully stated in the opinion.

Messrs. **George E. Terry** and **M. B. Philipp**, for appellant:

As this machine was used by Sprague for more than two years prior to his application for the patents in suit, the 1st, 2d, 3d, 4th and 6th claims of the patent 228136 and the 2d, 3d, and 5th claims of the patent 231199, covering inventions embodied in and carried out by it while so publicly used, are void.

Consolidated Fruit Jar Co. v. *Wright*, 94 U. S. 92 (24: 68); *Egbert* v. *Lippmann*, 104 U. S. 333 (26: 755); *Worley* v. *Loker Tobacco Co.* 104 U. S. 340 (26: 821); *Manning* v. *Cape Ann Isinglass & G. Co.* 108 U. S. 462 (27:793); *Henry* v. *Providence Tool Co.* 14 Off. Gaz. 855; *Perkins* v. *Nashua Card & Glazed Paper Co.* 2 Fed. Rep. 451; *American Hide & L. S. & D. M. Co.* v. *American Tool & M. Co.* 4 Fish. Pat. Cas. 284; *Lyman* v. *Maypole*, 19 Fed. Rep. 735; *Henry* v. *Francestown Soapstone Co.* 2 Fed. Rep. 78.

The defendant is free to use its form of improvement upon the old machine.

McCormick v. *Talcott*, 61 U. S. 20 How. 402 (15: 930); *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554 (24:1053).

The question to be determined in this case is, What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.

Mowry v. *Whitney*, 81 U. S. 14 Wall. 620 (20: 860); *Black* v. *Thorne*, 111 U. S. 122 (28:372); *Cawood Patent*, 94 U. S. 695 (24: 238); *Livingston* v. *Woodworth*, 56 U. S. 15 How. 546 (14: 809).

Mr. **Charles E. Mitchell**, for appellee:

Two years' prior public use is not proven. The earliest date of application is the date for both patents.

Graham v. *McCormick*, 21 Off. Gaz. 1533; *Beedle* v. *Bennett*, 122 U. S. 71 (30: 1074); *Manning* v. *Cape Ann Isinglass & G. Co.* 108 U. S. 465 (27: 794).

An experimental use being established, an incidental sale of such portion of the product as was salable will not change the character of the use, and create a forfeiture.

Agawam Woolen Co. v. *Jordan*, 74 U. S. 7 Wall. 583 (19:177); *Winans* v. *New York & H. R. R. Co.* 4 Fish. Pat. Cas. 1; *Jennings* v. *Pierce*, 15 Blatchf. 42; *Pitts* v. *Hall*, 2 Blatchf. 229.

For rule as to damages, see *Cawood Patent*, 94 U. S. 695 (24: 238); *Bigelow Carpet Co.* v. *Dobson*, 21 Off. Gaz. 1200.

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity for an injunction and account based upon the alleged infringement by the appellant of letters patent No. 228136, dated May 25, 1880, and letters patent No. 231199, dated August 17, 1880, for improvements in machines for making buckle levers, issued to Leonard A. Sprague, the appellee. The defenses relied on are: (1) a denial of the infringement alleged in respect to the fifth claim of patent No. 228136 and the first and fourth claims of patent No. 231199; (2) as to all the other claims of both, that a machine embodying them was in public use for more than two years prior to the application for the patents. The application for patent No. 228136 was filed on November 11, 1879, while that for patent No. 231199 was filed December 2, 1878, the two being divisions of an application based on the same model. The machines described in the two patents, it is admitted, are substantially the same in construction and operation, both patents being for different parts and combinations of a single machine. For the purposes of this case, therefore, the date of the application is to be taken as of December 2, 1878, being the earlier of the two.

The machine is for making levers of buckles used almost exclusively on "arctic" overshoes. These levers are made from a single piece of brass, with slots through them near each end to fasten them to the strap of a shoe, and are bent by formers and swaged by dies so that they have what is termed a lip or bead, which bears upon the holding strap, two grooves within which lies the bar or pivot of the buckle, and two beads at the upper edge for a finish and to prevent the strap from cutting when it is fast through the slots and bears upon them when in use. There is no claim in these pa-

tents for the buckle lever itself as a new article of manufacture, for which, however, Sprague, the appellee had a prior patent dated May 27, 1862. The levers are made from a strip of metal by a succession of operations in the patented machine. The first step is to produce the slotted blank; the next, to bend it by doubling it upon itself into a U shape; the next, to produce the central double bead forming the grooves, and the next to produce the double beads between the slot and the edge of the lever. The machine is organized to feed a strip of sheet brass under punches which punch the slots in the blank, and then cut it from the strip; to feed this blank over a matrix where it is bent into U form; to feed it on to a mandrel, on which, by a pair of dies, it is partially formed, and then along that mandrel to a second pair of dies, where its form is completed. The machine is automatic, and while these successive steps take place in the complete manufacture of a single lever, all the various steps in the process, with respect to successive levers, take place simultaneously. So that as each lever is completely and finally formed on the mandrel it is pushed from the mandrel by another to take its place in that stage of formation.

The 1st, 2d, 3d, 4th, and 6th claims of patent No. 228136, and the 2d, 3rd, and 5th claims of patent No. 231199, are those in respect to which the alleged infringement is admitted, and as to which the defense of two years' prior public use is urged. These claims are as follows:

Of patent No. 228136.

"1. In combination with the mandrel M, provided at its lower edge with the rib *m* and with the short ribs m^2 m^3, the dies N N′ O O, whereby, after the partially formed lever has been acted upon by dies N N′, the rib *m* serves as a support or guide over which said lever may be moved to a proper position relative to dies O O, substantially as set forth.

"2. In a machine for making buckle levers, the combination of the mandrel M, the dies N N′, advanced on planes substantially at right angles to the planes of the partially formed buckle lever, and the tongue n^2, attached to the die N, substantially as set forth.

"3. In a machine for making buckle levers, the combination, with the mandrel, the punch which punches blanks from a continuous sheet of metal, and two or more dies which successively form the metal into the desired shape, of a carrier which moves a blank from the punches to the forming dies and advances the partially formed levers against the preceding lever, substantially as set forth."

"4. In a machine for making buckle levers, the combination, with the matrix L and folder l^2, of the dies N N′, the mandrel arranged to receive the blank from the matrix, and the carrier, substantially as set forth."

"6. In a machine for making buckle levers, the combination with the folder l^2, of the pusher pin c^3, attached to and moving with the punch stock C, and a returning spring, which lifts the folder, substantially as set forth."

Of patent No. 231199.

"2. In a machine for making buckle levers, the combination, with the die which punches blanks from a continuous sheet of metal, of two or more dies which successively form the metal into the desired shape, and a carrier which moves a blank from the punching die to the forming dies and advances the partially formed lever against the preceding lever, substantially as set forth.

"3. In a machine for making buckle levers, the combination, with the mandrel M, provided with the rib *m*, of the dies N N′ and a stop adapted to engage with the lower end of the lever and determine the length of the bit *u*, substantially as described."

"5. The herein described method of manufacturing buckle levers—that is to say, by bending the blank into U shape, then forming the bit *u* and seats u^2 u^3, and subsequently forming the grooves u^4, substantially as herein set forth."

The claims in respect to which infringement is denied are as follows:

Of patent No. 228136.

"5. In a machine for making buckle levers, the combination, with the mandrel M and dies N N′, of the springs N^2 N^3, to press the dies forward into proper position relative to the mandrel, substantially as set forth."

Of patent No. 231199.

"1. In a machine for making buckle levers, the combination of the mandrel M, provided with the ribs *m* m^2, of the dies N N′ O O, and a support, which presses the part *u* of the lever against the rib *m*, substantially as set forth."

"4. In a machine for making buckle levers, the combination, with the mandrel M, having rib *m*, of the dies N N′ and stops adapted to engage both ends of the partially formed lever, to regulate its position relative to the mandrel and dies, substantially as set forth."

It will be observed that the claims in respect to which the infringement is denied do not embrace the whole invention claimed in the two patents. They cover only certain definite and specific combinations of parts of the mechanism. It is possible, therefore, that a defendant might be guilty of infringement in respect to all the other claims in the two patents, and yet not infringe the three claims specified above. That is to say, he might use a machine which embodied all the combinations except those specified in these three claims. These he might entirely omit without any substitute, or he might have a substitute for them so different as to amount to a separate invention, and therefore not mere equivalents for them.

In the examination of the question, therefore, of the prior public use, for two years before the date of the application, of the invention as embodied in those claims in respect to which the infringement is admitted, we assume for the present that the machine used by the defendant is an infringement of that covered by the complainant's patents only so far as it is covered by them, excluding the three claims in respect to which the infringement is denied.

The testimony on the subject of the prior public use by the complainant is, that from the fall of 1874 until the fall of 1877, and thus more than two years prior to December 2, 1878, the complainant had in use for the purpose of profit in his business, operated in his factory by his workmen for the production of arctic overshoe buckles, a machine which contained all the elements and combinations covered by the claims in the two patents in respect to which

the defendant confesses infringement. This machine was practically successful in that during the period of its use the complainant produced and sold about 50,000 gross of levers used on these shoe buckles, which he sold to his customers in the market. It was a public use in the sense of the statute and within the decisions of this court, inasmuch as it was used by the complainant in the regular conduct of his business by workmen employed by him in its operation, and in the view of such part of the public as chose to resort to his establishment, either for the purpose of selling material for the manufacture or of purchasing its product. It is claimed, however, and it was so decided by the circuit court, that this prior use of the machine in that form was not a public use within the prohibition of the statute so as to defeat the patent, because that use was experimental only, of an imperfect machine, embodying an incomplete invention, in order to enable the inventor to perfect it by improvements actually added, and to overcome defects developed by this use, which improvements are contained in the three additional claims, and which were added as parts of the invention within two years before the date of the application.

The matters under this head are stated by the learned judge of the circuit court, in his opinion contained in the record, as follows:

"The facts are, that from 1862 to 1868 the patentee made another kind of buckle from those produced by this machine upon two or more different machines. Between 1868 and the fall of 1878 another kind of buckle was made by one machine. For a year prior to the fall of 1874, he made the 'beaded' buckles—*i. e.*, the kind now under consideration, upon two machines.

"In 1874 he ordered the skeleton of the patented machine from Bliss & Williams, his workmen or himself making the patented portions. This machine was in a condition in which it was used to manufacture buckle levers in the fall of 1874, and continued to be so used, without substantial change, until the spring of 1878; but it was not a perfected invention. It had two defects—one, that it choked, and the overlapping blanks had to be picked apart by a workman; another, that the bead was not parallel with the slot, because the blank could not be forced upon the mandrel evenly. Nevertheless, it was used, in some seclusion from the public, to make levers, and it made about 50,000 gross, which were sold; but the organization was defective until it was perfected in the early part of 1878, after repeated experiments. The inventor always adhered to the idea of perfecting the invention, and then obtaining a patent upon it. The two improvements which were introduced in 1878 were the springs between the levers and the dies, which prevented overlapping, and the rib m^3, in order to keep the blank in position when it was forced upon the mandrel. These changes, which are apparently not of great importance, perfected the invention, and enabled the inventor to take the final step between partial and complete success.

"It is perfectly true that a patentee cannot be permitted to use for profit a machine which embodies a perfected invention for a period of two years or more, and then obtain a valid patent for the old machine by means of the addition of some new improvements, which, in the language of *Judge* Lowell, 'were intended to benefit the patent rather than the machine.' *Perkins* v. *Nashua Card, etc. Co.* 2 Fed. Rep. 451-454.

"The present case is that of a machine which was imperfect, and which demanded and received the continuous experiments of the inventor to remedy the defects in its organization. It is not true that the inventor cannot safely use for profit such a machine in its imperfect state, lest two years should elapse during the experimental period before the invention is completed and the patent is applied for." *Sprague* v. *Smith & G. Mfg. Co.* 12 Fed. Rep. 721.

We think this view might be correct and applicable to the case if the invention of the complainant, which he sought to embody and protect by the patents, consisted of the entire machine as he ultimately constructed and operated it, considered as a unit; for, in that view, it would have been imperfect and incomplete, and merely experimental, until it had received from its inventor every element necessary to its operation. But that supposes that his invention is nothing less than the single, entire, and completed machine. We do not think that to be the present case. Here the invention is not one, but many; each of the claims in both of the patents is for a specific combination in a practically successful machine for making buckle levers, and each is a separate and distinct invention, and claimed as such. All the elements of these combinations were old; it was the specific arrangement and several combinations and sub-combinations of them that are claimed as new. The use of any one of these combinations, or of any number of them, in such a machine, would be an infringement of the complainant's rights as patentee. And if, without the use of the combinations contained in the excluded claims, the complainant had a machine practically useful for the purpose for which it was designed, which could be used with commercial success as superior to modes of manufacture previously in use, and which, in fact, he did so use for profit in the ordinary course and conduct of his business, and for the purpose of a successful prosecution of that business, it can hardly be said with propriety that such use was merely experimental, although during the period of its operation he was also engaged in the invention of improvements by which he hoped and expected to make it more valuable and useful.

A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal and not the incident must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition. The lan-

guage of section 4886 of the Revised Statutes is, that "Any person who has invented or discovered any new and useful * * * machine, * * * not in public use or on sale for more than two years prior to his application, * * * may * * * obtain a patent therefor."

A single sale to another of such a machine as that shown to have been in use by the complainant more than two years prior to the date of his application would certainly have defeated his right to a patent; and yet, during that period in which its use by another would have defeated its right, he himself used it, for the same purpose for which it would have been used by a purchaser. Why should the similar use by himself not be counted as strongly against his rights as the use by another to whom he had sold it, unless his use was substantially with the motive and for the purpose, by further experiment, of completing the successful operation of his invention?

On the other hand, the use of an invention by the inventor himself, or by another person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded in this court as such a public use as under the statute defeats his right to a patent. *Shaw* v. *Cooper*, 32 U. S. 7 Pet. 292 [8:689]; *Elizabeth* v. *American Nich. Pavement Co.* 97 U. S. 126 [24:1000]; *Egbert* v. *Lippmann*, 104 U. S. 333 [26:755]. In this last case it was said p. 336 [756]: "A use necessarily open to public view, if made in good faith, solely to test the qualities of the invention, and for the purpose of experiment, is not a public use within the meaning of the statute." In *Elizabeth* v. *Am. Nich. Pavement Co.* 97 U. S. 126, 134 [24:1000,1004], it was said: "When the subject of invention is a machine, it may be tested and tried in a building either with or without closed doors. In either case, such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though during all that period he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a *bona fide* intent of testing the qualities of the machine, would be a public use within the meaning of the statute. * * * Whilst the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist mill, or a carding machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the meaning of the law. But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale within the meaning of the law."

The only witness called to prove the fact of two years' prior use was the patentee himself. It is to be supposed that his statement of the circumstances is as favorable to himself as the facts will justify. It appears from this that he commenced making buckles under his patent of May 27, 1862, No. 35401, in the course of that year. The manufacture of the levers for these buckles required the use of three separate machines, one for cutting the blank with the holes punched, another for drawing it into a U-shape, and the other for pressing the U shaped blank into its final form on a mandrel. This continued until 1867 or 1868, from which time until the fall of 1873, he testifies that he made a certain class of levers in one operation, but that they were "not arctic." In order to make the levers for the arctic buckles, from the fall of 1873 to the fall of 1874, two machines were used, one for making the whole of the lever, "except putting on a bead on the tail of the lever;" this operation was performed by a second machine. While producing the buckle levers in this way upon two separate machines, the patentee states that he made changes in the mechanism with a view of producing the entire lever with a bead on by means of one machine. One change was, to put in an apparatus "to stop the machine when it worked imperfectly." Another was to put "a friction joint in the lever," that is, the lever of the machine, which he thinks he put in during the year 1866. The change whereby he was enabled to put the bead on, and which he says was made in 1870, or 1871, or 1872, he states was not successful. In describing the causes of the failure in this machine to produce the beaded arctic buckle lever he says: "One feature, it broke the levers that done the pressing, and, by not driving on to mandrel true, it would not strike it in the right place, and had to be sent back by customers." The result was, that in the year 1874 he abandoned the use of this machine for the purpose of making beaded arctic buckle levers, and constructed, in the spring of that year, a new one. This press was manufactured for him by Bliss & Williams, in March, 1874, and, as made by them, included the press, the main shaft, one of the levers, the lever for driving the carrier, the arrangement for working the levers for operating the striking dies, and the bed of the buckle lever machine was planed for receiving the dies and the working parts of the buckle lever machine. The other parts of the machine were made by the patentee himself and his own workmen. On the subject of this machine, the following is a portion of his examination:

"Q. 115. After carefully examining your patent 231199 again, please state wherein that machine, as it was used by you in the latter part of the year 1874, differed, if at all, from the machine described in your said patent and shown therein.

"A. The springs between the levers that worked the striking dies are in the patent, but were not in the machine, and this rib m^3 on top of the mandrel, which projects over the matrix to keep the U shaped blank down in position when forced on to the mandrel to keep it true and straight, was not in the machine. The point in the lower side of the carrier or driver is not in the patent, as I used the bar m^3 in its place. It gave me a great deal of trouble, and so I changed it. I don't know as I see a

great deal more. I don't see anything more that I can describe.

"Q. 116. When did you put the springs between the levers and the striking dies in that machine?

"A. It was in 1877, in the fall.

"Q. 117. When did you put the extension of the mandrel, referred to as m^3 in your patent, in that machine in place of the point on the carrier to hold the U-shaped blank down in the matrix?

"A. It was either in January or February, 1878; I think it was.

"Q. 118. Did you use that machine between the fall of '74 and the fall of '77 for making buckle levers such as are described in your patent 231199?

"A. Yes.

"Q. 119. How many did you make during that period of time on that machine?

"A. Well, I must have made about fifty thousand gross, as near as I can come at it.

"Q. 120. And what did you do with that fifty thousand gross?

"A. Sold them. I might have made a few more and I might have made a few less; I can't tell till I look at my books; I could come nearer to it.

"Q. 121. Which of the figures of the drawings of your patents in suit illustrates these fifty thousand gross of buckle levers?

"A. Figure 9 of 231199."

The witness further states that into the room where this machine was being operated people came at will, some to sell brass; others, people from the neighboring factories; and others to buy buckles; that the machine was open to their inspection; and in answer to the question whether an attempt was made to keep the operation of the machine secret during this period of time, the witness states: "From parties whom we thought were manufacturing buckles; we endeavored not to let them see them closely;" "not from those that we became acquainted with, and did not suppose would want to use any such machine."

In respect to the changes made in the machine in 1877 and 1878, and which are covered by claims in the patents, he further testifies on cross examination as follows:

"Q. 171. After you had completed the new machine in the way described in reply to question 115 in your testimony, did you have any practical trouble in its working?

"A. Not near as much.

"Q. 172. What had been the trouble up to that time?

"A. Forming the bead or telescoping or failing to drive on the mandrel.

"Q. 173. Describe what you mean by telescoping.

"A. The buckle levers, when the die formed the first impression onto the mandrel—the next blank from the matrix has to force that along, and it would spread open and go on the outside of the tongue formerly on there, and what I call telescope.

"Q. 174. Was this telescoping a real practical difficulty in the operation of this machine up to that time?

"A. It was, and gave me considerable trouble.

"Q. 175. Did you experiment from time to time to devise means to prevent it?

"A. Yes, sir.

"Q. 176. Now, about the trouble in the beading which you say existed up to the time when, in the fall of 1877, and in January or February, 1878, you made the change you have described. Please explain what the trouble was.

"A. One trouble was, that if it was not held in the right position in the matrix, it would go onto the mandrel one side longer than the other to match the ribs. It would not come in the center.

"Q. 177. What would be the result of one side of the bent blank being longer than the other when it went onto the mandrel?

"A. It made a bad lever, which was rejected by my customers, and consequently was lost.

"Q. 178. Did you have any trouble from the bead not being made precisely parallel with the slot before you made these improvements of 1877 and '78?

"A. Yes, sir.

"Q. 179. How did that come about?

"A. One cause that I have described, and telescoping, not being held in the right position in the matrix to be forced onto the mandrel.

"Q. 180. State whether or not it was a very delicate operation to make the head precisely parallel with the slot, and why?

"A. It gave me a great deal of trouble to do it. If it was not forced onto the mandrel evenly it would come that way.

"Q. 181. Did you have any practical trouble in any of these respects after you completed the machine in 1877 and '78 by the changes which you have described?

"A. Not when the dies and tools were in order—mandrel, carrier, etc.

"Q. 182. I suppose you mean that the parts were liable to wear and get out of order like other machines; am I right?

"A. Yes, sir.

"Q. 183. State whether or not it was your intention, while you were experimenting upon and improving this last machine, to obtain a patent when it should be completed?

"A. It was."

"Q. 187. State whether to complete the machine for making these arctic buckle levers with a slot and bead so that all, or practically all, the levers would come out of the machine with a perfect bead required the later improvements which you put upon the machine?

"A. Yes, sir; or I would not have put them on.

"Q. 188. What would be the effect of telescoping upon the machine itself before you devised the improvements which you made in 1877 and 1878?

"A. It would break the mandrel sometimes, and choke up the machine so that we had to get it out.

"Q. 189. In what way did you get out the telescoping blanks when the machine was choked?

"A. Stopped the machine, and took a pointed steel with a hook on and drew them back, and sometimes worked them off the further end of the mandrel."

On re-examination, he further testifies as follows:

"Q. 190. Did you ever have any trouble with

the machine in choking after you had made the slight alterations you have spoken about, of extending the mandrel and putting in the springs?

"A. Yes, sir; some, but it was not near as much.

"Q. 191. What caused this choking, since those alterations—telescoping, or what?

"A. Sometimes telescoping and sometimes the blank not being cut smooth.

"Q. 192. In what way did you get out the telescoping blanks when the machine was choked, after it was altered?

"A. By stopping the machine, and using a sharp pointed hook, the same as before.

"Q. 193. Since those alterations were made, have you had any trouble about putting the bead on on account of the blank not going on the mandrel just right in this machine?

"A Yes, sir; when the matrix was worn and the die was worn, the die, not cutting smooth, will throw it around.

"Q. 194. Would the telescoping of the blanks, after the alterations were made in this machine, also injure the machine, and, if so, what part?

"A. The telescoping would produce the same injury as before when it did telescope."

Also, on further cross examination, he testified as follows:

"Q. 203. After your machine was completed by the changes of 1877 and 1878, did you have any practical trouble in forming the bead, or pushing the blank into the mandrel, or from telescoping, or from waste, when the machine was in good running order and in repair?

"A. No, sir; not any practical trouble.

And on further examination:

"Q. 204. Wasn't the telescoping that you have testified about, that occurred in this machine after it was altered by extending the mandrel and putting in the springs, a practical difficulty?

"A. Yes; one of them.

"Q. 205. What caused this practical difficulty after those changes were made?

"A. There was several. The matrix wearing, the dies wearing smooth, not holding the brass evenly upon the mandrel, and the end of the carrier wearing so as to not force the U-shaped blanks on evenly.

"Q. 206. And those same things caused the telescoping in the machine before it was altered, didn't they?

"A. Yes; and when the dies wasn't worn it would telescope."

The effect of this testimony, it is claimed by the appellee, is that "before the changes the telescoping took place when the machine was in order, the defect residing in the organization; after the changes it would only take place when the machine was out of repair." On the other hand, it is contended on the part of the appellant, that, although the patentee, on being asked the question whether he experimented from time to time to devise means to prevent the difficulty of telescoping which he had experienced, answered in the affirmative, yet "there is nothing to show that these experiments were made prior to the fall of 1877, and he is entirely silent as to what, if any, they were, and what, if anything, was done by him by way of experimenting. As the record stands, this machine was not changed or altered, nor was any experiment made with it or on it, during the period of some three years while it made over 7,000,000 buckle levers, which were sold. Sprague does not intimate anywhere that he made any experiments to overcome the objection which he said existed in the guiding of the U blanks upon the mandrel, at any time before he added to the mandrel an ordinary guide or rib, m^3, which was in January or February, 1878;" and that "the only testimony as to his intention of patenting the machine while experimenting is his answer to X-Q. 183, as follows: 'X-Int. 183. State whether or not it was your intention, while you were experimenting upon and improving this last machine, to obtain a patent when it should be completed? A. It was.'"

In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing.

The testimony of the patentee seems to be indefinite and vague. The question whether, during the period of his use of the machine, he was experimenting for its improvement, put to him by his counsel, suggested its own answer, which was in the affirmative, as also that respecting his intention during that time to apply for a patent. He gives no account of the dates of any such experiments, nor any particulars respecting them. He does not say whether more than one mode of overcoming the difficulties experienced was suggested and tried, or not; nor, if more than one device was attempted, what they were. The statements are meager and bald, and quite insufficient to satisfy us that the problem of perfecting the machine, in the particulars in which it was proved to be deficient, was one that was exercising the ingenuity and inventive faculty of the patentee continuously, with the ever present intention, during the whole period, to make an application for the patents as soon as he had reached a satisfactory solution.

In the present case, the use of the machine was apparently for the purpose of conducting an established business; the machine itself was the only one used for the manufacture, of which the patentee, by a prior patent, already had a monopoly. He alone supplied the market with the article, and the whole demand was satisfactorily met by this single machine. To this extent, it operated successfully. That it was capable of improvement need not be denied, nor that, while it was in daily use, its owner and inventor watched it with the view of devising means to meet and overcome imperfections in its operation; but this much can be said in every such case. There are few machines, probably, which are not susceptible of further development and improvement, and the ingenuity of mechanics and inventors is commonly on the alert to discover defects and invent remedies. The alterations made in the machine in ques-

tion, however useful, were not vital to its organization. Without them, it could and did work so as to be commercially successful.

The impression made upon us by the evidence, the conclusion from which we cannot resist, is, that the patentee unduly neglected and delayed to make his application for the patents, and deprived himself of his right thereto by the public use of the machine in question, so far as it is embodied in the claims under discussion.

The proof falls far short of establishing that the main purpose in view, in the use of the machine by the patentee, prior to his application, was to perfect its mechanism and improve its operation. On the contrary, it seems to us that it shows that the real purpose in the use was to conduct the business of the manufacture, the improvement and perfection of the machine being merely incidental and subsidiary.

The case upon the proofs seems to us to fall within the principle of the decision of this court in *Hall* v. *Macneale*, 107 U. S. 90, 97 [27: 367, 369]. It was there said: "It is contended that the safes were experimental and that the use was a use for experiment. But we are of opinion that this was not so, and that the case falls within the principle laid down by this court in *Coffin* v. *Ogden*, 85 U. S. 18 Wall. 120 [21: 821]. The invention was complete in those safes. It was capable of producing the results sought to be accomplished, though not as thoroughly as with the use of welded steel and iron plates. The construction and arrangement and purpose and mode of operation and use of the bolts in the safes were necessarily known to the workmen who put them in. They were, it is true, hidden from view, after the safes were completed, and it required a destruction of the safes to bring them into view. But this was no concealment of them or use of them in secret. They had no more concealment than was inseparable from any legitimate use of them. As to the use being experimental, it is not shown that any attempt was made to see if the plates of the safe could be stripped off, and thus to prove whether or not the conical bolts were efficient."

It follows that patent No. 228136, to the extent of the 1st, 2d, 3d, 4th, and 6th claims, and patent No. 231199, in respect to the 2d, 3d, and 5th claims, must be held void by reason of a prior public use of the invention covered thereby for more than two years before the date of the application. In respect to the alleged infringement of the 5th claim of patent No. 228136, and the 1st and 4th claims of patent No. 231199, we agree with the conclusions of the circuit court for the reasons stated in its opinion, which it is not necessary here to repeat. *Sprague* v. *Smith & Griggs Mfg. Co.* 12 Fed. Rep. 721.

As we find the decree of the Circuit Court to be erroneous in respect to the other claims, it must be reversed, and the cause remanded, with instructions to take further proceedings therein, in conformity with this opinion; and it is so ordered.

UNITED STATES, *Appt.*
v.
ROBERT W. ALLEN.

(See S. C. Reporter's ed. 345-349.)

Pay of navy officer—allowances by General Order of 1866.

1. A paymaster in the Navy is not entitled in the settlement of his accounts, under the Act of March 3, 1883, 22 Stat. at L. 473, to the longevity increment on his 33½ per cent of salary allowed in lieu of fuel, quarters, etc., under Navy General Order No. 75, of May 23, 1866.

2. The allowances provided for in the General Order of 1866 are to be ascertained by reference to the amount statedly received by the officer as statutory pay at the time such general order was in force, and are not to be increased by the additional compensation allowed by the Act of 1883.

[No. 1083.]

Submitted Oct. 26, 1887. Decided Nov 7, 1887.

APPEAL from a judgment of the Court of Claims, rendered in favor of Robert W. Allen, the claimant, for the sum of $1,818.79. *Reversed.*

Claimant is a paymaster in the Navy, and has been since 1868. In the adjustment of his claim for benefits accruing to him under the clause in the Naval Appropriation Act of 1883, known as the Longevity Pay Act, 23 Stat. at L. 473, the sum of $1,112.75, being the amount paid him under General Order No. 75, issued by the Secretary of the Navy, May 23, 1866, was deducted from the settlement made in his favor.

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Assist. Atty-Gen.*, and **F. P. Dewees,** for appellant:

This deduction, in view of the decision in *U. S.* v. *Philbrick*, 120 U. S. 52 (30:559) was erroneous. The judgment, therefore, of the court below to the amount of $1,112.75 is not disputed. But it is contended by claimant that the allowance for commutation of quarters, etc., under General Order No. 75, was part of the pay of officers of the Navy, and that, as he is entitled to the benefits of the Longevity Pay Act of March 3, 1883, the further sum of $206.04 would have accrued to him under such general order when in force, had he at that time been credited with his prior service. That is to say, it is claimed that the percentage of pay allowed as commutation for quarters, etc., under said general order should be made, not upon the pay actually received by claimant under existing laws at the time the payment was made and the order in force, but also upon the increased pay which he has since been allowed under the Longevity Pay Act of 1883, upon which basis the further sum alleged to be due claimant would be, according to the calculation of the accounting officers of the treasury, $206.04. Parallel facts were before this court in the case of *Philbrick* v. *U. S.* 21 Ct. Cl. 511; *U. S.* v. *Philbrick*, *supra*.

The allowance for commutation of quarters, etc., was no part of the pay of naval officers. The pay of naval officers is fixed by statute. The Secretary of the Navy has no power to increase or diminish it. The powers of all officers from the President down are limited by law.

The *Floyd Acceptances*, 74 U.S. 7 Wall. 677; (19:174); *U. S.* v. *Alexander*, 110 U. S. 329 (28:

168); *Moffat* v. *U. S.* 112 U. S. 32 (28:625); *Symonds* v. *U. S.* 21 Ct. Cl. 152.

Messrs. **John Paul Jones** and **R. B. Lines**, for appellee:

The question in this case is whether appellee is entitled, in the settlement of his account under what is known as the longevity-pay clause of section 1 of the Naval Appropriation Act of March 3, 1883, 22 Stat. at L. 478, to the longevity increment on his 33⅓ per cent of salary allowed in lieu of fuel, quarters, etc., under Navy General Order No. 75, of May 23, 1866. The case, so far as it goes, is identical with that of the *United States* v. *Philbrick*, in which the judgment of the court of claims was affirmed by this court. 120 U. S. 52 (30:559).

Mr. Justice **Harlan** delivered the opinion of the court:

The appellee is a paymaster in the Navy, having served in that capacity since February 1, 1868. In the adjustment of his claim for the benefits of what is known as the Longevity Act of March 3, 1883, 22 Stat. at L. 478, the accounting officers of the treasury deducted the sum of $1,112.75, the amount paid the claimant under General Order No. 75, issued by the Secretary of the Navy, under date of May 23, 1866, in relation to allowances "for rent of quarters, or to pay rent for furniture, or for lights and fuel," etc. The object of the order, as appears upon its face, was to establish a fixed rate of compensation in lieu of the extra allowances prohibited by the Act of March 3, 1835, 4 Stat at L. 753, which last Act was repealed by that of April 17, 1866, 14 Stat at L. 33, 38. That order made an allowance to officers, not provided with quarters on shore stations, of "a sum equal to 33⅓ per centum of their pay in lieu of all allowances, except for mileage and traveling expenses under orders; and those provided with such quarters, 20 per centum of their pay in lieu of said allowances." It also stated: "The Act of March 3, 1865, having increased the pay of midshipmen and mates, the allowances hereby authorized will not be extended to them."

The findings of fact further state that "said accounting officers refused, in the settlement of said claim [under the Act of 1883], to allow claimant the further sum of $206.04, which said amount would have accrued to him if he had been credited, at that time, with his service prior to the date of his commission as paymaster." The court below, following the decision in *United States* v. *Philbrick*, 120 U. S. 52 [30: 559], which sustained the validity of the said general order, held the deduction of $1,112.75 to be unauthorized by law; and, without considering the merits of the question made as to the item of $206.04, adjudged—upon the ground that, in its opinion, the decision in *Philbrick's Case* required it to be done—that the appellee should also have been allowed the latter sum in the settlement of his claim under the Act of 1883.

It is possible that the findings in *Philbrick's Case*, although very meager and obscure, involved the question now presented. But no such point was suggested by counsel, and it was not considered by this court. The only question actually disputed in that case was as to the validity of General Order No. 75; and this court was led to believe that if that order was sustained as a proper exercise of authority by the Secretary of the Navy, the affirmance of the judgment below would follow as a matter of course.

We are not at all certain from the pleadings and findings in the present case what is the precise question raised in respect to the item of $206.04. The Act of March 3, 1883, provides that "All officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the Regular or Volunteer Army or Navy, or both, and shall receive all the benefits of such actual service, in all respects, in the same manner as if all said service had been continuous and in the Regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers; *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the Volunteer Army or Navy." 22 Stat. at L. 478, chap. 97. The question which counsel for the appellee contend is presented by the record is, whether appellee is entitled, in the settlement of his account under the Act of 1883, "to the longevity increment on his 33⅓ per cent of salary allowed in lieu of fuel, quarters, etc., under Navy General Order No. 75, of May 23, 1866." It is perfectly clear, they argue, that if the Act of 1883 had been in force in 1866, the salary of appellee would have been larger than it actually was by reason of the credit for prior service, which the Act of 1883 now directs to be given to them; that is, their salaries being larger, the 33⅓ per cent allowance would have been correspondingly larger, and they should now receive the difference in that item.

We do not concur in this interpretation of the statute. The allowances provided for in the General Order of 1866 were made pursuant to rules and regulations established for the apportionment from time to time of sums appropriated in gross by Congress for specific objects connected with the naval service. They constituted no part of the pay proper of officers, and were designed to meet certain expenses they would necessarily incur in the discharge of their duties. The secretary used their regular pay simply as a basis upon which to calculate the percentage allowed for commutation of quarters, etc. That percentage is to be ascertained by reference to the amount statedly received by the officer, as statutory pay, at the time General Order No. 75 was in force, and is not to be increased by the additional compensation allowed by the Act of 1883, as the result of giving him the benefits of actual service, as if it "had been continuous and in the Regular Navy in the lowest grade having graduated pay held by such officer since last entering the service."

These views lead to a reversal, with directions to enter judgment in favor of the claimant, only for the sum of $1,112.75. It is so ordered.

LOUIS SANDS, *Plff. in Err.*,
v.
MANISTEE RIVER IMPROVEMENT COMPANY.

(See S. C. Reporter's ed. 288-297.)

Organization of company—exaction of tolls—authority of State—Ordinance of 1787.

1. The Statute of the State of Michigan, under which the Manistee River Improvement Company was organized, is not in conflict with the Constitution of the United States.

2. The exaction of tolls, under a statute, for the use of an improved water way, is not a deprivation of property within the meaning of the clause in the Constitution that no State shall deprive a person of property without due process of law. There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways.

3. A State can authorize any improvement of a river wholly within its limits, which, in its judgment will enhance its value as a means of transportation from one part of the State to another, if the free navigation of the river, as permitted under the laws of the United States, is not impaired, or any system for the improvement of its navigation provided by the General Government is not defeated; and to meet the costs of such improvement the State may levy a general tax or lay a reasonable toll upon all who use the river as improved.

4. There was no contract in the fourth article of the Ordinance of 1787, respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory or of any portion of it when subsequently formed into a State, and admitted into the Union, nor anything in said article which would prevent the State from authorizing the improvement made in the navigation of the Manistee River.

[Nos. 40, 41.]

Argued Oct. 31, 1887. Decided Nov. 14, 1887.

IN ERROR to the Supreme Court of the State of Michigan. *Affirmed.*

Reported below, 58 Mich. 593.

Statement by *Mr Justice* **Field:**

The plaintiff below is a corporation organized, under a Statute of Michigan, for the improvement of Manistee River, a stream wholly within that State. The present action was brought to collect from the defendant the amount of tolls levied for the use, in the years 1878, 1879, 1880, and 1881, of the river as improved. The improvements consisted in the removal of obstacles to the floating of logs and lumber down the stream, principally by cutting new channels at different points, and by confining the waters at other points by embankments. The statute under which the plaintiff below was organized contains various provisions to secure a careful consideration of the improvements proposed, of their alleged benefit to the public, and, if adopted, of their proper construction, and of the tolls to be charged for their use. The company must first obtain the assent of the Governor and of the Attorney-General to the proposed improvements, and then submit to the Board of Control designated a map of the sections of the stream which it proposes to improve, and plans showing the nature and character of the improvements. If, in the opinion of the board, the construction of the proposed improvements will be a public benefit, and the company is a proper one to make them, the board is required to endorse its approval upon the map and plans, give the consent of the State to their construction, and fix the time for their completion. Upon such approval, the corporation is authorized to make the improvements; and, whenever they have been completed to the satisfaction of the Board of Control, and accepted, that body is to fix the rates of toll which the company may charge for running vessels, boats, rafts, timber, logs, or lumber through the improved stream. These rates are to be graduated with reference to the distance run upon the river, and are not to be increased or changed without the consent of the board, and cannot be increased at any time so that they will amount to more than 15 per cent of the cost of the improvements after deducting necessary expenses and repairs. The collection of tolls is to be confined strictly to that part of the river improved, and to the floatable material benefited by the improvements. The streams improved under the statute are to be open to all persons for the passage of vessels, boats, logs, rafts, timber, and lumber, upon payment of the prescribed tolls; and uniform rates are to be charged.

The declaration alleges a compliance by the plaintiff below with the requirements of the statute in its incorporation; in obtaining the consent of the Governor and of the Attorney-General of the State to its proposed improvement of Manistee River; in submitting to the Board of Control the maps and plans of the improvements; in obtaining its opinion that their construction, as thus shown, would be a public benefit; that the plaintiff was a proper company to make the improvements; and, also, its consent to the same on behalf of the State, and its designation of the time within which they were to be constructed. The declaration also sets forth that the improvements were made pursuant to the plans and within the time required, with such changes and exceptions as were authorized by the board under the statute, and that when they were completed and accepted, that body fixed the rates of toll for the use of the river as improved, in running logs and timber for the years 1879 to 1881, inclusive, those rates varying from five to fifteen cents per thousand feet, board measure, according to the distance that the logs were to run through different sections of the improved stream; that, during the years mentioned, the defendant below floated down the river, through the portions improved, seventy-eight million seven hundred and eleven thousand feet of logs, board measure, and became liable for the tolls fixed upon them, amounting to $9,253, to recover which the present action was brought.

The defendant pleaded the general issue, and gave notice of several special defenses. On the trial, the plaintiff established the matters alleged by him in the declaration, but the evidence offered by the defendant only tended to show that the measurement of the logs was excessive, and that the tolls receivable were less by 10 per cent than the amount claimed.

The defendant, however, contended, and requested the court to instruct the jury in substance as follows:

First. That the statute of the State, under which the plaintiff was organized and the tolls were fixed, is in conflict with the clause of the

Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law, in authorizing the Board of Control to fix the rates of toll without notice to the parties interested, or affording them any opportunity of contesting the validity or propriety of such tolls, either in the first instance or afterwards.

Second. That the statute in authorizing the improvements of rivers and the collection of tolls for them is in conflict with the clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, in that it impairs the contract contained in the Ordinance of 1787, "for the government of the territory of the United States northwest of the River Ohio," giving to the people of that territory the right to the free use of the navigable waters leading into the St. Lawrence, without any tax, impost, or duty therefor. The fourth article of that ordinance declares that "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy without any tax, impost, or duty therefor." But the court refused to give these instructions or either of them; and the defendant excepted. The jury found a verdict for the plaintiff for $8,731.88, upon which judgment was entered. On appeal, the judgment was affirmed by the Supreme Court of the State (53 Mich. 593); and the case is brought here on writ of error.

Mr. **M. J. Smiley,** for plaintiff in error:

The Statute of Michigan under which the Manistee River Improvement Company was organized, as expounded by the Supreme Court of Michigan, is unconstitutional and void, being opposed to the Fourteenth Amendment of the Constitution of the United States, prohibiting the States from depriving any person of their property without due process of law, and denying to any person within its jurisdiction the equal protection of the laws.

Benjamin v. *Manistee Riv. I. Co.* 42 Mich. 628; *Manistee Riv. I. Co.* v. *Sands*, 53 Mich. 593; Const. Mich. art. 18, § 4; Ang. Water Courses, § 535; *Moor* v. *Veazie*, 32 Me. 356; *Lorman* v. *Benson*, 8 Mich. 18; *Morgan* v. *King*, 35 N. Y. 454; *Thunder Bay Riv. Boom Co.* v. *Speechly*, 31 Mich. 335; *La Plaisance Bay H. Co.* v. *Monroe*, Walk. Ch. 155; *Moore* v. *Sanborne*, 2 Mich. 520; *San Mateo County* v. *Southern Pac. R. R. Co.* 18 Fed. Rep. 722; *Burns* v. *Multnomah R. R. Co.* 15 Fed. Rep. 177; *Santa Clara County* v. *Southern Pac. R. R. Co.* 18 Fed. Rep. 385; *Stuart* v. *Palmer*, 74 N. Y. 183; *Lavin* v. *Emigrant I. Sav. Bank*, 18 Blatchf. 1-27; *Ames* v. *Port Huron L. D. & B. Co.* 11 Mich. 139, 147; *Railroad Tax Cases*, 13 Fed. Rep. 722.

All tolls must be reasonable.

Munn v. *Illinois*, 94 U. S. 113 (24:77); *Chicago, B. & Q. R.* v. *Iowa*, 94 U. S. 155 (24:94); *Railroad Commission Cases*, 116 U. S. 331 (29:644); *People* v. *Brooklyn*, 4 N. Y. 431; *Transportation Co.* v. *Parkersburg*, 107 U. S. 699 (27:587); *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 449 (30:978); *Ehlers* v. *Stoeckle*, 37 Mich. 263; *Thomas* v. *Gain*, 35 Mich. 164; *Davidson* v. *New Orleans*, 96 U. S. 97 (24:616).

Messrs. **Ramsdell & Benedict,** for defendants in error:

The Ordinance of 1787 was superseded by the Constitution of the United States and by the several Acts of Congress admitting the States.

Escanaba Co. v. *Chicago*, 107 U. S. 678 (27:442); *Huse* v. *Glover*, 15 Fed. Rep. 292; *Woodman* v. *Kilbourn Mfg. Co.* 1 Biss. 549.

The objection to the Michigan Statute based on the Fifth Amendment to the Constitution of the United States may also be summarily disposed of by reference to adjudged cases.

Kelly v. *Pittsburgh*, 104 U. S. 78 (26:658); *Withers* v. *Buckley*, 61 U. S. 20 How. 84 (15:816); *Davidson* v. *New Orleans*, 96 U. S. 97 (24:616).

The objection to the Michigan Statute, based upon the Fourteenth Amendment to the Federal Constitution, is alike untenable.

Manistee Riv. I. Co. v. *Bradley*, Dyer, *D. J.*, affirmed, on motion for new trial, by Gresham, *C. J.*; *Huse* v. *Glover*, 119 U. S. 543 (30:487); *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444 (30:976).

The State has plenary power to improve the navigation of its internal rivers.

Pollard v. *Hagan*, 44 U. S. 3 How. 212 (11:565); *Withers* v. *Buckley*, *supra*; *Wilson* v. *Black Bird Creek Marsh Co.* 25 U. S. 2 Pet. 245 (7:412); *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96); *Pound* v. *Turck*, 95 U. S. 462 (24:526); *Mobile Co.* v. *Kimball*, 102 U. S. 691 (26: 238); *Escanaba Co.* v. *Chicago*, *supra*; *Benjamin* v. *Manistee Riv. I. Co.* 42 Mich. 628; *Nelson* v. *Cheboygan S. W. Nav. Co.* 44 Mich. 10; *Manistee Riv. I. Co.* v. *Lamport*, 49 Mich. 442.

These decisions are in full harmony with those of other States.

Wisconsin Riv. I. Co. v. *Munson*, 43 Wis. 255; *Spooner* v. *McConnell*, 1 McLean, 352; *Palmer* v. *Cuyahoga County*, 3 McLean, 226; *Kellogg* v. *Union Co.* 12 Conn. 7; *Thames Bank* v. *Lovell*, 18 Conn. 500; *Sinking Fund Comrs.* v. *Green Riv. Nav. Co.* Ky. Ct. App. Oct. 22, 1880, 11 Rep. 394; *McReynolds* v. *Smallhouse*, 8 Bush, 447; *Carondelet Canal & Nav. Co.* v. *Parker*, 29 La. Ann. 430.

The States have power to authorize municipal corporations to construct wharves upon the navigable streams and to impose tolls or charges upon vessels using such wharves.

Packet Co. v. *Keokuk*, 95 U. S. 80 (24:377); *Packet Co.* v. *St. Louis*, 100 U. S. 423 (25:688); *Vicksburg* v. *Tobin*, Id. 430 (25:690); *Packet Co.* v. *Catlettsburg*, 105 U. S. 559 (26:1169); *Transportation Co.* v. *Parkersburg*, 107 U. S. 691 (27:584).

"Due process of law" means "according to the due course of the law of the land."

State v. *Simons*, 2 Speers, 767; *Sears* v. *Cottrell*, 5 Mich. 251; *Hard* v. *Nearing*, 44 Barb. 472; *Weimer* v. *Bunbury*, 30 Mich. 201; *Munn* v. *Illinois*, 94 U. S. 113 (24:77); *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 (24:97).

An action at law must be brought to recover the tolls, in case the toll payer and the Improvement Company do not agree. Thereby he has notice and an opportunity to be heard.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28:569) *Davidson* v. *New Orleans*, 96 U. S. 97, 104, 105 (24:616, 620); *McMillen* v. *Anderson*, 95 U. S. 37 (24:335).

The proceeding to impose tolls is not taxation. The tolls are not taxes.

Packet Co. v. *Catlettsburg*, 105 U. S. 564 (26:1171); *Packet Co.* v. *Keokuk*, 95 U. S. 84 (24:379); *Carondelet Canal & Nav. Co.* v. *Parker*, 29 Am. Rep. 339.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff in error, the defendant below, misapprehends the purport of the provision that no State shall deprive one of property without due process of law, when he considers the exaction of tolls under a statute for the use of an improved waterway as a deprivation of property within its meaning. There is no taking of property from him by such exaction within the prohibition, any more than there is a taking of property from a traveler, in requiring him to pay for his lodgings in a public inn. There is in such a transaction only an exchange of money for its supposed equivalent. The tolls exacted from the defendant are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated.

There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. The Legislature, acting upon information received, may prescribe, at once, the tolls to be charged; but, ordinarily, it leaves their amount to be fixed by officers or boards appointed for that purpose, who may previously inspect the works, and ascertain the probable amount of business which will be transacted by means of them, and thus be more likely to adjust wisely the rates of toll in conformity with that business. This subject, like a multitude of other matters, can be better regulated by them than by the Legislature. In the administration of government, matters of detail are usually placed under the direction of officials. The execution of general directions of the law is left, in a great degree, to their judgment and fidelity. Any other course would be attended with infinite embarrassment.

In authorizing the Board of Control to fix rates of toll for the floating of logs and timber over the improved portions of the Manistee River certain limits are prescribed to its action; but within those limits the matter is left to its judgment. No notice can be given to parties, who may have occasion to use the stream, to attend before the board and present their views upon the tolls to be charged. Such parties cannot be known in advance. The occasion for using the improved stream may arise at any time in the year; perhaps after the tolls have been established. The whole subject is one of administrative regulation, in which a certain amount of discretionary authority is necessarily confided to officers entrusted with its execution. Should there be any gross injustice in the rate of tolls fixed, it would not, in our system of government, remain long uncorrected.

The Manistee River is wholly within the limits of Michigan. The State, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the General Government; and, to encourage the growth of this commerce and render it safe, the States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *Mobile County* v. *Kimball*, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the General Government is not defeated. 102 U. S. 691, 699 [26:238]. And to meet the cost of such improvements, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse* v. *Glover*, 119 U. S. 543, 548 [30:487]. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the State.

There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a State and admitted into the Union.

The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that its articles "shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent." And for many years after the adoption of the Constitution, its provisions were treated by various Acts of Congress as in force, except as modified by such Acts. In some of the Acts organizing portions of the territory under separate territorial governments it is declared that the rights and privileges granted by the ordinance are secured to the inhabitants of those Territories. Yet, from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the States thus formed were, in the language of the resolutions

or Acts of Congress, "admitted into the Union on an equal footing with the original States, *in all respects whatever*." Michigan, on her admission, became, therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original States, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. *Permoli* v. *First Municipality of N. O.* 44 U. S. 3 How. 589, 600 [28: 739]; *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 [28: 565]; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688, [27: 447]; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 159 [29: 845]; *Huse* v. *Glover*, 119 U. S. 544, 546 [30: 488].

But, independently of these considerations, there is nothing in the language of the fourth article of the ordinance respecting the navigable waters of the territory emptying into the St. Lawrence which, if binding upon the State, would prevent it from authorizing the improvements made in the navigation of the Manistee River. As we said in *Huse* v. *Glover*, decided at the last term: "The provision of the clause, that the navigable streams shall be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls." 119 U. S. 548 [30: 488]. And again: "By the terms tax, impost, and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements." Id. 549 [30: 490].

We perceive no error in the record, and the judgment of the Supreme Court of Michigan must be affirmed; and it is so ordered.

CHARLES F. RUGGLES, *Plff. in Err.*,
v.
MANISTEE RIVER IMPROVEMENT CO.

[No. 41.]

IN ERROR to the Supreme Court of the State of Michigan.

The same questions are presented as in *Sands* v. *Manistee River Improvement Co.*; and, in conformity with the decision there rendered, the judgment herein is *affirmed*.

GEORGE WILKINSON, Treas., ET AL.,
Plffs. in Err.,
v.
STATE OF NEBRASKA.

(See S. C. Reporter's ed. 286-288.)

Appeal from order remanding suit to state court.

Since the Act of March 3, 1887, chap. 273, 24 Stat. at L. 552, no appeal or writ of error lies to this court under the Act of March 3, 1875, from an order of the circuit court remanding a suit which has been removed from a state court, whether the suit was begun and the removal had before or after the Act of 1887.

[No. 1082.]

Submitted Nov. 1, 1887. Decided Nov. 14, 1887.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

On motion to dismiss. *Granted.*

Mr. **J. M. Woolworth**, for defendant in error:

Until the passage of the Act of March 3, 1887, this court had jurisdiction of a writ of error to a circuit court which remanded a cause to the state court from which it had been removed. The last clause of section five of the Act of March 3, 1875, 18 Stat. at L., 472, gave this jurisdiction. The provision is as follows:

"But the order of said circuit court, dismissing or remanding said cause to a state court, shall be reviewable by the supreme court on writ of error or appeal, as the case may be."

But this provision was repealed by the last clause of section two of the Act of 1887. That provision is as follows:

"Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the circuit court shall decide that the cause was improperly removed and order the same to be remanded to the state court from whence it came, such remand shall immediately be carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

This clause devests this court of the jurisdiction conferred upon it by the Act of 1875.

All cases fall with the repeal of a statute conferring jurisdiction over them.

South Carolina v. *Gaillard*, 101 U. S. 433, 438 (25:937, 939); *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398 (25:231).

Section 6, in terms, repeals the provision of the Act of 1875, which had conferred that jurisdiction. But to the repealing clause is added a proviso that the Act of 1887 "shall not affect jurisdiction over or disposition of any suit removed" before its passage. This proviso, however, is subject to an exception; it does not operate upon other express provisions of the Act. As the last clause of section 2 is express, its operation is not qualified by the terms of the proviso, and the repeal is effective as regards this case as well as any removed after the passage of the repealing statute.

This proviso does not apply to cases like this, where all that had been done in the state court was the filing the petition and bond for removal.

Gordon v. *Longest*, 41 U. S. 16 Pet. 97 (10:900); *Kanouse* v. *Martin*, 56 U. S. 15 How. 198 (14:660); *Home L. Ins. Co.* v. *Dunn*, 86 U. S. 19 Wall. 214 (22:68); *Virginia* v. *Rives*, 100 U. S. 313 (25:667); *New Orleans, M. & T. R. R. Co.* v. *Mississippi*, 102 U. S. 135 (26:96); *Baltimore & O. R. R. Co.* v. *Koontz*, 104 U. S. 5 (26:643); *National Steamship Co.* v. *Tugman*, 106 U. S. 118 (27:87).

Messrs. **A. J. Poppleton** and **J. M. Thurston**, for plaintiffs in error:

It could not have been the intention of Congress to deny the writ of error in any case of removal under the Act of 1887, in which the cause is remanded by the circuit court, but the

clause relied upon as accomplishing that purpose has sole reference to removals for prejudice and local influence. If this view of the statute is correct, section 6 saves and preserves the right to remove in any suit removed from the court of any State before the passage of the Act of March 3, 1887.

On the filing of a proper petition and bond in a suit which is removable, a state court is devested of jurisdiction and the cause is removed.

Kern v. *Huidekoper*, 103 U. S. 485 (26:354); *Baltimore & O. R. R. Co.* v. *Koontz*, 104 U. S. 5 (26:643); *National Steamship Co.* v. *Tugman*, 106 U. S. 118 (27:87).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error for the review of an order of the circuit court remanding a suit which had been removed from the Supreme Court of the State of Nebraska. The suit was for a *mandamus* to compel Wilkinson, the Treasurer of Dakota County, to apply certain moneys in his hands, collected for that purpose, to the payment of past due coupons detached from bonds issued by the county. It was begun February 14, 1887. The defendants answered March 1, 1887, denying the validity of the bonds, and at the same time they presented their petition for the removal of the suit to the Circuit Court of the United States for the District of Nebraska, on the ground that the relator was a citizen of Ohio and they were citizens of Nebraska. The state court directed the removal April 6, 1887, and a copy of the record was entered in the circuit court on the 19th of the same month. On the 27th of May the relator moved to remand the suit "on the ground that the circuit court was without jurisdiction to review the said cause, and to hear and determine the same." This motion was granted the same day, and thereupon the present writ of error was sued out by the defendants, which the relator now moves to dismiss for want of jurisdiction.

We have already decided at the present term, in *Morey* v. *Lockhart*, 123 U. S. 56 [*ante*, 68], that since the Act of March 3, 1887, chap. 373, 24 Stat. at L. 552, no appeal or writ of error lies to this court under the last paragraph of section 5 of the Act of March 3, 1875, from an order of the circuit court remanding a suit which had been removed from a state court. That, however was a case in which the suit was begun and the removal had after the Act of 1887 went into effect. Here the suit was begun and a petition for removal filed in the state court before the Act, and this it is contended saves to these parties their right to a writ of error under the Act of 1875, because of a proviso in section 6 of that of 1887, in these words: "Provided that this Act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this Act."

This, in our opinion, relates only to the jurisdiction of the circuit court and the disposition of the suit on its merits; and has no reference to the jurisdiction of this court under the Act of 1875 for the review by appeal or writ of error of an order of the circuit court remanding the cause. That was "expressly provided" for in the last paragraph of section 2 of the Act of 1887, in which it was enacted that "Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." This provision, when taken in connection with the repeal by section 6 of the last paragraph of section 5 of the Act of 1875, shows unmistakably an intention on the part of Congress to take away all appeals and writs of error to this court from orders thereafter made by circuit courts remanding suits which had been removed from a state court, and this, whether the suit was begun and the removal had before or after the Act of 1887.

The motion to dismiss is granted.

GUARANTEE INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Admr. of CHARLES WILLIAM SIEMENS, ET AL., *Appts.*,

v.

WILLIAM SELLERS ET AL.

(See S. C. Reporter's ed. "*Siemens v. Sellers*," 276–286.)

American patent issued after English patent—new improvements—Act of 1839.

1. Where an American patent is for the same invention as that for which an English patent had been issued, the term of the American patent is limited to run from the date, or sealing, which is equivalent to the publication, of the English patent; and not from its own date.

2. A patent cannot be exempted from the operation of the law on that subject by adding some new improvements to the invention.

3. The condition imposed by the Act of 1839, that the term of a patent for an invention which has been patented in a foreign country shall commence to run from the time of publication of the foreign patent, was not repealed or abrogated by the Act of 1861.

[No. 6.]

Argued Oct. 17, 1887. Decided Nov. 14, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

The facts are stated by the court.

Mr. **Charles S. Whitman,** for appellants:

A United States patent is *prima facie* evidence that in the specification there is contained a full and proper description.

Poppenhusen v. *N. Y. Gutta Percha Comb Co.* 2 Fish. Pat. Cas. 62.

When a prior foreign patent is relied upon to defeat a patent, the description and drawings therein must contain and exhibit a substantial representation of the patented improvement.

Curt. Pat. 4th ed. §§ 99, 368 *a*, 378 *b*; *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20:33); *Hills* v. *Evans*, 6 L. T. N. S. 90; *Betts* v. *Men*

zies, 4 Best & S. Q. B. 999; *Cohn* v. *United States C. Co.* 93 U. S. 366 (23:907); *Cahill* v. *Brown*, 15 Off. Gaz. 697; *Harwood* v. *Mill River W. Mfg. Co.* 3 Fish. Pat. Cas. 526.

Novelty can only be negatived by proof which puts the fact beyond a reasonable doubt.

Coffin v. *Ogden*, 85 U. S. 18 Wall. 120 (21:821); *Parham* v. *American B. O. & S. M. Co.* 4 Fish. Pat. Cas. 482; *Shirley* v. *Sanderson*, 8 Fed. Rep. 908; *Green* v. *French*, 11 Fed. Rep. 591; *Wood* v. *Cleveland R. M. Co.* 4 Fish. Pat. Cas. 560; *Hawes* v. *Antisdel*, 2 Ban. & Ard. 10; *Begnell* v. *Harvey*, 5 Ban. & Ard. 636.

When an extended term is granted in apparent conformity to the Act of Congress, the decision of the officer granting the extension has the attribute of a final judgment.

It cannot be shown that the commissioner exceeded or irregularly exercised his authority, except by matter apparent on the face of the patent.

Clum v. *Brewer*, 2 Curt. 506; *Brooks* v. *Bicknell*, 3 McLean, 250; *Colt* v. *Young*, 2 Blatchf. 471; *Goodyear* v. *Providence Rubber Co.* 2 Fish. Pat. Cas. 499; and on appeal, 76 U. S. 9 Wall. 788 (19:566); *Jordan* v. *Dobson*, 4 Fish. Pat. Cas. 232; *Gear* v. *Grosvenor*, 6 Fish. Pat. Cas. 314; *Cromton* v. *Belknap Mills*, 3 Fish. Pat. Cas. 536; *Eureka Co.* v. *Bailey Co.* 78 U. S. 11 Wall. 488 (20:209); *Mowry* v. *Whitney*, 5 Fish. Pat. Pat. Cas. 496; and on appeal, 81 U. S. 14 Wall. 620 (20:860); *Tilghman* v. *Mitchell*, 4 Fish. Pat. Cas. 615; *Corning* v. *Burden*, 56 U. S. 15 How. 271 (14:691); *Wilder* v. *McCormick*, 2 Blatchf. 34; *Alden* v. *Dewey*, 1 Story, 341; *Hotchkiss* v. *Greenwood*, 4 McLean, 456; *S. C.* on appeal, 52 U. S. 11 How. 248 (13:683).

The description may be partly in writing and partly in drawing.

Earle v. *Sawyer*, 4 Mason, 1; *Swift* v. *Whiscn*, 3 Fish. Pat. Cas. 343; *Brooks* v. *Bicknell*, 3 McLean, 250, 261; *Washburn* v. *Gould*, 3 Story, 122, 133; *Hogg* v *Emerson*, 52 U. S. 11 How. 587 (13:824), 47 U. S. 6 How. 437 (12:505); *Kittle* v. *Merriam*, 2 Curt. 475; *Emerson* v. *Hogg*, 2 Blatchf. 1; *Heinrich* v. *Luther*, 6 McLean, 348; *Webster Loom Co.* v. *Higgins*, 105 U. S. 580 (26:1177).

There are two sources to which we are entitled to resort in construing the claims,—first, the state of the art to which the invention relates prior to the invention of the patentees (*Blaisdell* v. *Tufts*, 15 Off. Gaz. 881; *Pitts* v. *Wemple*, 2 Fish. Pat. Cas. 10; *Burden* v. *Corning*, Id. 477; *Rubber C. H. T. Co.* v. *Welling*, 97 U. S. 7 (24:985); *Carlton* v. *Bokee*, 84 U. S. 17 Wall. 463 (21:517); *Washing Machine Co.* v. *Tool Co.* 87 U. S. 20 Wall. 342 (22:303); *Duff* v. *Sterling Pump Co.* 107 U. S. 636 (27:517); second, the description in writing and in drawing contained in the specification.

Construction of the Act of 1861.

Weston v. *White*, 18 Blatchf. 364; *Goff* v. *Stafford*, 14 Off. Gaz. 748; *DeFlores* v. *Raynolds*, 17 Off. Gaz. 503.

Messrs. **S. S. Hollingsworth** and **Joseph C. Fraley**, for appellees:

The term of the reissue No. 8265 was limited to seventeen years from July 19, 1861, the date or publication of complainants' prior British patent.

The subject matter of the reissue No. 8265 was patented in complainants' British patent No. 167, published and dated July 19, 1861.

The reissued patent sued upon, the original of which was granted March 1, 1864, expired on July 20, 1878.

Act. July 4, 1836, 5 Stat. at L. 117; Act. March 3, 1839, 5 Stat. at L. 353; Act March 2, 1861, 12 Stat. at L. 246; *DeFlores* v. *Raynolds*, 17 Blatchf. 445, 446; *Nathan* v. *New York E. R. R. Co.* 2 Fed. Rep. 225.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit on a patent granted to the appellants, Charles W. and Frederick Siemens, of Great Britain, on the 12th day of January, 1869, being a reissue of a patent originally granted to the appellants on the 1st day of March, 1864. This patent was for an improved regenerator furnace, so called, intended to be used where a high degree of heat is required. By the arrangements of this invention, the products of combustion, after passing through the furnace, and before entering the chimney, are utilized in heating what are called the regenerators, consisting of bricks, or other refractory materials, loosely piled up in two pair of separate chambers through which, alternately, after being thus heated, the air and gases are made to pass on their way to the furnace, and thus become raised to an intense degree of heat before entering it. Whilst one pair of regenerators are being thus heated by the outgoing products of combustion or flame, the other pair are giving out their heat to the air and gases which are passing into the furnace; and then, by a reversal of dampers, the current is changed, and the air and gases are made to pass through the newly heated regenerators, and the products of combustion, or flame, through those that have become partially cooled; and so on alternately.

The apparatus has various incidental appliances necessary to its successful operation. Thus, as the regenerator chambers are placed underneath the furnace, spaces are formed between them and the furnace bottom, for the purpose of admitting a circulation of air to cool the parts and prevent their being destroyed by the intense heat. Another arrangement is that of a separate and distinct furnace of peculiar form, for the consumption of the raw fuel, so constructed and operated that the gases produced thereby are carried over by a suitable flue to one of the heated regenerators, whilst atmospheric air is admitted into the other regenerator of the same pair. The air and gases are thus kept separate until about to enter the furnace by separate flues, when they meet and commingle and produce a rapid combustion and a most intense heat.

This is the general nature of the invention, and this explanation will be sufficient for understanding the claims of the patent, which are four in number, and are as follows, to wit:

"We claim, in combination with a furnace, A, and its chimney or smoke discharge flue P, a system or series of air and gas regenerators B^1 B^2 B^3 B^4, constructed substantially as specified, and having conduits and dampers arranged so that air and gas may be led into and through such regenerators and furnace and out

of the chimney, in manner and so as to be operated as and for the purpose or purposes hereinbefore described.

"We also claim the arrangement and combination of the air space or open chamber C with the furnace and its system of regenerators, arranged and applied together substantially in manner and so as to operate as described. [The air space here referred to is that by which the hearth of the furnace and other parts are cooled and prevented from destruction by the intense heat.]

"We also claim the arrangement and combination of the air chamber or space D, or the same and the space E, with the furnace, regenerators, conduits, and damper chests applied thereto, the whole being substantially as specified. [The air chamber D admits the atmospheric air to the regenerator.]

"We also claim the combination of a furnace with one or more regenerators or means of receiving its waste smoke and gaseous products, and intercepting or receiving heat therefrom, and also with means or devices by which all or a portion of the heat so intercepted or received may be absorbed by the influent air or gas during its passage into or to such furnace, for the purpose of improving or promoting combustion therein."

The defendants do not deny that the appellants were the authors of the very ingenious invention claimed by the patent; and they do not seriously deny that they use it. The principal defense which they set up is that the appellants took out an English patent for the same invention, dated January 22, 1861, and sealed July 19, 1861; and that, by force of the Acts of 1839 and 1861, the American patent expired at the end of seventeen years from the sealing of the English patent, namely, on the 19th day of July, 1878; and they deny that they used the said invention before the last mentioned date, and no evidence is given that they did do so.

The questions to be decided, therefore, are whether the English patent (which was given in evidence) was for the same invention as the American patent; and, if so, whether the latter is limited to expire at the end of seventeen years from the sealing of the former. We think that both of these questions must be answered in the affirmative.

As to the first question, we have carefully compared the two patents, the English and American, and can see no essential difference between them. They describe the same furnace in all essential particulars. The English specification is more detailed, and the drawings are more minute and full; but the same thing is described in both. There is only one claim in the English patent, it is true. But that claim, under the English patent system, entitled the patentees to their entire invention, and is at least as broad and comprehensive as all four claims in the American patent. It is in these terms:

"Having now described the nature of our invention and the best modes we are acquainted with of performing the same, we wish it to be understood that we do not confine ourselves to the precise details shown on the accompanying drawings; but we claim as our invention the various arrangements of regenerative furnaces worked by the gases resulting from an imperfect combustion of solid fuel in separate places, as hereinbefore set forth."

It is contended by the counsel of the complainants, that the American patent contains improvements which are not exhibited in the English patent. But if this were so, it would not help the complainants. The principal invention is in both; and if the American patent contains additional improvements, this fact cannot save the patent from the operation of the law which is invoked, if it is subject to that law at all. A patent cannot be exempted from the operation of the law by adding some new improvements to the invention; and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion.

We have, then, to examine the question whether the term of the American patent was limited to run from its own date, or from the date (or sealing—which is equivalent to the publication) of the English patent. The reissued patent sued on is dated January 12, 1869, but the original patent, which is the one to be looked at, was dated March 1, 1864. It was issued, therefore, before the Act of 1870, by which the patent laws were revised, and whilst the Acts of 1836, 1839 and 1861 were in force. The Act of 1836, as well as previous Acts, made the term of a patent fourteen years; but it authorized an extension of the term for seven years longer, if it should appear that the patentee, without neglect or fault on his part, failed to obtain a reasonable remuneration for his invention. By the same Act (section 7), if an invention for which a patent was sought, had been patented in a foreign country, before the application for a patent here, it was a bar to obtaining a patent in this country, unless (section 8) such foreign letters patent had been taken out by the applicant himself within six months previous to the filing of his specification and drawings. The Act of 1839 (section 6) removed the limitation of six months, and allowed a patent to be taken out here at any time after the inventor had taken out a patent for the same invention in a foreign country, provided it should not have been introduced into public and common use in the United States prior to the application for a patent here; "*And provided also*, that in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent."

The Act of 1861 introduced several changes in the administration of the Patent Office, and gave a right to patents for designs. The last section (section 16) declared as follows: to wit, "that all patents hereafter granted shall remain in force for the term of seventeen years from the date of issue; and all extension of such patents is hereby prohibited."

The Act of 1870, which was a revision of all previous laws relating to patents, continued the period of seventeen years as the term of a patent, and in case a foreign patent had been previously issued, declared that the American patent should expire at the same time with the foreign patent, or, if more than one, at the same time with the one having the shortest term; but, in no case, for a longer term than seventeen years. This provision is substantially carried forward into the Revised Statutes. Sec. 4887.

The appellants contend that the Act of 1861 repealed that portion of the Act of 1839 which declared that a patent should be limited to the term of fourteen years from the date or publication of prior foreign letters patent for the same invention. So far as the period of fourteen years is concerned, this is, undoubtedly, true. Prior to 1861 all patents, as we have seen, were granted for the term of fourteen years, with a right, under certain circumstances, to an extension for seven years longer. This right of extension was attended with many inconveniences and much expense to meritorious patentees, and Congress, by the Act of 1861, cut it off, and made the term of all patents seventeen years—a compromise between fourteen and twenty-one years. The Act had nothing to do with the question of foreign patents, but only with the term for which patents should ordinarily run; and the period of seventeen years, without any privilege of extension, was adopted in lieu of fourteen years with a provisional right of extension. That was the sole point before the legislative mind. Seventeen years limit was substituted for fourteen years. That was all that was intended or thought of. We are of opinion, therefore, that the condition imposed by the Act of 1839, that the term of a patent for an invention which has been patented in a foreign country shall commence to run from the time of publication of the foreign patent, was not repealed or abrogated by the Act of 1861. If it was, it follows that there was a period of nine years, from 1861 to 1870, in which our patent system presented the anomaly of allowing patents to be taken out in this country at any length of time after the invention had been patented abroad, and without being subject to any condition, limitation, or restriction. This can hardly be supposed to have been the intention of Congress.

No doubt, the words of a law are generally to have a controlling effect upon its construction; but the interpretation of those words is often to be sought from the surrounding circumstances and preceding history. From the history of the law in this case, as exhibited in previous enactments, and from the evident object and purpose of section 16 of the Act of 1861, we are satisfied that the words there used to define and limit the term during which patents thereafter granted should remain in force, namely, "seventeen years from the date of issue," were only intended to change the length of the term, and not the point of its commencement. The latter continued as before, at "the date of issue," as defined by previous laws—referring either to the issue of the American patent itself, when no foreign patent had been previously obtained, or to that of the latter when such a patent had been obtained. This view of the construction and meaning of the Act of 1861 was fully explained and enforced by *Mr. Justice* Blatchford in the case of *De Florez* v. *Raynolds*, 17 Blatchf. 436; *S. C.* 8 Fed. Rep. 484.

The decree of the Circuit Court is affirmed.

JANE C. HITZ, *Appt.*,
v.
JOHN STORY JENKS ET AL., Exrs. of WILLIAM P. JENKS.

(See S. C. Reporter's ed. 297-307.)

Deed of married woman to secure husband's debt —wife's acknowledgment, when cannot be contradicted—receiver.

1. By a deed voluntarily executed and duly acknowledged by a husband and his wife, the entire title of both to land in the District of Columbia may be conveyed, to secure the payment of his debt, notwithstanding that the Act of Congress of 1869 exempted her property from liability for his debts.
2. Under the Revised Statutes of the District of Columbia, where a deed has been executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgement, in the form prescribed by the statute, and duly recorded with the deed, cannot afterwards, except for fraud or duress, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate.
3. Rents received by a receiver of a bank, under a decree of the court, are properly distributable among the creditors of the bank.

[Nos. 28, 468.]

Argued Oct. 21, 1887. Decided Nov. 14, 1887.

APPEALS from the Supreme Court of the District of Columbia. *Affirmed.*,
See 2 Mackey, 521-526, 4 Mackey, 179.

The facts are fully stated in the opinion.

Mr. **Enoch Totten,** for appellant:

The deed was procured from Mrs. Hitz by fraud and deceit, and the appellee was constructively a party thereto and is chargeable therewith.

Landes v. *Brant*, 51 U. S. 10 How. 348 (13: 449); *Sergeant* v. *Ingersoll*, 15 Pa. 348; *Cambridge Valley Bank* v. *Delano*, 48 N. Y. 326; *Taylor* v. *Stibbert* 2 Ves. Jr. 440; *Hiern* v. *Mill*, 13 Ves. Jr. 114; *Farnsworth* v. *Childs*, 4 Mass. 639; *Cordova* v. *Hood*, 84 U. S. 17 Wall. 1 (21:587); *Shaw* v. *Spencer*, 100 Mass. 382; *Blaisdell* v. *Stevens*, 16 Vt. 179; Wade, Notice, 1.

The deed of a *feme covert*, conveying her interest in land which she owns in fee, does not pass her interest by the force of its execution and delivery.

Hepburn v. *Dubois*, 37 U. S. 12 Pet. 375 (9: 1122); *Woods* v. *Polhemus*, 8 Ind. 60; *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 338 (7:169). The separate examination and attendant solemnities required by law are indispensable, and must not be omitted.

Rhea v. *Rhenner*, 26 U. S. 1 Pet. 105 (7:72); *Johnston* v. *Wallace*, 53 Miss. 335; *Drury* v. *Foster*, 69 U. S. 2 Wall. 28 (17:780); *Central Bank* v. *Copeland*, 18 Md. 305; *Dewey* v. *Campau*, 4 Mich. 565; *Fisher* v. *Meister*, 24 Mich. 447; *O'Ferrall* v. *Simplot*, 4 Iowa, 382; *Dodge* v. *Hollinshead*, 6 Minn. 1.

The alterations of the deed are material.

Oneale v. *Long*, 8 U. S. 4 Cranch, 60 (2:550); *Speake* v. *U. S.* 13 U. S. 9 Cranch, 28 (3:645); *Moore* v. *Bickham*, 4 Binn. 1; *Coit* v. *Starkweather*, 8 Conn. 289; *Adams* v. *Frye*, 3 Met. 103; *Jackson* v. *Malin*, 15 Johns. 293; *Hibblewhite* v. *McMorine*, 6 Mees. & W. 200; *Walker* v. *Caulk*, 9 Harr. & J. 36; *U. S.* v. *Nelson*, 2 Brock, 64; *Drury* v. *Foster*, 69 U. S. 2 Wall. 24

(17:780); *Van Horne* v. *Dorrance*, 2 U.S. 2 Dall. 304 (1:391).

Messrs. **Walter D. Davidge** and **R. D. Mussey**, for appellees:

The "Married Woman's Act" does not require the husband to join the wife in a conveyance of her property.

R. S. D. C. §§ 727, 728; *Wing* v. *Schramm*, 13 Hun, 377; *McIlvaine* v. *Kadel*, 30 How. Pr. 193; S. C. 3 Robt. 429; *Farr* v. *Sherman*, 11 Mich. 33; *Watson* v. *Thurber*, Id. 457; *Hitz* v. *National Met. Bank*, 111 U. S. 729 (28:579).

The money of Jenks having gone, in good faith, and without notice to him of anything wrong, to discharge a prior valid mortgage standing on the estate of Mrs. Hitz, she cannot be allowed to assail Jenks' security for that money without making restitution and paying back to Jenks, with interest, the money advanced by him.

Sheldon, Subrogation, § 8; *Snelling* v. *McIntyre*, 6 Abb. N. C. 469; *Green* v. *Milbank*, 3 Abb. N. C. 133; *Gilbert* v. *Gilbert*, 39 Iowa, 657; *Garwood* v. *Eldridge*, 2 N.J. Eq. 145; *Price* v. *Hobbs*, 47 Md. 384; *Bowie* v. *Berry*, 3 Md. Ch. Dec. 359; *Hyde* v. *Tanner*, 1 Barb. 80; Bispham, Eq. § 333; *Burnhisel* v. *Firman*, 89 U.S. 22 Wall. 170 (22:766); *Davis* v. *Gaines*, 104 U. S. 386 (26:757).

Mr. Justice **Gray** delivered the opinion of the court:

The original suit was a bill in equity, filed January 10, 1879, by Keyser, as the receiver of the German American National Bank, against Hitz and wife, Donaldson, Prentiss, Chipley, Halstead, Crane, Tyler and Jenks, to enforce a deed, in the nature of a mortgage, dated January 26, 1876, by which Hitz and wife conveyed land in Washington to Donaldson and Prentiss, in trust to secure the payment of promissory notes for $20,000, made by Chipley, indorsed by Halstead and held by the bank; as well as to set aside, as made in fraud of the bank, the following conveyances of the same land: 1. A release, dated June 16, 1877, from Donaldson and Prentiss to Mrs. Hitz. 2. A deed, of the same date, from Hitz and wife to Crane. 3. A deed, dated June 18, 1877, from Crane to Tyler, in trust to secure the payment of Crane's promissory notes for $20,000, payable to Hitz and by him indorsed to Jenks.

Mrs. Hitz filed a cross bill against Keyser and her codefendants, alleging that she was induced to execute the conveyance to Crane by fraud and in ignorance of its contents; and praying for a cancellation both of that conveyance and of the deed of trust from Crane to Tyler, and for an account of rents and profits. By leave of court, she afterwards amended her bill so as to allege that the deed to Crane was fraudulently altered after she executed it.

After a hearing upon pleadings and proofs, it was adjudged at the special term, by a decree made November 28, 1881, and amended December 15, 1881, that these two deeds were valid against Hitz, but void as against his wife; that the former deed of trust had been discharged by payment and release; and that Keyser account for the rents and profits previously received by him, and collect and pay into court all rents subsequently accruing. From that decree Mrs. Hitz, Jenks and Keyser each appealed to the General Term, which on December 11, 1883, reversed the decree of the special term, and dismissed both bills, save that the cause was retained to take an account of the rents and profits received or which should have been received by Keyser, and to determine the right to those rents and profits, which were claimed by Mrs. Hitz as her separate property, by Jenks as part of the security afforded by the deed of trust to Tyler, and by Keyser under judgments recovered against Hitz. 2 Mackey, 513. On July 13, 1885, a further decree was entered in General Term, denying the right of Mrs. Hitz to any part of those rents and profits. 4 Mackey, 179. From each decree of the General Term she alone appealed to this court.

The principal matter to be determined is the validity, as against Mrs. Hitz, of the conveyance from her husband and herself to Crane, and of the deed of trust from Crane to Tyler. The evidence establishes the following facts:

Mr. and Mrs. Hitz were married in 1856, children were born to them, and she inherited the land in question from her father, before the passage of the Act of Congress providing that "in the District of Columbia the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were *feme sole*, and shall not be subject to the disposal of her husband, nor be liable for his debts; but such married woman may convey, devise and bequeath the same, or any interest therein, in the same manner and with like effect as if she were unmarried." Act April 10, 1869, chap. 28, § 1, 16 Stat. 45; R. S. D. C. §§ 727, 728.

Chipley and Halstead were men of no means, and the real object of the deed of trust from Hitz and wife to Donaldson and Prentiss was to secure certain liabilities of Hitz to the bank, of which he was then president. The object of making the deeds from Hitz and wife to Crane and from Crane to Tyler was to secure the payment of money actually advanced by Jenks to Hitz, and by Hitz applied to the payment of the notes secured by the former deed of trust.

The evidence satisfactorily proves that no fraud was practiced upon Mrs. Hitz, and that the deed from herself and her husband to Crane was put in its present form before it was signed by either of them. As these are pure matters of fact, and the evidence relating to them is well summed up in the opinion of the court below, they need not be enlarged upon. 2 Mackey, 521-526.

There can be no doubt that by a deed, voluntarily executed and duly acknowledged by the husband and the wife, the entire title of both might be conveyed to secure the payment of his debt, notwithstanding that the Act of 1869, as construed by this court, exempted the land or any interest therein, from being taken on execution against him. *Hitz* v. *National Met. Bank*, 111 U. S. 722 [28:577]; *Mattoon* v. *McGrew*, 112 U. S. 713 [28:824].

The more important question is, whether the appellant has shown by competent and sufficient proof that her acknowledgment of the deed to Crane did not fulfill the requirements of the Revised Statutes of the District of Columbia upon the subject, which are as follows:

By section 441, acknowledgments of deeds may be made before any judge of a court of record and of law, or any chancellor of a State, or a judge of a court of the United States, or a justice of the peace, or a notary public, or a commissioner of the circuit court of the district.

By section 450, "when any married woman shall be a party executing a deed for the conveyance of real estate or interest therein, and shall only be relinquishing her right of dower, or when she shall be a party with her husband to any deed, it shall be the duty of the officer authorized to take acknowledgments, before whom she may appear, to examine her privily and apart from her husband, and to explain to her the deed fully."

By section 451, "if, upon such privy examination and explanation, she shall acknowledge the deed to be her act and deed, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, the officer shall certify such examination, acknowledgment and declaration by a certificate annexed to the deed, and under his hand and seal, to the following effect," that is to say, beginning in the usual form of a certificate of acknowledgment, and adding that "being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it."

By section 452, "when the privy examination, acknowledgment and declaration of a married woman is taken and certified and delivered to the recorder of deeds for record, in accordance with the provisions of this chapter, the deed shall be as effectual in law as if she had been an unmarried woman," except as to any covenants therein.

These provisions substantially re-enact statutes which have been in force ever since 1715 in the District of Columbia, and in the State of Maryland out of which the District was formed. Maryland Stat. 1715, chap. 47, § 11; 1752, chap. 8; 1766, chap. 14, § 6; 1797, chap. 103, § 3—all in Kilty's Laws; Dist. Col. Laws, 1868, pp. 21, 28, 86; Acts May 31, 1832, chap. 112, 4 Stat. 520; April 20, 1838, chap. 57, § 4, 5 Stat. 227.

The conveyance of the estates of married women by deed, with separate examination and acknowledgment, has taken the place of the alienation of such estates by fine in a court of record under the law of England, though differing in some of its effects, owing to the diversity in the nature of the two modes of proceeding.

A fine was in the form of a judgment of a court of record, at first in an actual, and afterwards in a fictitious suit by the conusee against the conusors to recover possession of the land; and derived its very name from its putting *an end* to that suit and to all other controversies concerning the same matter. 2 Bl. Com. 349; Co. Litt. 262 *a*. A party could not therefore impeach it at law, even for infancy (except by writ of error sued out while still under age) or for insanity. Bac. Abr. Fines and Recoveries, Fines C; 5 Cruise, Dig. tit. 35, chap. 5, §§ 41–54; *Murley* v. *Sherren*, 1 Perry & D. 126; *S. C.* 8 Ad. & El. 754. Yet if any fraud or undue practice was used in obtaining the fine, the court of chancery would relieve against it, as against any other conveyance. 5 Cruise, Dig. tit. 35, chap. 14, §§ 68–77; *Bulkley* v. *Wilford*, 2 Clark & F. 102; *Conry* v. *Caulfield*, 2 Ball & B. 255.

On the other hand, the alienation of land by deed of husband and wife with her separate examination and acknowledgment is, in form as well as in fact, a conveyance by the parties, and therefore does not, even if the acknowledgment is certified by a magistrate in the form prescribed by statute, and recorded, bind a wife who, by reason of infancy or insanity, is incapable of conveying. *Sims* v. *Everhardt*, 102 U. S. 300 [26: 87]; *Williams* v. *Baker*, 71 Pa. 476; *Priest* v. *Cummings*, 16 Wend. 617, 681, and 20 Wend. 338, 349; *Jackson* v. *Schoonmaker*, 4 Johns. 161. In any case of fraud or duress, also, it may be impeached by bill in equity, or, in some States, in an action at law. *Central Bank* v. *Copeland*, 18 Md. 305; *Schrader* v. *Decker*, 9 Pa. 14; *Louden* v. *Blythe*, 16 Pa. 532, and 27 Pa. 22; *Hall* v. *Patterson*, 51 Pa. 289; *Jackson* v. *Hayner*, 12 Johns. 469; *Fisher* v. *Meister*, 24 Mich. 447; *Wiley* v. *Prince*, 21 Tex. 637.

The statute of 18 Edw. I. *De Modo Levandi Fines* enacted that if a *feme covert* should be one of the parties to a fine, then she must first be examined by certain justices, and if she did not assent to the fine it should not be levied. Yet this was always understood to mean that the fine ought not to be received without her examination and free consent; but that if it was received and recorded, neither she nor her heirs could be permitted to aver that she was not examined and did not consent, "for this," says *Lord* Coke, "should be against the record of the court, and tending to the weakening of the general assurances of the realm." 2 Inst. 510, 515; Bac. Abr. *ubi supra*.

The object of a statute, like that now before us, requiring the separate examination of the wife to be taken by a judicial officer or notary public, to be certified by him in a particular form, and to be recorded in the registry of deeds, is twofold; not only to protect the wife by making it the duty of such an officer to ascertain and to certify that she has not executed the deed by compulsion of her husband or in ignorance of its contents; but also to facilitate the conveyance of the estates of married women, and to secure and perpetuate evidence, upon which innocent grantees as well as subsequent purchasers may rely, that the requirements of the statute, necessary to give validity to the deed, have been complied with. *Lawrence* v. *Heister*, 3 Harr. & J. 371.

The duty of examining the wife privily and apart from her husband, of explaining the deed to her fully, and of ascertaining that she executed it of her own free will, without coercion or under influence of his, is a duty imposed by law upon the officer, involving the exercise of judgment and discretion, and thus a judicial or quasi-judicial act. The magistrate is required to ascertain a particular state of facts, and, having ascertained it, to certify it for record, for the benefit of the parties to the deed, and of all others who may thereafter acquire rights under it. And the statute expressly provides that upon the recording of the cer-

tificate "the deed shall be as effectual in law as if she had been an unmarried woman."

The reasonable, if not the necessary conclusion is, that, except in case of fraud, the certificate, made and recorded as the statute requires, is the sole and conclusive evidence of the separate examination and acknowledgment of the wife.

It has been decided by this court, in a case arising, under a similar statute of Virginia, that if the certificate, as recorded, is silent as to these facts, the want cannot be supplied by parol evidence that the wife was duly examined; and this for the reason stated by *Mr. Justice* Trimble, in delivering judgment, as follows: "What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact which makes the deed effectual to pass the estate of a *feme covert*." *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 328, 340 [7:164, 170].

That the magistrate's certificate, when made in the form required by the statute, and duly recorded, is conclusive evidence that he has performed his duty, has not been directly adjudged by this court; but the course of its decisions has tended to this conclusion. In *Drury* v. *Foster*, *Mr. Justice* Nelson, in delivering judgment, observed: "There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the *feme covert*, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that the acts of the officer for this purpose are judicial and conclusive." 69 U. S. 2 Wall. 24, 34, [17:780, 781]. And in *Young* v. *Duvall*, the court said that if the officer's certificate "can be contradicted, to the injury of those who in good faith have acted upon it, the proof to that end must be such as will clearly and fully show the certificate to be false or fraudulent. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity of titles to real estate, which would inevitably follow from one less rigorous." 109 U. S. 573, 577 [27:1086, 1088].

It would be inconsistent with the reasons above stated, as well as with a great weight of authority, to hold that, in the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, can afterwards, except for fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate. *Comegys* v. *Clarke*, 44 Md. 108; *Jamison* v. *Jamison*, 8 Whart. 457; *Williams* v. *Baker*, 71 Pa. 476; *Harkins* v. *Forsyth*, 11 Leigh, 294; *Greene* v. *Godfrey*, 44 Me. 25; *Baldwin* v. *Snowden*, 11 Ohio St. 203; *Graham* v. *Anderson*, 42 Ill. 514; *Dolph* v. *Barney*, 5 Oreg. 191; *Johnston* v. *Wallace*, 58 Miss. 331; *Hartley* v. *Frosh*, 6 Tex. 208. See also *Bancks* v. *Ollerton*, 10 Exch. 168, 182.

As to such of the cases, cited by the learned counsel for the appellant, as have not been already referred to, it may be remarked that in *Rhea* v. *Rhenner*, 26 U. S. 1 Pet. 105 [7:72], in *Hepburn* v. *Dubois*, 37 U. S. 12 Pet. 345 [9:1111] in *Dewey* v. *Campau*, 4 Mich. 565, and in *O'Ferrall* v. *Simplot*, 4 Iowa, 381, the requisite certificate was either wanting or defective upon its face; and that *Dodge* v. *Hollinshead*, 6 Minn. 25, and *Landers* v. *Bolton*, 26 Cal. 393, were decided under statutes which expressly provided that the certificate should not be conclusive, but might be rebutted by other evidence.

In the case at bar, the recorded certificate of the notary public who took the acknowledgment is in the form given in the statute. The other evidence on the subject is the testimony of the appellant and of the notary. The appellant, being called as a witness in her own behalf, admitted her signature, but did not recollect that she ever executed or acknowledged the deed in question, and denied that it was ever explained to her. The notary, being called as a witness by the appellees, testified that in taking her acknowledgment he asked her if she had read over the deed and understood its contents, and if she willingly signed, sealed and delivered it, without any compulsion on the part of her husband, and wished not to retract it, to all which she answered in the affirmative; that he did not otherwise explain the deed to her, and did not read it himself; and that he did not think it necessary to explain a deed if the party was already acquainted with its contents.

The appellant's signature being admitted, and there being no proof of fraud or duress in taking or procuring her acknowledgment, the extrinsic evidence was, for the reasons and upon the authorities before stated, incompetent to impeach the notary's certificate as to the manner in which he had performed his duty.

The result is that the appellant shows no ground for reversing the principal decree, and it only remains to consider her claim to rents and profits. This claim consists of two parts:

First. For rents received, with the consent of Hitz, by Keyser as receiver, appointed by the Comptroller of the Currency, of the national bank, from the time of his appointment as such receiver in October, 1878, to the date of the decree of the court below in special term, December 15, 1881. But it appears that the moneys so received were paid by him into the Treasury of the United States, subject to the order of his superior officer, the Comptroller of the Currency, as required by section 5234 of the Revised Statutes, and were distributed by the Comptroller among the creditors of the bank. They were therefore rightly treated by the court below as not to be accounted for in this cause.

Second. For rents received by Keyser under his appointment as receiver by the decree of the court in special term on December 15, 1881, and paid by him into the registry of the court, pursuant to that decree, from its date until its reversal in General Term on December 11, 1883. It is argued for the appellant that

by the rule affirmed in *Teal* v. *Walker*, 111 U. S. 242 [28: 415], a mortgagee is not entitled to rents and profits until he has been lawfully put in possession of the land; and that Keyser, having been admitted into possession by Hitz only, cannot hold the rents and profits against Mrs. Hitz. The conclusive answer to this argument is that the accruing rents were not received and held by Keyser by virtue of an agreement with Hitz; but the court, through Keyser as its receiver, took possession of these rents in order to preserve them for the party who should ultimately prevail in the suit. When it was afterwards adjudged that the first deed of trust, and the debt thereby secured, which Keyser's original bill sought to enforce, had been released and discharged, and that the second deed of trust was valid as against Mrs. Hitz; and the sum obtained for the land at a sale under the power contained in this deed proved insufficient, by more than the whole of the fund in court, to pay the debt of Hitz to Jenks, secured by this deed, it was rightly held that Mrs. Hitz had no right as against Jenks to any part of this fund. This view disposes of the case, independently of the application of part of the fund to the payment of taxes accrued during the pendency of this suit; and even if the rents originally belonged to Mrs. Hitz, and not to her husband as tenant by the curtesy, which is by no means clear. *Hitz* v. *National Met. Bank*, 111 U. S. 722 [28:577].

Decree affirmed.

WILLIAM D. ANDREWS ET AL., *Appts.*,
v.
GEORGE HOVEY.

(See S. C. Reporter's ed. 267-276.)

Driven well patent, void—more than two years' prior use.

1. The driven well patent, No. 4372, granted to Nelson W. Green, May 9, 1871, is invalid because the invention was used in public more than two years before the application for the patent.

2. A patent granted under the Act of 1839 is void, if there had been more than two years' use of the invention prior to the application therefor, whether such use was, or was not, with the knowledge or consent of the applicant.

[No. 16.]

Argued Oct. 18, 19, 1887. Decided Nov. 14, 1887.

APPEAL by plaintiff from the Circuit Court of the United States for the Southern District of Iowa. *Affirmed.*

Reported below, 5 McCrary, 181.

The case is fully stated in the opinion.

Messrs. **Joseph C. Clayton** and **Anthony Q. Keasbey**, for appellants—

Cited, on the question of dedication to the public, to show that consent or allowance was necessary, in order to work a forfeiture:

Pierson v. *Eagle Screw Co.* 3 Story, 402; *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 (11: 102); *Pitts* v. *Hall*, 2 Blatchf. 235; *American Hide & L. S. & D. M. Co.* v. *American Tool & M. Co.* 4 Fish. Pat. Cas. 285; *Russell & Irwin Mfg. Co.* v. *Mallory*, 5 Fish. Pat. Cas. 632; *Jones* v. *Sewall*, 6 Fish. Pat. Cas. 343; *McMillin* v. *Barclay*, 5 Fish. Pat. Cas. 189; *Andrews* v. *Carman*, 18 Blatchf. 307; *Andrews* v. *Cross*, 19 Blatchf. 294; *Elizabeth* v. *Nicholson Pavement Co.* 97 U. S. 126 (24: 1000); *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92 (24: 68); *Manning* v. *Cape Ann I. & G. Co.* 108 U. S. 462 (27: 793); *Ryan* v. *Goodwin*, 3 Sumn. 518.

Messrs. **Jed. Lake**, *M. W. Harmon* and *Geo. Hovey*, for appellees:

If the original patent was not inoperative or void, by reason of defective specifications, there was no law authorizing the reissue. If the reissue was not authorized by the terms of the statute, then the Commissioner of Patents exceeded his jurisdiction and the reissue is void for want of authority to issue it.

Giant Powder Co. v. *California V. Powder Co.* 18 Off. Gaz. 1339; S. C. 4 Fed. Rep. 720; *Flower* v. *Rayner*, 5 Fed. Rep. 793; *Russell* v. *Dodge*, 93 U. S. 460 (23: 973); *Giant Powder Co.* v. *California Powder Works*, 98 U. S. 138 (25: 77); *Siebert Cylinder Oil Cup Co.* v. *Harper Steam L. Co.* 4 Fed, Rep. 328; *Putman* v. *Tinkham*, Id. 411.

The original specifications are so complete and full that there were no legal grounds on which a reissue could be asked.

R. S. § 4916; *Lockwood* v. *Morey*, 5 Wall. 230; *Railway* v. *Sayles*, 97 U. S. 568; *Searls* v. *Bouton*, 12 Fed. Rep. 625, 626.

The scope of the patent has been enlarged, and for that reason, also, the reissue is invalid.

Giant Powder Co. v. *California Powder Works*, *Putnam* v. *Tinkham*, and *Siebert Cylinder Oil Cup Co.* v. *Harper Steam L. Co. supra; Root* v. *E. N. Welch Mfg. Co.* 4 Fed. Rep. 423; *Washburn & Moen Mfg. Co.* v. *Haish*, Id. 900, 910; *Novelty Paper-Box Co.* v. *Stapler*, 5 Fed. Rep. 919.

Authorities on the question of prior use:

Bedford v. *Hunt*, 1 Mason, 302; *Coffin* v. *Ogden*, 2 Whit. Pat. Cas. 465; *Miller* v. *Foree*, 9 Fed. Rep. 603; *Collender* v. *Griffith*, 10 Rep. (Boston) 8; *New* v. *Lawrence*, 11 Rep. (Boston) 45; *Reed* v. *Cutter*, 1 Story, 590; *McNish* v. *Everson*, 2 Fed. Rep. 899; *Olendorf* v. *Eckler*, 2 Fed. Rep. 570; *Blake* v. *San Francisco*, 113 U. S. 679 (28: 1070); *Pennsylvania R. R. Co.* v. *Locomotive Engine S. T. Co.* 110 U. S. 490 (28: 222); *Brown* v. *Piper*, 91 U. S. 37 (23: 200); *Roberts* v. *Ryer*, 91 U. S. 150 (23: 267); *Sewall* v. *Jones*, 91 U. S. 171, 180 (23: 275, 276); *Reckendorfer* v. *Faber*, 92 U. S. 347 (23: 719); *King* v. *Gallun*, 109 U. S. 99 (27: 870); *Zane* v. *Soffe*, 110 U. S. 200 (28: 119); *Estey* v. *Burdett*, 109 U. S. 633 (27: 1058); *Phillips* v. *Detroit*, 111 U. S. 604 (28: 532); *Mahn* v. *Harwood*, 112 U. S. 354 (28: 665); *Miller* v. *Foree*, 116 U. S. 22 (29: 552).

These cases show conclusively that the courts hold in every instance where prior use is proved, that it is a successful and meritorious defense.

Shaw v. *Cooper*, 1 Whit. Pat. Cas. 173.

Where public use is known, or might be known to the inventor, knowledge of its use and acquiescence is presumed.

Sisson v. *Gilbert*, 5 Fish. Pat. Cas. 109; *Egbert* v. *Lippmann*, 14 Off. Gaz. 822; *Edgarton* v. *Furst & Bradley Mfg. Co.* 9 Fed. Rep. 450; *Henry* v. *Francestown Soapstone Co.* 2 Fed. Rep. 78; *Perkins* v. *Nashua Card & G. P. Co.* Id. 451; *Manning* v. *Cape Ann I. & G. Co.* 9 Rep. (Boston) 837; *Kells* v. *McKenzie*, 9 Fed.

Rep. 284; *Henry* v. *Francestown Soapstone Co.* 9 Rep. (Boston) 706; *Campbell* v. *Mayor of N. Y.* 9 Fed. Rep. 500; *Miller* v. *Smith*, 5 Fed. Rep. 359.

In *Elizabeth* v. *Nicholson Pavement Co.* 97 U. S. 134 (24: 1004), this court said "An abandonment of an invention to the public may be evidenced by the conduct of the inventor at any time within the two years named in the law.

Egbert v. *Lippmann*, 21 Off. Gaz. 77; *Consolidated Fruit Jar. Co* v. *Wright*, 94 U. S. 92 (24: 68).

An abandonment of a perfected invention, no matter for what reason, cannot be recalled.

Mellus v. *Silsbee*, 4 Mason, 108; *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1 (7: 327); *Jones* v. *Sewall*, 3 Cliff. 563; *Bell* v. *Daniels*, 1 Bond. 212; *Rowley* v. *Mason*, Am. L. R. 106.

Acquiescence in a public use is an abandonment.

Whittemore v. *Cutter*, 1 Gall. 478; *Savary* v. *Lauth*, 1 McAr. Pat. Cas. 691; *Kendall* v. *Winsor*, 62 U. S. 21 How. 322 (16: 165); *Babcock* v. *Degener*, 1 McAr. Pat. Cas. 607; *Rich* v. *Lippincott*, 2 Fish. Pat. Cas. 1; *Hayden* v. *Suffolk Mfg. Co.* 4 Fish. Pat. Cas. 86.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity brought by the appellants for the infringement of reissued letters patent No. 4372, granted to Nelson W. Green, one of the appellants, May 9, 1871, for an "improvement in the methods of constructing artesian wells," the original patent, No. 78425, having been granted to said Green, as inventor, January 14, 1868, on an application filed March 17, 1868.

This patent was before this court in the cases of *Eames* v. *Andrews* and *Beedle* v. *Bennett*, at October Term, 1886, reported in 122 U. S. 40 and 71 [30: 1064, 1074]. In those cases, this court sustained the validity of the reissued patent and affirmed the decrees of the circuit courts. In the present case, the decree of the circuit court was against the validity of the patent, and the bill was dismissed. 5 McCrary, 181. From that decree the plaintiffs have appealed.

The patent is familiarly known as the "driven well" patent. The specifications and drawings of the original and reissued patents are set forth in the opinion of this court in *Eames* v. *Andrews*. Numerous defenses are set up in the answer in the present case, and voluminous proofs have been taken in respect to those defenses; but it is necessary to consider only one of them, which, in our view, is fatal to the validity of the patent; and that is, that the invention was used in public, at Cortland, in the State of New York, by others than Green, more than two years before the application for the patent.

The brief of the appellants concedes that it is shown in this case that other persons than Green put the invention into public use more than two years before his application was filed. It is contended for the appellants that this was done without his knowledge, consent or allowance. The appellee contends that such knowledge, consent or allowance was not necessary in order to invalidate the patent, while the appellants contend that it was necessary. The whole question depends upon the proper construction of section 7 of the Act of March 3, 1839, 5 Stat. at L. 354, interpreted in connection with sections 6, 7, and 15 of the Act of July 4, 1836, 5 Stat. at L. 119, 123.

A list of the various cases decided in the circuit courts brought on the reissued "driven well" patent, is given in the case of *Eames* v. *Andrews*, at page 47 [1066]. In none of those cases, except the present one and those heard at the same time with it, did the question thus presented arise. In *Andrews* v. *Carman*, 13 Blatchf. 307, 324, the question involved and considered by the court was that of a dedication and abandonment to the public of his invention by Green prior to his application, founded upon acts done by him. The conclusion of the court was, that there was no evidence of any use or sale of the invention by Green prior to his application for a patent, nor any direct proof of knowledge on his part of any use or sale of the invention by others within two years prior to his application, nor sufficient evidence from which to properly infer that he had such knowledge. The question of the use of his invention by others more than two years prior to his application does not appear to have been raised.

Nor was it raised in *Andrews* v. *Cross*, 19 Blatchf. 294. One of the defenses set up in the answer in that case was "that the claim of Green as inventor was barred because the improvement was in use more than two years prior to the granting of his patent," and, as was said in the opinion in that case, there was "no allegation that the invention was in public use in the United States for more than two years before Green applied for his original patent, or that any use was with his consent or allowance, or that he abandoned the invention to the public in fact, or otherwise than inferentially from the fact alleged, that it was in use for more than two years before his original patent was granted." The conclusion of the circuit court in *Andrews* v. *Cross* was, that no abandonment or dedication of the invention to the public by Green was shown; and that there was no evidence of any use or sale of the invention by Green before his application, and no sufficient evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him. The use by others thus referred to was, as in *Andrews* v. *Carman*, a use within two years prior to the application.

The point was not presented in *Eames* v. *Andrews* or in *Beedle* v. *Bennett*, and in the opinion in the latter case, it was said p. 77 [1076]: "There is no evidence in the record of any use or sale of the invention by Green before his application for a patent, and no evidence from which to conclude that any use of any driven well by others before his application was consented to or allowed by him, except in the instances mentioned at Cortland, which were merely experimental tests, made by himself. Much less is there any evidence to show that there was any use of the invention by others for more than two years prior to his application."

The question involved has never been decided by this court. In *Egbert* v. *Lippmann*, 104 U. S. 333, 334 [26: 755] it was said: "Since the pas-

sage of the Act of 1839, it has been strenuously contended that the public use of an invention for more than two years before such application, even without his" the inventor's "consent and allowance, renders the letters patent therefor void. It is unnecessary in this case to decide this question, for the alleged use of the invention covered by the letters patent to Barnes is conceded to have been with his express consent." In that case, the circuit court had, in *Egbert* v. *Lippmann*, 15 Blatchf. 295, held that the effect of the Act of 1839 was to require that the inventor should not permit his invention to be used in public at a period earlier than two years prior to his application for a patent, under the penalty of having his patent rendered void by such use; and that consent and allowance by the inventor were not necessary to such invalidity. The circuit court said that the policy introduced by the Act of 1839, and continued by sections 24 and 61 of the Act of July 8, 1870, 16 Stat. at L. 201, 208, now sections 4886 and 4920 of the Revised Statutes, was, "That the inventor must apply for his patent within two years after his invention is in such a condition that he can apply for a patent for it, and that, if he does not apply within such time, but applies after the expiration of such time and obtains a patent, and it appears that his invention was in public use at a time more than two years earlier than the date of his application, his patent will be void, even though such public use was without his knowledge, consent, or allowance, and even though he was in fact the original and first inventor of the thing patented and so in public use." The circuit court, in that case, appears to have decided the question on the view that the defense set up in the answer was that the invention had been known and in use in the United States more than two years before the application, and that there was no issue as to whether the public use for more than two years was with the consent or allowance of the patentee; but this court decided the case on the question of the consent of the patentee to the use for more than [two] years before the application.

The original patent in the present case, having been applied for and issued prior to the passage of the Act of 1870, is to be governed by the provisions of the Acts of 1836 and 1839. Section 6 of the Act of 1836 provided for the issuing of a patent to an inventor for an invention not known or used by others before his discovery or invention thereof, "and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer." Section 7 of the same Act provided for the issuing of a patent if, on examination, it should not appear to the commissioner that the invention had been made by any other person in this country prior to its being made by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, "or had been in public use or on sale with the applicant's consent or allowance prior to the application." Section 15 of the same Act provided that the defendant, in an action for the infringement of a patent, might show, among other things, that the thing patented "had been in public use, or on sale, with the consent and allowance of the patentee, before his application for a patent;" and that, if that was shown, judgment should be rendered for the defendant.

The seventh section of the Act of 1839 was in these words: "That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in said invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

The Act of July 8, 1870, repealed the Act of 1839, but provided (section 111) that such repeal should not affect, impair, or take away any right existing under the Act of 1839. Section 24 of the Act of 1870, now embodied in section 4886 of the Revised Statutes, was in these words: "That any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the duty required by law, and other due proceedings had, obtain a patent therefor."

Section 37 of the Act of 1870, now embodied in section 4899 of the Revised Statutes, provided as follows: "That every person who may have purchased of the inventor, or with his knowledge and consent may have constructed any newly invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or sold or used one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor."

In section 61 of the Act of 1870 it was enacted, that, in any action for infringement, the defendant might prove on the trial, as a defense, among other things, that the thing patented "had been in public use or on sale in this country, for more than two years before his application for a patent, or had been abandoned to the public," and that, if such special matter alleged should be found for the defendant, judgment should be rendered for him. This provision is now found in section 4920 of the Revised Statutes.

It is very plain that, under the Act of 1836, if the thing patented had been in public use or on sale with the consent or allowance of the applicant for any time, however short, prior to his application, the patent issued to him was invalid. Then came section 7 of the Act of 1839, which was intended as an amelioration in favor of the inventor, in this respect, of the strict provisions of the Act of 1836. The first

clause of that section provides for the protection of a person who, prior to the application for the patent, purchases or constructs a specific machine or article, and declares that he may use and sell such specific machine or article after the patent is issued, without liability to the patentee. The section does not require, in order to this protection, that the purchase or construction shall have been with the consent or allowance of the person who afterwards obtains the patent and seeks to enforce it against such purchaser or constructor. The words "consent or allowance" are not found in the provision. The only requirement is that the specific machine or article shall have been purchased or constructed at some time prior to the application for a patent. The second clause of the section then passes to consider the effect upon the validity of the patent "of such purchase, sale, or use prior to the application" for the patent, and declares that "no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent, as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent." The expression "such purchase" clearly means the purchase from any person, and not merely from the person who becomes the patentee of the machine or article. The expression "such sale or use" clearly refers to the use or sale by the person who has purchased or constructed the machine or article, the right to use and sell which is given to him by the first part of the section. That right is given to a person who has constructed the machine or article, as well as to one who has purchased it; and the plain declaration of the second part of the section is, that, where the purchase or construction of the machine or article took place more than two years prior to the application for the patent, or where the use or sale by the person who so purchased or constructed the machine or article took place at a time more than two years prior to the application, the patent becomes invalid. It is not possible in any other way to give full effect to the word "constructed," in the first part of the section. The word "purchased" and the word "constructed" are used in the same connection, and in connection with the words "so made or purchased," which occur afterwards; and the word "purchased" cannot be limited to a purchase from the applicant for the patent, nor can the word "constructed" be limited to a construction with the consent and allowance of such applicant, without interpolating into the statute the words "consent or allowance." We can find no warrant for doing this. The evident purpose of the section was to fix a period of limitation which should be certain, and require only a calculation of time, and should not depend upon the uncertain question of whether the applicant had consented to or allowed the sale or use. Its object was to require the inventor to see to it that he filed his application within two years from the completion of his invention, so as to cut off all question of the defeat of his patent by a use or sale of it by others more than two years prior to his application, and thus leave open only the question of priority of invention. The evident intention of Congress was to take away the right (which existed under the Act of 1836) to obtain a patent after an invention had for a long period of time been in public use without the consent or allowance of the inventor; it limited that period to two years, whether the inventor had or had not consented to or allowed the public use. The right of an inventor to obtain a patent was in this respect narrowed, and the rights of the public as against him were enlarged, by the Act of 1839. The language of section 24 of the Act of 1870, now section 4886 of the Revised Statutes, is to the same effect, and carries out the policy inaugurated by the Act of 1839. It allows a patent to be granted only for an invention which was not in public use or on sale for more than two years prior to the application for the patent, subject to the defense of abandonment within such two years, which is also the requirement of section 61 of the same Act; while section 37 of that Act requires that a person, in order to have the right to use and sell, without liability, a specific thing made or purchased prior to the application for the patent, shall have purchased it of the inventor or constructed it with his knowledge and consent.

In view of the fact that section 37 of the Act of 1870 re-enacts the first part of section 7 of the Act of 1839, with the addition, *ex industria*, of the requirement, in order to confer the right to use the specific thing in question, that the purchase of it should have been from the inventor or the construction of it should have been with his knowledge and consent, and of the further fact that section 24 of the Act of 1870 re-enacts the second part of section 7 of the Act of 1839, and does not contain a requirement that the public use or sale for more than two years prior to the application shall have been with the consent or allowance of the patentee, in order to invalidate the patent, it may fairly be said, that it was the view of Congress that section 7 of the Act of 1839 did not require, as an element, the knowledge, consent or allowance of the applicant.

Views are to be found in decisions of circuit courts, not in harmony with the construction we have thus put upon section 7 of the Act of 1839. That construction was upheld in the very full opinion given by *Judge* Love, one of the judges who sat in the present case in the circuit court. 5 McCrary, 204. It was indicated as the proper construction in the opinion of this court in *Elizabeth* v. *Nicholson Pavement Co.* 97 U. S. 126, 134 [24:1000,1004], which was the case of a patent issued under the Act of 1839, and where this court, speaking by *Mr. Justice* Bradley, said, in regard to that Act: "An abandonment of an invention to the public may be evinced by the conduct of the inventor at any time, even within the two years named in the law. The effect of the law is that no such consequence will necessarily follow from the invention being in public use or on sale, with the inventor's consent and allowance, at any time within two years before his application; but that, if the invention is in public use or on sale prior to that time, it will be conclusive evidence of abandonment, and the patent will be void."

The decree of the Circuit Court is affirmed.

EMIL OELBERMANN ET AL., *Piffs. in Err.*,
v.
EDWIN A. MERRITT, Late Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 356-369.)

Merchant appraiser—qualifications of—examination by—witness.

1. An importer is entitled, under section 2930, R. S., to have a merchant appraiser who is familiar with the character and value of the goods in question, and is entitled to raise the question of want of qualification of the appraiser, in a suit at law, brought to recover an excess of duties; such qualification being one of the conditions on which the validity of the assessment depends.

2. The importer may also show, in such action, that the appraiser did not observe the requirements of section 2901 of the Revised Statutes by opening, examining and appraising the packages designated by the collector; the appraisement being vitiated by proof of a failure of the appraiser so to do.

3. The merchant appraiser is a competent witness, in such action, to prove that he was not familiar with the character and value of the goods, and the extent and character of the examination which he made of them.

[No. 47.]

Argued Nov. 3, 1887. Decided Nov. 21, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Reversed.*

The facts of the case are fully stated in the opinion.

Messrs. **Daniel H. Chamberlain,** *W. B. Hornblower* and **Eugene H. Lewis,** for plaintiffs in error:

Was Mr. Bates such a person as is contemplated by the statute? Were the reappraisement proceedings fatally irregular by reason of the appointment of a merchant appraiser not qualified, in the manner prescribed by law, to act? These questions should have been submitted to the jury to pass upon them.

R. S. § 2930; *Burgess* v. *Converse*, 2 Curt. 220; *Falleck* v. *Barney*, 5 Blatchf. 38; *U. S.* v. *Earnshaw*, 12 Fed. Rep. 283.

Another material issue of fact was tendered by the protest and pleadings and was sought to be supported by evidence which was excluded, viz., the question whether the merchant appraiser sufficiently examined the merchandise under appraisement to comply with the positive requirements of law. There can be no doubt, under the authorities, of the materiality of this issue.

R. S. §§ 2901, 2902, 2930; Treasury Regulations, 1874, arts. 406, 409; *Greely* v. *Thompson*, 51 U. S. 10 How. 225 (13:397); *Burgess* v. *Converse*, 2 Curt. 216; *Converse* v. *Burgess*, 59 U. S. 18 How. 418 (15:455); *Passavant* v. *Merritt*, Actions Nos. 1 & 2 (unreported); R. S. § 2901.

The merchant appraiser was a competent witness to prove his own disqualification for the office to which he was appointed, as well as the nonperformance of acts upon which the jurisdiction of the board of reappraisement depended.

Wright v. *Mississippi & I. Telegraph Co.* 20 Iowa, 210; *Packard* v. *U. S.* 48 Am. Dec. 376n.; *Heffron* v. *Gallupe*, 55 Me. 563; *Ritchie* v. *Holbrooke*, 7 Serg. & R. 458; *Follansbee* v. *Walker*, 74 Pa. 309; *Woodward* v. *Leavitt*, 107 Mass. 453; *U. S.* v. *Reid*, 53 U. S. 12 How. 366 (13:1025); *York & C. R. R. Co.* v. *Myers*, 59 U. S. 18 How. 246 (15:380).

Says Abbott, in his Trial Evidence, p. 468: "An arbitrator may be required to testify to facts upon which his legal power depended, but not the propriety or impropriety of his exercise of it." This rule is well settled in New York.

Birkbeck v. *Burrows*, 2 Hall, 53; *Mayor of N. Y. etc.* v. *Butler*, 1 Barb. 335; *Briggs* v. *Smith*, 20 Barb. 409; *Cole* v. *Blunt*, 2 Bosw. 117.

The same rule prevails in Massachusetts, Pennsylvania, Delaware, Maine and Illinois.

Strong v. *Strong*, 9 Cush. 560; *Hale* v. *Huse*, 10 Gray, 99; *Roop* v. *Brubacker*, 1 Rawle, 304; *Stevens* v. *Gray*, 2 Har. (Del.) 347; *Woodbury* v. *Northy*, 3 Me. 85; *Spurck* v. *Crook*, 19 Ill. 415.

And in England.

Redman, Awards, 114; *Brophy* v. *Holmes*, 2 Molloy, 1; Russ. Awards, 504; *Re Dare Valley R. Co.* L. R. 6 Eq. 429; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 3 Exch. 306; *S. C.* L. R. 5 Exch. 234; *S. C.* L. R. Eng. & I. App. 5 H. L. 418.

That portion of section 2900 which provides, in certain cases, for the imposition of an additional duty of 20% is in conflict with the Constitution of the United States, and is therefore void.

U. S. Const. art. 1, § 8; Id. Amendments, 5, 14; *Davidson* v. *New Orleans*, 96 U. S. 97 (24:616).

The following are some of the cases in which the meaning of the phrase "due process of law" has been approximated:

McMillen v. *Anderson*, 95 U. S. 37 (24:335); *Davidson* v. *New Orleans*, *supra*; *Kirtland* v. *Hotchkiss*, 100 U. S. 491 (25:558); *Springer* v. *United States*, 102 U. S. 586 (26: 253); *Kelly* v. *Pittsburgh*, 104 U. S. 78 (26: 658); *Hilton* v. *Merritt*, 110 U. S. 97 (28: 83); *Hagar* v. *Reclamation Dist.* 111 U. S. 701 (28:569); *Wurts* v. *Hoagland*, 114 U. S. 606 (29:229); Cooley, Const. Lim. 5th ed. 434; *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 244 (4:559, 561).

The imposition of the 20 per cent upon the conditions prescribed by the statute is equally obnoxious whether it be considered a penalty or a duty.

Bartlett v. *Kane*, 57 U. S. 16 How. 263 (14:931); *U. S.* v. *67 Packages*, 58 U. S. 17 How. 85 (15:54).

In cases of conflict that provision must prevail which is most favorable to the citizen.

Cobb v. *Hamlin*, 3 Cliff. 191; *Powers* v. *Barney*, 5 Blatchf. 202; *U. S.* v. *Wigglesworth*, 2 Story, 374; *Adams* v. *Bancroft*, 3 Sumn. 387.

There is no authority in the customs revenue laws for the imposition, in any case, of the additional duty of 20 per cent upon charges and commissions.

R. S. §§ 2900-2902; Treasury Dec. 1877, No. 3192; *Sampson* v. *Beasley*, 61 U. S. 20 How. 571 (15:1022); *Cobb* v. *Hamlin*, 3 Cliff. 191; *Baccari* v. *Maxwell*, 3 Blatchf. 374; *Passavant* v. *Merritt*, *supra*.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for defendant in error:

The statute declares the appraisement when determined shall be final and deemed to be the

true value, and duties shall be levied thereon accordingly.

Hilton v. *Merritt*, 110 U. S. 97 (28:83); *Hertz* v. *Maxwell*, 3 Blatchf. 137; *Belcher* v. *Linn*, 65 U. S. 24 How. 506 (16:754).

In the case of *Maillard* v. *Lawrence*, 8 Blatchf. 381, the percentage added under a similar statute was ruled not to be a penalty, but was regarded as an increase, on the contingency specified. In the case of *Murray* v. *Hoboken Land & I. Co.* 59 U. S. 18 How. 272 (15:372), the language in the Constitution, "due process of law," was ruled not to prevent the collection of taxes or dues to the government by summary process.

Hilton v. *Merritt*, 110 U. S. 107 (28:86).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought in the Circuit Court of the United States for the Southern District of New York by the members of the copartnership firm of E. Oelbermann & Co., against the Collector of the Port of New York, in November, 1880, to recover the sum of $4,925.20, with interest, as an alleged excess of duties exacted by the Collector on an importation of 34 cases of silk and cotton velvets into the Port of New York from Germany, *via* Rotterdam, in June, 1879.

There were two invoices covered by one entry. One of the invoices was for 10 cases and the other for 24 cases. The Collector designated 2 cases from the invoice of 10 cases and 3 cases from the invoice of 24 cases for examination by the appraiser, which 5 cases were sent to the public store. The appraiser, after examination, raised the entered value of the merchandise more than 10 per cent, and reported such advance in value to the Collector. The plaintiffs thereupon gave notice to the Collector of their dissatisfaction with such appraisement. The Collector then selected Levi M. Bates, a merchant of New York City, to be associated as merchant appraiser with A. P. Ketchum, general appraiser, in examining and appraising the merchandise. Such proceedings were had that the general appraiser and the merchant appraiser disagreed, and made separate reports of their appraisement to the Collector, who decided between them and adopted the report of the general appraiser as to the value of the merchandise. The entered value of the invoice of the 10 cases was $3,477, and the entered value of the invoice of the 24 cases was $9,441, being an aggregate entered value of $12,918, upon which, at the time of entry, the plaintiffs paid a duty of 60 per cent *ad valorem*, the proper rate, amounting to $7,750.80. The value of the invoice of the 10 cases was advanced by the reappraisement to $4,032, and that of the invoice of the 24 cases to $11,522, making a total advanced value of the goods, after the reappraisement, of $15,554. Thus the entered value of each invoice was advanced by the reappraisement more than 10 per cent, and the Collector liquidated the duty on the goods at 60 per cent upon such advanced valuation, such duties amounting to $9,332.40, being an increase in the duty of $1,581.60. In addition to such regular duty, he levied an additional duty of 20 per cent, under section 2900 of the Revised Statutes, upon the $15,554, amounting to $3,110.80. The plaintiffs paid such two sums of $1,581.60 and $3,110.80, and filed a protest in writing on the 16th of October, 1879, in due time, against the alleged exaction. They also appealed from the decision of the Collector to the Secretary of the Treasury, and brought this suit within the time limited by law. They included in their suit a further sum of $232.80, which had reference to some other matter. At the trial, the court directed the jury to find a verdict for the defendant, which was done; and, after a judgment for the defendant, the plaintiffs sued out a writ of error.

It appeared in evidence at the trial that all the cases covered by the invoice of the 10 cases were, before the official appraisement was made, sent to the appraisers' store; that the merchant appraiser advanced the value of the 10 cases an average of 8.4 per cent, and the value of the 24 cases an average of 8.9 per cent; and that the general appraiser advanced the value of the 10 cases an average of 16 per cent, and the value of the 24 cases an average of 22.1 per cent.

Among the grounds of objection stated in the protest were these: (1) that the merchant appraiser was not a merchant duly qualified to appraise the merchandise in question, as required by law, inasmuch as he was not familiar with the character and value of the goods to be appraised; (2) that the appraisers, and each of them, did not diligently and faithfully examine and inspect such packages of the goods as were designated by the Collector on the invoices and were ordered to the public store to be opened, examined and appraised.

Section 2930 of the Revised Statutes provides, that the importer may, after the original appraisement of imported goods, give notice to the Collector in writing of his dissatisfaction therewith, and that, on the receipt of such notice, "the Collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the Collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly." It was under this provision of the statute that the foregoing proceedings took place.

After evidence to the purport before mentioned had been given, the plaintiffs called as a witness Mr. Bates, the merchant appraiser, who testified that he resided and carried on business in the City of New York, and that he served as merchant appraiser in this case, and received his appointment as such from the Collector. The witness was then asked in succession, by the plaintiffs' counsel, the following questions:

"Q. Will you state whether, at the time you were selected to act as merchant appraiser, you had any familiarity, and if so, how much familiarity, with silk velvets."

"Q. Will you state what familiarity you had with silk velvets at the time you were appointed merchant appraiser in this case?"

"Q. At the time you were appointed mer-

chant appraiser were you familiar with the value of silk velvets?"

To each of these questions the counsel for the defendant objected, on the ground that each was incompetent and immaterial, and also upon the grounds (1) "that it is not competent now to try the question as to whether the person appointed by the Collector was familiar with the goods in question or not; that that is a question which must be determined by the Collector;" (2) "that if it were competent for the plaintiffs to try the question at all here, it is not competent for them to prove the incompetency of this appraiser by his own mouth." The court sustained the objection to each question, and the plaintiffs excepted to each ruling.

After the last question above recited had been objected to, and before it was ruled upon, the court said: "I will exclude that in that form, but I do not intend to cut you off from introducing any competent evidence of the fact that Mr. Bates was not a merchant; that is, an experienced man having some familiarity with these goods; that he was not of the class pointed out in the Act of Congress, as an experienced merchant."

The plaintiffs' counsel then asked the witness the following question:

"Q. Will you state to the court and jury what steps you took after you became merchant appraiser to examine the merchandise which was the subject of reappraisement?"

The defendant's counsel objected to this question "on the ground that it was incompetent and immaterial, and because the witness should not be allowed to impeach his own finding as merchant appraiser." Thereupon the court said: "As you put the question I shall exclude it; at the same time I should not exclude evidence that he made no examination at all or that he did not act at all." To this ruling the plaintiffs excepted.

The following question was then ruled out under the same objection, and the ruling was excepted to by the plaintiffs: "Q. What did you do in the way of examination of the merchandise which was the subject of that reappraisement?"

The following question was then put by the plaintiffs' counsel: "Q. Did you make any examination of any of the merchandise which was the subject of that reappraisement?" The witness answered that he did, and that his examination was at the appraisers' headquarters, on the west side of the town.

The following questions in succession were then asked the witness by the plaintiffs' counsel, and to each the same objection was taken by the defendant. Each was ruled out by the court, and to each ruling an exception was taken by the plaintiffs.

"Q. Did your examination of the goods, such as it was, take place in the wareroom at the appraisers' headquarters?"

"Q. Who was present?"

"Q. Were the importers?"

"Q. Or either of them?"

"Q. How many cases of merchandise belonging to this invoice did you find there?"

"Q. How many cases did you open or have opened for examination?"

"Q. How many pieces of velvet did you examine?"

"Q. Was that the only examination you made of those goods?"

"Q. Assuming that you had been examining those goods as a purchaser, and that you did not know who the owners were, and knew nothing of their responsibility, would you have purchased the goods from the examination that you made, if there was nobody behind you to fall back upon if there were any variations in the quality?"

The court then directed a verdict for the defendant, and the plaintiffs excepted to such direction.

Although the advance made in the valuation of each invoice by the merchant appraiser was less than 10 per cent, yet the importers were entitled to have a merchant appraiser with the qualifications prescribed by the statute, with a view to his legitimate influence with the general appraiser to limit his advance not only so that it should not exceed 10 per cent, with reference to the additional duty, but so that it should not exceed such sum as a merchant appraiser with those qualifications should deem just and fair. For the Collector is required, by section 2930, to decide between the two appraisers, if they disagree.

It was held by this court, in *Hilton* v. *Merritt*, 110 U. S. 97 [28:88], that the valuation of merchandise made by the customs officers under the statute for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, and that sections 2931 and 3011 of the Revised Statutes, which give the right of appeal to the Secretary of the Treasury, when duties are alleged to have been illegally or erroneously exacted, and the right of trial by jury in case of adverse decision by the Secretary of the Treasury, do not relate to alleged errors in the appraisement of goods.

In that case, there was a reappraisement by a merchant appraiser, associated with one of the general appraisers, of an invoice of kid gloves, and the collector had thereafter adopted the appraisement returned in an amended report of the general appraiser, and, the advance of the invoice value being 16.2 per cent, had imposed an additional duty of 20 per cent, on account of undervaluation in the entry. At the trial, the plaintiffs offered to show the foreign market value of the goods. They also offered in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and various documents before those officers and subsequently before the collector, and also the testimony of the collector to show all the facts within his knowledge, or officially acted upon by him, in relation to the invoice in question, and to show what his experience was in valuing kid gloves. This evidence was excluded. The plaintiffs also claimed the right to go to the jury upon the questions (1) whether the collector, acting as appraiser, fully and fairly examined the goods; (2) whether the goods were invoiced at their fair and actual value in the principal markets of France at the time of exportation; (3) whether a fair examination of the goods was made by the general appraiser, associated with the merchant appraiser, when that question was referred to him; (4) whether the facts stated in the protests had been established by the evi-

dence; (5) whether the appraisers followed the evidence before them or disregarded it, and whether the collector disregarded the evidence or was negligent in his appraisal.

This court, in its opinion, stated that the question presented by the plaintiffs' exceptions was, "whether the valuation of merchandise made by the customs officers under the Statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest."

On a consideration of all the sections of the Revised Statutes relating to the subject, embracing sections 2900, 2902, 2906, 2922, 2929, 2930, 2931, 2949, and 3011, the court came to the conclusion that the meaning of those sections was that the appraisement of the customs officers should be final, but that all other questions relating to the rate and amount of duties might, after the importer has taken the prescribed steps, be reviewed in an action at law brought to recover duties unlawfully exacted; that the valuation made by the customs officers was not open to question in an action at law, so long as the officers acted without fraud and "within the power conferred upon them by the statute;" that the evidence offered by the plaintiffs and ruled out by the court "tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute;" and that the questions which the plaintiffs proposed to submit to the jury were immaterial and irrelevant. This view of the statutes on the subject, and to which we adhere, does not cover the material questions raised in this case.

Section 2930 of the Revised Statutes provides, that, on the receipt by the collector of the notice of dissatisfaction, he "shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same." The qualification prescribed by this section requires as well that the merchant appraiser associated with one of the general appraisers shall be a discreet and experienced merchant, and a citizen of the United States, and familiar with the character and value of the goods in question, as it does that the two merchant appraisers, who are to act without the general appraiser, shall be discreet and experienced merchants, and citizens of the United States, and familiar with the character and value of the goods in question.

This section 2930 was taken from section 17 of the Act of August 30, 1842, chap. 270, 5 Stat. at L. 564, and section 3 of the Act of March 3, 1851, chap. 38, 9 Stat. at L. 630. Section 17 of the Act of 1842 provided that, on the receipt by the collector of the notice of dissatisfaction, he should select "two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same." Section 3 of the Act of 1851 provided that "wherever practicable, in cases of appeal from the decision of the United States appraisers," under the provisions of section 17 of the Act of August 30, 1842, "the collector shall select one discreet and experienced merchant, to be associated with one of the appraisers appointed under the provisions of this Act, who together shall appraise the goods in question."

It is quite apparent that the "one discreet and experienced merchant" referred to in section 3 of the Act of 1851 is to be a discreet and experienced merchant having the additional qualifications prescribed in section 17 of the Act of 1842; that is, that he is to be also a citizen of the United States and familiar with the character and value of the goods in question.

The importer is entitled to have a merchant appraiser who answers these qualifications, and is entitled to raise the question of a want of qualification by a protest and an appeal to the Secretary of the Treasury, and in a suit at law brought thereafter. If the merchant appraiser does not possess these qualifications, he has no power conferred on him by the statute to act as a merchant appraiser. The questions excluded by the court at the trial of this case, so far as they bore upon the question as to whether Mr. Bates was familiar with the goods in question or not, were competent; and the ruling of the court, which was to the effect that that question was to be determined solely by the Collector, was erroneous. The questions excluded by the court, as to whether Mr. Bates had any familiarity, and if so, how much, with silk velvets, and as to whether he was familiar with the value of silk velvets, were questions in the exact language of section 2930.

The remark of the court, that it did not intend to cut the plaintiffs off from any "competent evidence of the fact that Mr. Bates was not a merchant, that is, an experienced man, having some familiarity with these goods," and "that he was not of the class pointed out in the Act of Congress, as an experienced merchant," must be regarded as emphasizing the word "competent," in view of the objection taken, that, if it were competent for the plaintiffs to try at all the question as to whether Mr. Bates was familiar with the goods in question, it was not competent for them to prove his incapacity by his own mouth, and as sustaining that objection, and as holding that Mr. Bates was not a competent witness upon the subject of his familiarity with the character and value of silk velvets.

That the plaintiffs had a right, on the trial, to inquire whether the provisions of section 2930 had been complied with in this respect, has been determined by the decisions of this court in like cases. In *Greely* v. *Thompson*, 51 U. S. 10 How. 225 [13:397], the circuit court had instructed the jury, that the valuation made by two merchant appraisers, under the Act of 1842, was invalid because one of the merchants who made the appraisement was wrongfully substituted for another who had been appointed, and who was removed by the collector for having stated it to be his opinion that the plaintiffs should have time to obtain evidence from England as to the true market value of the goods. The judgment of the circuit court was affirmed by this court, on the ground, among others, that the removal of one of the merchant appraisers, and the appointment in his place of

another, under the circumstances stated, was illegal. This was an examination into the competency of the appointment of the substituted merchant appraiser, of the same character with the inquiry into the competency of the merchant appraiser in the present case.

In *Converse* v. *Burgess*, 59 U. S. 18 How. 418 [15:455], which arose under the Act of 1842, the plaintiffs offered to prove that the merchant appraisers did not examine or see any of the original packages of the merchandise, which was sugar, but only saw samples which had been previously taken from one in ten of the packages described in the invoice, and that such samples would not, when exposed to the air, afford a fair criterion by which to judge of the importation, and claimed the right to go behind the return of the merchant appraisers, on the ground that they had not examined the sugar. Section 21 of the Act of August 30, 1842, chap. 270, 5 Stat. at L. 565, now embodied in section 2901 of the Revised Statutes, provided that the collector should designate on the invoice at least one package of every invoice, and one package at least of every ten packages imported, to be opened, examined, and appraised in the public stores. The defendant objected to the admission of the evidence, in the absence of fraud on the part of the appraisers, and claimed that their decision was in the nature of an award, and final under the statute, and not open to review under the protest. The protest alleged that the goods "were not fairly and faithfully examined by the appraisers." The circuit court ruled that the evidence was admissible, and that the plaintiffs might go to the jury on the question whether the examination made by the merchant appraisers was in substance and effect equivalent to an examination of one package in ten of the importation, and that, if it was not, the appraisement was void. The plaintiffs had a verdict and a judgment, and, on a writ of error by the collector, the judgment was affirmed by this court. The court observes, in its opinion, that the decision of the merchant appraisers is final "provided it is made in pursuance of law;" and, referring to the Acts of Congress on the subject, the court adds: "These Acts of Congress provide for the appointment, regulate the duties, and impose the limitations on the authority of the appraisers, and determine the conditions on which the validity of their assessment depends. All their powers are derived from these Acts, and it is their duty to observe the restrictions and to obey the directions they contain. In the present instance, there was a neglect of the positive mandate 'to open, examine and appraise one package of every invoice and one package at least of every ten packages of goods, wares and merchandise;' and the jury have found that the inquiry they made was not, in substance nor in effect, an equivalent for such an examination. We are, therefore, of the opinion that the importer was not precluded by their return from disputing the sufficiency or accuracy of their assessment."

If such nonobservance of the positive mandate of the statute in regard to the examination of so many of the original packages as the statute specified, as a condition on which the validity of the assessment depended, vitiated the appraisement, the nonobservance of the statute in regard to the qualifications of the merchant appraiser must be regarded as equally one of the conditions on which the validity of the assessment depends, and the plaintiff must have an equal right in either case to make proof, at the trial, of such nonobservance, if he has complied with the other statutory requirements necessary for the bringing of his suit. We do not lay down any absolute or comparative standard of familiarity with the character and value of the goods which must be applied to carry out the requirements of the statute. There must be, in every case, a substantial compliance with the statute. This does not necessarily require the highest degree of such familiarity. There must be, in good faith, in every case, the appointment of a person having the qualifications prescribed by the statute.

In regard to the question whether Mr. Bates was a competent witness to prove that he was not familiar with the character and value of silk velvets, we are of opinion that his evidence on that subject was admissible. As the question of his familiarity with the article and with its value necessarily depended upon the nature, and to some degree, at least, upon the extent, of his experience in connection with the article, no one could know what that experience was so well as himself. If he is to be excluded as a witness on the subject, when offered by either side, the court and the jury and the parties would be deprived of the best testimony within reach. There is no ground of public policy which forbids that the merchant appraiser should be a witness to the extent above indicated. The brief of the solicitor general does not urge that the witness was not a competent witness to that extent.

The question is somewhat analogous to that in the case of an arbitrator. It has been held that an arbitrator can be a witness as to the time when, and the circumstances in which, he made an award, with a view to show that, by the terms of the submission, he was not authorized to make the award (*Woodbury* v. *Northy*, 3 Me. 85); as to the fact that the arbitrators did not examine or act upon a certain matter (*Roop* v. *Brubacker*, 1 Rawle, 304); as to facts which occurred at or during the arbitration, and which tend to show the award to be void for legal cause (*Strong* v. *Strong*, 9 Cush. 560, 576); and as to whether a certain claim was included in the award (*Hale* v. *Huse*, 10 Gray, 99). See also *Spurck* v. *Crook*, 19 Ill. 415. The same principle has been applied in the case of a tribunal called a jury, appointed to assess damages and apportion benefits in the widening of a street (*Canal Bank* v. *Albany*, 9 Wend. 244); and in the case of commissioners appointed to condemn land for railroad purposes (*Marquette, H. & O. R. R. Co.* v. *Probate Judge*, 53 Mich. 217). In *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. Eng. & I. App. 5 H. L. 418, it was held that an arbitrator may be a witness as to what passed before him and as to what matters were presented to him for consideration. See 2 Greenl. Ev. § 78 and notes.

We are also of opinion that the court erred in excluding the evidence of Mr. Bates, which was offered to show that he did not observe the requirements of section 2901 of the Revised Statutes, and did not open, examine, and appraise the packages designated by the Collector, and ordered to be sent to the public store

for examination. The court observed that it would not exclude evidence that Mr. Bates made no examination at all, and thereupon the witness, in reply to a question whether he made any examination of any of the merchandise, answered that he did. But this ruling did not give to the plaintiffs that to which they were entitled. The subsequent questions which were excluded, as to how many cases he opened or had opened for examination, and as to the character of the examination he made, the object of which questions was to ascertain whether it was such an examination as the statute prescribed, were intended to show a noncompliance with the statute as to examination, within the terms of the protest. This the plaintiffs had a right to show. In *Greely* v. *Thompson*, 51 U. S. 10 How. 225 [13:397], the circuit court had instructed the jury that if both of the appraisers did not make some personal examination of the goods, their report or decision was not made in conformity to law, and did not justify the penalty; and the propriety of this instruction was approved by this court. In *Converse* v. *Burgess*, 59 U. S. 18 How. 413 [15:456], it was held, as we have seen, that the appraisement was vitiated by proof of a failure to open, examine, and appraise the packages designated by the collector, or to do what was an equivalent for such an examination.

We are also of opinion, for the reasons before stated, that Mr. Bates was a competent witness to prove the extent and character of the examination which he made of the goods in question. He may have been the only witness who could testify as to such examination, and certainly there was no witness who could know more on the subject.

We do not consider it necessary or proper to express an opinion upon any of the other questions raised by the counsel for the plaintiffs in error.

The judgment of the Circuit Court is reversed, and the case is remanded to that Court, with a direction to award a new trial.

THOMAS J. MUSTIN ET AL., *Plffs. in Err.*,

v.

JOHN CADWALADER, Collector of Dist. of Phila.

(See S. C. Reporter's ed. 369-372.)

Merchant appraiser—evidence.

1. A merchant appraiser, under section 2930 of the Revised Statutes, must be a person familiar with the character and value of the goods in question.

2. In an action for an erroneous imposition of duties, the importer may show that the merchant appraiser was not familiar with the character and value of the goods.

[No. 1002.]

Submitted Nov. 3, 1887. Decided Nov. 21, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Henry E. Tremain, Mason W. Tyler, Alexander P. Ketchum** and **Frank P. Prichard,** for plaintiffs in error:

An appraiser is an officer, and can only be appointed by the President, or if an "inferior officer," by the head of a department, or a court of law.

Henly v. *Lyme*, 5 Bing. 91; *State* v. *Wilson*, 29 Ohio St. 348; *Re Wood*, Hopk. Ch. 6; Moz. & W. Law Dic. 284; *People* v. *Pinckney*, 32 N. Y. 726; *Stone* v. *U. S.* 8 Ct. Cl. 262; *Re Hathaway*, 71 N. Y. 248; *Rex* v. *Burnell*, Carth. 478, 479; 3 Kent, Com. 454; *U. S.* v. *Maurice*, 2 Brock. 102; 7 Bac. Abr. 279, 280; *Collins* v. *U. S.* 14 Ct. Cl. 574; *U. S.* v. *Germaine*, 99 U. S. 509 (25:483); 11 Ops. Attys-Gen. 210; 13 Ops. Attys-Gen. 518; 4 Ops. Attys-Gen. 164; 8 Ops. Attys-Gen. 41; *Robinson* v. *Chamberlain*, 34 N. Y. 398; *Wise* v. *Withers*, 7 U. S. 3 Cranch, 336 (2:458); *Sanford* v. *Boyd*, 2 Cranch, C. C. 78; *Ex parte* Smith, Id. 694.

The tribunal organized under section 2930, United States Revised Statutes, is an official board. Both members of the tribunal are United States officers.

By the statutes and by treasury regulations, considered either together or separately, merchant appraisers are officers.

The treasury regulations constitute the merchant appraiser a dignified and superior officer.

The court has established these merchant appraisers, as customs officers.

Hilton v. *Merritt*, 110 U. S. 97 (28:88).

These appraisers have become customs officers of power and authority inferior to none in the United States revenue system.

The merchant appraiser being an officer or employee in the customs service is amenable to the Civil Service Law.

Act Jan. 16, 1883, chap. 27.

Section 2930 is wholly inoperative because of its unconstitutional features.

Allen v. *Louisiana*, 103 U. S. 88 (26:319); *Trademark Cases*, 100 U. S. 98 (25:553); *Virginia Coupon Cases*, 114 U. S. 304 (29:197); *Spraigue* v. *Thompson*, 118 U. S. 95 (30:117).

Evidence was admissible as to the character and value of the merchandise.

Morrill v. *Jones*, 106 U. S. 466 (27:267); *Oberteuffer* v. *Robertson*, 116 U. S. 499 (29:706).

Actions at law of this character, founded on the illegality of the transaction, existed at common law prior to the Constitution; and are therefore guaranteed under the Seventh Amendment, which preserves the right of trial by jury in all suits at common law where the value in controversy shall exceed $20.

Campbell v. *Hall*, Cowp. 205; *Stevenson* v. *Mortimer*, Cowp. 805; *Camplin* v. *Bullman*, Parker, Exch. 198; *Snowdon* v. *Davis*, 1 Taunt. 359; *Irving* v. *Wilson*, 4 T. R. 485; *Buller* v. *Harrison*, Cowp. 565; *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 157 (9:381); and this common law has prevailed in state courts in actions against the United States officials.

Ripley v. *Gelston*, 9 Johns. 201; *Clinton* v. *Strong*, Id. 370; *Den* v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 274 (15:373); *Springer* v. *U. S.* 102 U. S. 594 (26:256).

The designated packages ordered by the collector must be opened, examined, and appraised. This act of examination is jurisdictional.

Ystalifera Iron Co. v. *Redfield*, 23 Fed. Rep. 650.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for defendant:

In the case of *United States* v. *Hartwell*, 73 U. S. 6 Wall. 393 (18:832), *Justice* Swayne declares: "An office is a public station or employment conferred by the appointment of the government. The term embraces the ideas of time, duration, emolument, and duties."

The case of *United States* v. *Germaine*, 99 U. S. 511 (25:483), refers to the case last cited, with approval as to the principle quoted.

The case of *United States* v. *Maurice*, 2 Brock. 103, recognizes the necessity of continuity and duration of duties as essential to the definition of an office.

That the determination of the appraisers or reappraisers is final as to value is firmly established by the cases of *Hilton* v. *Merritt*, 110 U. S. 97 (28:83); *Herts* v. *Maxwell*, 3 Blatchf. 187; *Belcher* v. *Linn*, 65 U. S. 24 How. 508 (16:754).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought in the Court of Common Pleas for the County of Philadelphia, in the State of Pennsylvania, by the members of the copartnership firm of Thomas J. Mustin & Co., against the Collector of the Port of Philadelphia, and removed into the Circuit Court of the United States for the Eastern District of Pennsylvania, to recover the sum of $346.09, alleged to have been illegally exacted by the Collector as duty on worsted yarn imported by the plaintiffs from Bremen, and entered at the custom house July 1, 1886. There was a protest, an appeal to the Secretary of the Treasury, and a decision by him, before the suit was brought. The statute in force at the time, applicable to the goods in question, was Schedule K of section 2502 of the Revised Statutes, as enacted by the Act of March 3, 1883, chap. 121, 22 Stat. at L. 509, which imposes as duty on worsted yarns valued at above 40 cents per pound and not exceeding 60 cents per pound, 18 cents per pound, and in addition 35 per cent *ad valorem;* and on the same article valued at above 60 cents per pound and not exceeding 80 cents per pound, 24 cents per pound, and in addition 35 per cent *ad valorem*. The goods in question were entered as having cost not more than 60 cents per pound and as being dutiable at 18 cents per pound and 35 per cent *ad valorem*, making the dutiable value $922, and the amount of duty, $611.42, corresponding with the invoice. The appraiser advanced the valuation from $922 to $1,041, the increase changing the rate of duty from 18 cents per pound to 24 cents per pound, and resulting in a total duty of $749.31, instead of $611.42, and in an additional duty of 20 per cent, under section 2901 of the Revised Statutes, on the $1,041, or $208.20, making a total duty of $957.51, or $346.09 more than the amount stated by the plaintiffs on the entry as the proper duty. After the invoice had been advanced in value by the appraiser, the importers demanded a reappraisement, which took place before the general appraiser and a merchant appraiser, the latter being William F. Read. The claims of the plaintiffs on the trial were in accordance with the claims made in the protest.

At the trial, it appeared that, at the opening of the proceedings for the appraisement by the general appraiser and the merchant appraiser, the broker of the plaintiffs appeared before them and presented to them a written protest against the appointment of Mr. Read as merchant appraiser, which stated "that the said William F. Read is not an importer of or dealer in the particular quality or kind of yarn in dispute, and that he is not acquainted with the foreign market values of the same, and that, therefore, his appointment is not in conformity with the customs regulations on this subject." The protest cited article 466 of the general regulations under the customs laws, issued by the Treasury Department in 1884, and in force at the time of the plaintiff's importation, and which required that the merchant appraiser should be a "discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question," and referred to section 2930 of the Revised Statutes. The plaintiffs offered this paper in evidence, and it was objected to by the defendant as immaterial, and also on the further ground that, as there had been a merchant appraisement, the same was final and conclusive as to the value of the goods, and that it could only be attacked upon the ground of fraud. The plaintiffs also offered to show that Mr. Read was not familiar with the character and value of the goods. This evidence was objected to by the defendant as immaterial and irrelevant. All of the evidence thus offered was ruled out by the court, on the ground that the Act of Congress had confided exclusively to the collector the selection of the merchant appraiser, and that the importer had no right to object to such selection; that the provisions of the statute were simply directory to the collector; that evidence tending to show that the person selected had not the requisite familiar knowledge of the subject-matter of the importation to enable him to discharge his duties satisfactorily could not be regarded as sufficient ground for assailing the action of the collector; and that his action in selecting a particular person to be merchant appraiser was not subject to revision in any court where the importer sought to recover what he claimed to be an erroneous imposition of duties. The plaintiffs excepted to these rulings. There was a verdict and a judgment for the defendant, to review which the plaintiffs have sued out a writ of error.

The question involved in the exclusion of the evidence offered, is the same question as that passed upon in the case of *Oelbermann* v. *Merritt*, [*ante*, 164] decided herewith. For the reasons stated in the opinion in that case, it must be held that the evidence was erroneously excluded.

Other questions were raised by the plaintiffs at the trial, and are discussed in the briefs of their counsel in this court, but we do not think it necessary or proper to pass upon any question other than the one above considered.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to award a new trial.

UNITED STATES, *Appt.*,
v.
MATHILDE DE MORANT ET AL.

(See S. C. Reporter's ed. 335-345.)

Spanish titles—validity thereof—Act of 1860—part owner—sufficiency of petition—evidence of genuineness—surveys.

1. Where Spanish titles had been presented by the grantee to the commissioners for ascertaining claims and titles to land within the district of West Florida, *held*, that proof that the grantee actually built houses and resided upon the lands shortly after the date of the grant is sufficient evidence of cultivation as required by the grant.

2. Under the Act of 1860, the date of the cession of Florida to the United States, or the time of transferring possession, is the point from which to test the validity of such grants. The Treaty by which Florida was ceded to the United States was signed Feb. 22, 1819, and possession of the Territory was not taken until July, 1822, and acts constituting titles to the lands in question which were done prior to May, 1818, are within the time required by the Act of 1860.

3. The present case does not come within the proviso of section 3 of the Act of 1860, forbidding the commissioners to embrace in claims, which, in their opinion, ought to be confirmed, any claim previously presented and rejected as fraudulent, or that had been twice rejected by previous boards.

4. A part owner of the lands claimed, or the heirs or representatives of a part owner, may have the benefit of the proceedings authorized by the Act of 1860.

5. The failure to annex a sworn copy of the government surveys to the petition is not a question of jurisdiction in the court below, but a matter relating merely to the form of procedure.

6. The original *testimonios* which were given in evidence, the signatures to which were identified, and the English translation certified by the keeper of public archives of West Florida, in whose office the originals and the translations of all claims laid before the commissioners of 1824 were recorded, *held*, to be sufficient evidence that the alleged grants were genuine; particularly as their genuineness was not disputed before the commissioners nor in the court below.

7. The objection that the grants, if genuine, were void because not surveyed at the time fixed in the treaty, is not sustained, as the Act of 1860 makes the date of cession of the Territory, or of yielding possession thereof, the epoch to be observed.

[No. 36.]

Argued Oct. 25, 26, 1887. Decided Nov. 21, 1887.

APPEAL from the District Court of the United States for the Northern District of Florida. *Affirmed.*

The history and facts of the case appear in the opinion of the court.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for appellant:

The Act of June 22, 1860, 12 Stat. at L. 85, constituted a commission for the examination of Spanish land grants in Florida.

The Act of March 2, 1867, extended the term limited in the last mentioned Act until the second of March, 1870. 14 Stat. at L. 544.

The proceedings in this case are had under the last named statute.

Jurisdiction is not presumed in favor of courts of limited jurisdiction.

Dred Scott v. *Sandford*, 60 U. S. 19 How. 401 (15:699); *Brown* v. *Keene*, 33 U. S. 8 Pet. 115 (8:886); *Ex parte Smith*, 94 U. S. 455 (24:165).

The grants, if genuine, are invalid, and did not warrant the decree of confirmation.

The Treaty with Spain was concluded February 22, 1819, and ratified on the 22d of February, 1821.

U. S. v. *Clarke*, 33 U. S. 8 Pet. 436 (8;1001); *Smith* v. *U. S.* 35 U. S. 10 Pet. 331 (9:444).

Where an imperfect grant is indescriptive it does not exist as a valid grant to land until it is actually located by survey.

Lilly v. *Paschal*, 2 Serg. & R, 400; *Star* v. *Bradford*, 2 Pen. & W. 395; *Lauman* v. *Thomas*, 4 Binn. 51; *Boyles* v. *Kelly*, 10 Serg. & R. 216.

Specific performance of the alleged grant should not be decreed, on account of laches of the alleged grantees and their privies.

Badger v. *Badger*, 69 U. S. 2 Wall. 87 (17:836).

Mr. Robert B. Lines, for the heirs of Millandon:

A decree under the Act of 1860 might be made for the undivided moieties represented.

U. S. v. *Watkins*, 97 U. S. 219 (24:952).

If one claiming as assignee does not prove the assignment, the confirmation may be made to the legal representatives of the original grantee.

U. S. v. *Patterson*, 56 U. S. 15 How. 10 (14:578).

The deed need not always follow the statute.

Moorhead v. *Pearce*, 2 Yeates, 456.

The deed is presumed valid after the lapse of twenty years.

Drouet v. *Rice*, 2 Rob. (La.) 874.

Where an official act has been done it will be presumed that preliminary acts necessary to give it validity have been performed.

Rex v. *Whiston*, 4 Ad. & E. 607; *Reg* v. *Broadhempston*, 28 L. J. N. S. M. C. 18; *Gosset* v. *Howard*, 10 Q. B. 411; *Bank of U. S.* v. *Dandridge*, 25 U. S. 12 Wheat. 64 (6:552); *Carpenter* v. *Rannels*, 86 U. S. 19 Wall. 138 (22:77); *Clements* v. *Macheboeuf*, 92 U. S. 418 (23:504); *Keely* v. *Sanders*, 99 U. S. 447 (25:329).

The deed from the marshal to Millandon recites the facts of judgment, execution, levy and sale. Such recitals are *prima facie* evidence.

Ellis v. *Smith*, 10 Ga. 253; *Perkins* v. *Dibble*, 10 Ohio, 433; *Hardin* v. *Cheek*, 8 Jones, L. 135; *Stephenson* v. *Thompson*, 13 Ill. 186; *White* v. *Chestnut*, 11 Humph. 79.

This court has frequently decided that where the preliminary papers appear, and the authenticity of grants is not questioned in the court below, it will not be here.

U. S. v. *Delespine*, 40 U. S. 15 Pet. 319 (10:753); *U. S.* v. *Auguisola*, 68 U. S. 1 Wall. 352 (17:613); *U. S.* v. *Yorba*, 68 U. S. 1 Wall. 412 (17:635).

The grants were valid under the Treaty of cession itself.

U. S. v. *Acosta*, 42 U. S. 1 How. 24 (11:33); *U. S.* v. *Clarke*, 41 U. S. 16 Pet. 228 (10:946); *U. S.* v. *Sibbald*, 35 U. S. 10 Pet. 321 (9:440).

Mr. **Abram Wintersteen,** by special leave of court, for appellees:

Mr. Wayne MacVeagh, for appellees:

As to individual rights the Treaty with Spain is to be considered as dated at its ratification.

U. S. v. *Sibbald*, 35 U. S. 10 Pet. 313 (9:437).

The surveys in this case were made in March, 1818. The Treaty was not ratified until February 19, 1821. 8 Stat. at L. 252. The power to survey under a grant or concession made be-

fore January 24, 1818, existed up to the change of flags.

U. S. v. *Clarke*, 41 U. S. 16 Pet. 231 (10:947); *U. S.* v. *Acosta*, 42 U. S. 1 How. 24 (11: 33); *U. S.* v. *Levi*, 33 U. S. 8 Pet. 479 (8:1016); *U. S.* v. *Hernandez*, Id. 485 (8:1018).

These descriptions will compare very favorably as to definiteness with the following descriptions of grants which have been approved by this court:

U. S. v. *Richard*, 33 U.S. 8 Pet. 470 (8:1013); *U. S.* v. *Huertas*, Id. 488 (8:1019); *U. S.* v. *Gomez*, Id. 477 (8:1016); *U. S.* v. *Fleming*, Id. 478 (8:1016); *U. S.* v. *Levi* and *U. S.* v. *Acosta*, *supra*.

Mr. Justice **Bradley** delivered the opinion of the court:

The petition in this case was filed in the District Court of the United States for the Northern District of Florida, for the confirmation of a Spanish grant, under the 11th section of the Act of June 22, 1860, entitled "An Act for the Final Adjustment of Private Land Claims in the States of Florida, Louisiana and Mississippi, and for Other Purposes." 12 Stat. at L. 85; and the appeal was taken directly from the decree of the district court to this court pursuant to the provisions of said section. The petition was filed November 22, 1869, within the time prescribed by the Act of March 2, 1867, 14 Stat. at L. 544. It is conceded by a stipulation filed of record in the cause that the petitioners are the legal representatives of Cerilo de Morant, Doqumeniel de Morant, and Laurent Millandon, who are deceased. The title of the petitioners is deduced from these deceased parties.

The petition states that on the 8th day of October, 1817, the King of Spain, by Don José Masot, Governor of West Florida, granted to Cerilo de Morant, then a subject of Spain, a certain tract of land containing 1600 arpents, situated northwest of Pensacola, in West Florida, about twelve miles and a half, bounded northwardly by lands previously granted to Don Emanuel Gonzales and by public lands, eastwardly and westwardly by public lands, and southwardly by lands granted to Desiderio Quina; that on the 1st of March, 1818, the said land was surveyed for the grantee by the deputy surveyor for West Florida, and that on the 6th of March, 1818, the said deputy surveyor delivered to the proper authorities his certificate and plan of said survey, a copy of which is annexed to the petition. That thereupon the grantee proceeded to clear, occupy, settle and cultivate the land. A copy of the *expediente* is annexed to the petition.

It then proceeds to state that another grant was made in the same manner on the 20th day of January, 1818, to Desiderio Quina, of 800 arpents of land, situated about eleven miles northwest of Pensacola, and surveyed for the grantee by the same deputy surveyor. The plats annexed show that the two tracts adjoin each other. The petition further states that Quina, on the 29th of October, 1818, sold and conveyed his grant to Cerilo de Morant; and that the latter subsequently sold and conveyed three undivided fourth parts of both tracts to Laurent Millandon, Louis Doqumeniel de Morant and John Chabaux, one undivided fourth to each; and that Laurent Millandon afterwards purchased the interest of Chabaux, and thus became owner of one undivided half of the land.

The petition further states that the heirs of Cerilo de Morant petition as well in behalf of the interests of the heirs of Louis Doqumeniel de Morant, and those of Laurent Millandon, as for themselves.

On the trial the petitioners produced in evidence their documentary title in Spanish, with English translations accompanying the same. The title of each tract consists of a *testimonio* in the usual form in such cases. The *testimonio* of the tract granted to Cerilo de Morant consists of, first, Morant's petition to the governor, for 1600 arpents of land, indicating the locality, and dated September 22, 1817; secondly, the governor's reference to the surveyor-general to ascertain if the lands were vacant, and to the fiscal, or attorney-general of the royal treasury, for his advice as to the legality and merits of the application; thirdly, the favorable answers of these functionaries; fourthly, an order of the governor that the applicant take the oath required by the fiscal, and that the surveyor-general proceed to the measurement and survey of the land, and to annex a figurative plan to his return; fifthly, a certificate of the oath taken by the applicant; sixthly, the return of the surveyor, dated March 6, 1818, stating the survey of the tract in detail, with a plat annexed; seventhly, the governor's certificate to the *testimonio*, declaring that it conforms with the original, and that it is issued at the request of the party at Pensacola, on the 5th of April, 1818. This *testimonio* is very full and particular. The other, issued to Quina, omits a report from the fiscal, as the petitioner merely stated the quantity of land desired, and left it to the governor to designate its location, who referred it to the surveyor-general. The latter located the land adjoining to the tract granted to Morant. A survey was made accordingly, and a *testimonio* issued to the grantee dated the first day of May, 1818.

Both of these *testimonios* (including the surveys) made complete titles under the Spanish laws.

The petitioners also produced in evidence certain acts of sale and transfer, to wit:

1. A sale by Quina to Cerilo de Morant for the tract of 800 arpents granted to the former. This act is dated 29th October, 1818.

2. A sale by Cerilo de Morant to John Chabaux, Laurence Millandon, and Louis Doquminel de Morant, Junior, of three undivided fourth parts of the tract of 800 arpents granted to Quina. This act of sale is dated November 9, 1818.

3. A sale by Cerilo de Morant to John Chabaux, Laurence Millandon and Company, of three undivided fourth parts of the tract of 1600 arpents, reserving to himself one undivided fourth part of the same. This act is dated June 14, 1821.

4. A marshal's deed, dated August 3, 1835, from James W. Evans, Marshal of the Western District of Florida, to Laurence Millandon, for the one undivided fourth part of both said tracts which belonged to John Chabaux. This deed recites a judgment against the executor of John Chabaux, recorded in the Superior Court of the Western District of Florida, in

May Term, 1825, and an execution sued out in May, 1835, and a sale thereunder by said marshal to said Millandon, in pursuance of which the deed purports to have been made. The judgment and execution were not produced, but no objection to the admission of the deed was made on this account; and the practice in Florida as to proof of judicial sales by sheriffs seems to be very liberal. (See *Hartley* v. *Ferrell*, 9 Fla. 374, where a sheriff's deed was given in evidence without, so far as appears, the production of the judgment or execution.) The fact that the judgment was against the executor was no objection, since real estate was made assets in the hands of executors by the territorial Act of 1833, and equally liable with personal property to an execution upon a judgment against the executor. Act of Feb. 17, 1833, §§ 2, 4; Thomp. Dig. 202, 203.

In 1824, these Spanish titles were presented by Cerilo de Morant to the commissioners for ascertaining claims and titles to land within the district of West Florida, and were rejected by them, on the ground, as appears from their report, that no evidence was given of cultivation as required by the grants. Another reason assigned by the commissioners for rejecting grants in the list containing those in question, was that the claims had not emanated from His Catholic Majesty, or his lawful authorities in West Florida, prior to January 24, 1818, or that the order of survey had not been actually executed anterior to that period. See Commissioners' Report in American State Papers, Public Lands, Vol. IV. pp. 198, 199.

These objections are repeated before us, and are, amongst other things, assigned as grounds of error in the judgment of the court below. They may as well be disposed of here.

As to not cultivating the land, it was proved very conclusively on the trial that the grantees actually built houses and resided upon it shortly after the dates of the grants.

As to the dates of the surveys, it is true that they were both made after the 24th day of January, 1818, namely, in the beginning of March in that year, although the grants were made before that period. The objection is based upon the terms of the Treaty entered into with Spain, in 1819, by which Florida was ceded to the United States. By the eighth article of this Treaty it was stipulated that all grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the ceded territories, should be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty; but all grants made since the 24th of January, 1818, when the first proposal on the part of His Catholic Majesty for the cession of the Floridas was made, were declared and agreed to be null and void.

The commissioners construed these provisions of the Treaty as invalidating grants made prior to the date named, if the surveys were not completed until after that date. This construction was opposed by the claimants who were affected by it, and a different view, perhaps, might well have been taken. But, be that as it may, the Act of 1860, under which the present proceedings were instituted, made the date of cession to the United States, or the time of transferring possession, the point from which to test the validity of grants. That Act was passed for the relief of parties who claimed lands in Florida, Louisiana, or Missouri, "by virtue of grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed were situated." See the Act, 12 Stat. at L. 85, §§ 1, 11. The Act of 1860 was intended to give relief to a large class of grantees of former governments, whose claims had been rejected by the different boards of commissioners, and by the courts, under the strict construction of the treaties, which prior laws had required. The history of the question is given at some length in the opinion of this court in the case of *U. S.* v. *Lynde*, 78 U. S. 11 Wall. 632 [20: 230], and need not be repeated here.

The Treaty by which the Floridas were ceded to the United States was not concluded and signed until the 22d day of February, 1819; and the ratifications were not exchanged until two years afterwards. The cession certainly did not take place, therefore, before the date named; and possession of the territory was not taken until July, 1822; whilst all the Acts constituting the titles in question were passed prior to May, 1818. We cannot hesitate to conclude, therefore, that these titles were completed within the time required by the Act of 1860.

We will proceed, then, to examine the other errors assigned on behalf of the Government.

1. It is contended that the court below had no jurisdiction of the case, (*a*) because the record does not show that the claim did not come within the purview of section 3 of the Act of 1860; (*b*) because the alleged claimants do not represent the whole title to the land claimed; (*c*) because no sworn copy of the government surveys was annexed to the petition. The first of these grounds is based on that clause of the eleventh section of the Act of 1860, which excludes from the jurisdiction of the district court claims which come within the purview of the third section of the Act. It requires only a momentary examination of that section to determine that the purview of it here referred to is the *proviso*, which declares, in substance, that in no case shall the commissioners embrace in classes one and two (namely, those which in their opinion ought to be confirmed) any claim previously presented to a board of commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or that had been rejected twice by previous boards. The present case does not come within either of these categories. The other matters assigned as grounds for want of jurisdiction are insufficient. We perceive no reason why a part owner, or the heirs or representatives of a part owner, should not have the benefit of the proceeding, even if the present petitioners did not show title to the entire interest in the lands; and the failure to annex a sworn copy of the government surveys to the petition is not a question of jurisdiction, but a matter relating merely to the

form of procedure, which should have been objected to when the pleadings were *in fieri*, and the petitioners could have obtained leave to amend. A plat of the two grants, laid down in connection with the sections and subsections of the government surveys, certified as correct by a civil engineer and surveyor, was put in evidence at the trial without objection, and forms part of the record here. There seems to have been no controversy as to the location of the grants, either before the commissioners in 1824, or on the trial of the present cause.

The next assignment of error is, that there was no sufficient evidence that the alleged grants were genuine. This assignment cannot be sustained. The original *testimonios* seem to have been given in evidence at the trial, since the signatures to the same were identified by the witness Francisco Moreno, who had been attached to the public office in Pensacola under the Spanish Government as treasurer of the customs and auditor of accounts, and was familiar with this kind of documents. The English translations are certified by the keeper of public archives of West Florida, in whose office both the Spanish originals and the translations of all claims laid before the commissioners of 1824 were recorded in pursuance of the Act of March 3, 1825, 4 Stat. at L. 125. It may be added that the genuineness of these titles was not disputed before the said commissioners, and do not seem to have been disputed in this case in the court below, where these titles are familiar to the courts and members of the bar.

The last assignment of errors is, that the grants, if genuine, were void. It is contended that they were void, because they were indescriptive grants which had not been surveyed on the twenty-second day of January, 1818. We have already shown that, although this was the epoch fixed in the Treaty for determining the validity of grants, yet that the Act of 1860 made the date of cession of the territory, or of yielding possession thereof, the epoch to be observed under that Act; and as this latter epoch was certainly as late as the 22d of February, 1819, when the Treaty was concluded and signed, the objection falls to the ground. The land was actually surveyed and mapped, and segregated from the public domain in the spring of 1818. The old cases, therefore, which were formerly decided by this court, and which are referred to by the counsel of the Government, have no application to the case before us. Prior statutes, inconsistent with the provisions of the Act of 1860, no longer control our decision.

We do not think that any of the alleged errors are well founded.

The decree of the District Court is affirmed.

This decision merely confirms the validity of the grants, but does not entitle the parties to possession. If the Government has sold the lands in whole or in part, or if the surveyor-general shall ascertain that they cannot be surveyed and located, the petitioners, under section 6 of the Act of 1860, will be entitled to scrip for other public lands of equal extent to those so sold, etc.

Ex Parte:

In the Matter of WILLIAM M. HENRY, *Petitioner.*

(See S. C. Reporter's ed. 872-875.)

Offenses under section 5480 R. S.—separate sentences.

1. The court below has jurisdiction to impose two distinct and separate sentences upon two distinct and separate indictments under section 5480, Revised Statutes, charging offenses committed within the same six calendar months which were tried at the same term of the court.

2. Each letter taken out of, or put in, the post office, for the purpose of carrying out a fraudulent scheme, contrary to the provisions of such section, is a distinct and separate violation thereof. Three distinct offenses committed within the same six months may be joined in the same indictment, and when joined there is to be a single sentence for all.

[No. 8, Orig.]

Submitted Nov. 10, 1887. Decided Nov. 21, 1887.

PETITION for a writ of *habeas corpus*. *Dismissed.*

The facts are fully stated in the opinion.

Mr. **Isaac M. Bryan,** for petitioner:

The question involved in this application is, the right of the court below to impose two distinct and separate sentences upon the petitioner, upon two distinct and separate indictments, both under section 5480, Revised Statutes of the United States.

A penal statute must be construed strictly.

U. S. v. *Wiltberger*, 18 U. S. 5 Wheat, 93 (5:42); *U. S.* v. *Morris*, 39 U. S. 14 Pet. 475 (10:548); *U. S.* v. *Winn*, 3 Sumn. 210; *U. S.* v. *Hartwell*, 73 U. S. 6 Wall. 395 (18:832); Bish. Stat. Crimes, 2d ed. § 82, and authorities there cited.

The construction must be humane.

U. S. v. *O'Callahan*, 6 McLean, 596; Bish. Stat. Crimes, 2d. ed. §§ 196, 54.

The court can give but a single sentence.

U. S. v. *O'Callahan*, 6 McLean, 598; *Re Snow*, 120 U. S. 282 (30:661); *U. S.* v. *Stickle*, 15 Fed. Rep. 801, 802.

The court below had no right to entertain the second indictment and impose a second sentence for offenses committed within the same six calendar months as those alleged in the first indictment; and the petitioner is entitled to his remedy by writ of *habeas corpus*.

Art. v. of Arts. in Addition to, and Amendment of, U. S. Const.; R. S. U. S., §§ 751-766; *Ex Parte Milligan*, 71 U. S. 4 Wall. 2, 142 (18:281,303); *Ex Parte Lange*, 85 U. S. 18 Wall. 163, 178 (21:872,879); *Ex Parte Clarke*, 100 U. S. 399, 422 (25:715, 783); *Ex Parte Yarbrough*, 110 U. S. 651, 666 (28:274,279); *Ex Parte Wilson*, 114 U. S. 417, 429 (29:89,93); *Re Snow*, 120 U. S. 274, 287 (30:658,663); *Ex Parte Bain*, 121 U. S. 1, 14 (30:849,853).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a motion for a rule to show cause why a writ of *habeas corpus* should not issue as prayed for. The case made by the petition is this:

Section 5480 of the Revised Statutes is as follows: "If any person having devised or intending to devise any scheme or artifice to de-

fraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post office of the United States, or take or receive any therefrom, such person, so misusing the post office establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device."

Henry, the petitioner, was indicted in the District Court of the United States, for the Western District of South Carolina, on the 11th of September, 1886, for a violation of this statute. The indictment charged three separate and distinct offenses, all alleged to have been committed within the same six calendar months. Under this indictment he was tried, convicted, and sentenced to imprisonment in the South Carolina penitentiary at Columbia for the term of twelve months.

Afterwards, at the same term of the court, but on a different day, he was indicted for three other and different offenses under the same statute, committed within the same six calendar months. To this indictment he pleaded his conviction upon the first indictment in bar. This plea was overruled, and upon a trial he was convicted and sentenced to imprisonment in the Albany penitentiary, New York, for the term of fifteen months, upon the termination of his sentence under the first indictment.

He has served out his term under the first sentence, and is now confined in the penitentiary at Albany under the second. From this imprisonment he seeks to be discharged on *habeas corpus*, because, as he alleges, the court had no jurisdiction to inflict a punishment for more than one conviction of offenses under this statute, committed within the same six calendar months.

We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment, "The Act forbids, not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office, in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the Act." It is not, as in the case of *Re Snow*, 120 U. S. 274 [30: 658], a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated.

It is indeed provided that three distinct offenses, committed within the same six months, may be joined in the same indictment; but this is no more than allowing the joinder of three offenses for the purposes of a trial. In its general effect this provision is not materially different from that of section 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person "for two or more acts of transactions of the same class of crimes or offenses;" and the consolidation of two or more indictments found in such cases. Under the present statute three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself.

The motion for a rule is denied and the petition dismissed.

THE SCHOONER MAGGIE J. SMITH,
ROBERT G. DUN ET AL., Claimants, *Appts.*,
v.
SAMUEL H. WALKER ET AL.

SAMUEL H. WALKER ET AL., *Appts.*,
v.
ROBERT G. DUN ET AL.

(See S. C. "*The Maggie J. Smith*," Reporter's ed. 349–356.)

Findings of fact in admiralty case—24th Sailing Rule—vessel in jeopardy—interest and costs.

1. The findings of fact, under the Act of Feb. 16, 1875, in an admiralty case, have the same effect as a special verdict in an action at law.

2. The 24th Sailing Rule applies only where there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water, or a concealed rock, the approach of a third vessel, or something of that kind.

3. If one vessel has been brought into immediate jeopardy by the fault of another, she will not be held to blame, if she has done something wrong, or has not been maneuvered with perfect skill and presence of mind.

4. The allowance of interest and costs, in such a case, rests in the discretion of the court below, and its action will not be disturbed on appeal.

[Nos. 65, 188.]

Argued Nov. 10, 11, 1887. Decided Nov. 21, 1887.

APPEALS from the Circuit Court of the United States for the District of Maryland. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **John H. Thomas** and **Robert H. Smith**, for Dun *et al.*:

The decisions of this court are clear and uniform, that in a case like this, its jurisdiction on appeal depends upon the amount of the decree, not on that of any of the claims to participate in the fruits of it.

Ex Parte Baltimore & O. R. R. Co. 106 U. S.

6 (27:78); *Shields* v. *Thomas*, 58 U. S. 17 How. 3 (15:93); *Market Co.* v. *Hoffman*, 101 U. S. 112 (25:782); *The Connemara*, 103 U. S. 754 (26:322); *The Mamie*, 105 U. S. 773 (26:937); *Farmers' Loan & T. Co.* v. *Waterman*, 106 U. S. 270 (27:117).

The jurisdiction of this court on appeal being clear, the motion to dismiss is a mere pretext to cover the motion to affirm.

Whitney v. *Cook*, 99 U. S. 607 (25:446).

The points raised are involved in the findings of fact and conclusions of law, and the exceptions were unnecessary.

The S. C. Tryon, 105 U. S. 267 (26:1026).

A formal exception is not necessary, if the want of jurisdiction is apparent from the record.

The Lucy, 75 U. S. 8 Wall. 309 (19:395).

Costs, in admiralty, are within the discretion of the court, and an appeal will not lie from either the refusal or allowance of them.

U. S. v. *The Malek Adhel*, 43 U. S. 2 How. 210 (11:239); *The Sapphire*, 85 U. S. 18 Wall. 56, 57 (21:816).

The rules prescribed by this court, under which the claimants sought and obtained a decree for the limitation of their liability, permit them, in the same proceedings, to contest any liability, and exempt them, whatever may be the result of that contestation, from any liability, after they have given the required stipulation, otherwise than as stipulators.

Admiralty Rules, 55–58; *The Benefactor*, 103 U. S. 239 (26:351); *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 578 (27:1038).

The circuit court was in error when it found, as a fact, that the vessels were approaching each other end on or nearly so, and on courses involving risk of collision.

The question of whether or not vessels, when approaching each other, are so meeting, is one of law, and not of fact.

The Nichols, 74 U. S. 7 Wall. 664 (19:159); *The Dexter*, 90 U. S. 23 Wall. 75 (23:85); *The Delaware*, Holt, R. of R. Cas. 66.

Mr. Wm. W. Macfarland, also filed the following brief for Dun *et al.*:

These words "end on or nearly end on" were found both in Rule 16 and Rule 18 of section 4233, in the former applying to sail vessels, and in the latter applying to vessels under steam.

The meaning of the words is the same in both rules. It means, as to navigation at night, such a position of vessels that each vessel is in a position to see both the side lights of the other vessel.

The America, 8 Ben. 429.

In the case of *The Adriatic*, the navigator on the steamer saw a green light two points on his starboard bow. He held his course, and was held not to have been in fault for so doing.

107 U. S. 512 (27:497).

A fortiori would the navigator have been free from fault in starboarding, for what would carry his vessel farther away from danger.

The Elizabeth Jones, 112 U. S. 514, 525 (28:812, 816).

The findings are to be considered in connection with the pleadings, and neither party is allowed to depart from the case he has set up.

The Vortigern, Swab. 518; *The Scotland*, 118 U. S. 507 (30:153).

Messrs. **John Lathrop** and **Sebastian Brown** for Walker *et al.*:

The principle on which this motion is made to dismiss has been fully settled by this court.

Rich v. *Lambert*, 53 U. S. 12 How. 347 (13:1017); *Ex Parte Baltimore & O. R. R. Co.* 106 U. S. 5 (27:78); *Farmers Loan & T. Co.* v. *Waterman*, 106 U. S. 265 (27:115); *Adams* v. *Crittenden*, 106 U. S. 576 (27:99); *Schwed* v. *Smith*, Id. 188 (27: 156); *Hawley* v. *Fairbanks*, 108 U. S. 543, 548 (27: 820, 822); *Tupper* v. *Wise*, 110 U. S. 398 (28:189); *Gibson* v. *Shufeldt*, 122 U. S. 27 (30:1083).

Under the rules of navigation and the authorities, The Smith is clearly liable for the consequences of this collision. Rule 16, article 11, in force when this collision took place, is as follows: "If two sail vessels, are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each shall pass on the port side of the other."

U. S. R. S. 1st ed. 823; *The Nichols*, 74 U. S. 7 Wall. 656 (19:157); *The Dexter*, 90 U. S. 23 Wall. 69 (23:84); *The Annie Lindsley*, 104 U. S. 185 (26:716); *The North Star*, 106 U. S. 17 (27:91); *The Repeater* v. *The Braga*, 14 L. T. N. S. 258; *The Fruiter* v. *The Fingal*, 18 L. T. N. S. 611; *Crowel* v. *The Radama*, 2 Cliff. 551; *Rogers* v. *The S. B. Wheeler*, 4 Cliff. 189.

The 24th Rule applies only when there is some peculiar danger of navigation, which renders a departure necessary to avoid immediate danger, such as a rock, another vessel, a narrow channel, or something of that nature.

See *The Agra*, 4 Moore, P. C. N. S. 435; *The Spring*, L. R. 1 Adm. 99; *The Aura*, Holt, R. of R. Cas. 255; *The Cleopatra*, Swab. 135; *The Beryl*, L. R. 9 P. Div. 137, 138.

This court has also declared that rules of navigation are obligatory on vessels approaching each other, from the time the necessity for precaution begins.

New York & L. U. S. M. S. S. Co. v. *Rumball*, 62 U. S. 21 How. 372, 384 (16:144, 148); *The Nichols*, 74 U. S. 7 Wall. 656, 663 (19:157, 158).

The circuit court had no jurisdiction to entertain propositions of law without first opening the decree.

U. S. v. *Carey*, 110 U. S. 51 (28:67).

It is impossible for this court to say, as matter of law, that at two miles apart risk of collision was not involved.

The Nichols, supra; The Dexter, 90 U. S. 23 Wall. 69, 75 (23:84, 85).

The findings are construed in connection with the pleadings (*The Adriatic*, 107 U. S. 512 (27:497), and parties will not be permitted to contradict by proof what they have admitted in their pleadings.

McKinlay v. *Morrish*, 62 U. S. 21 How. 343 (16:100).

If one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent recovery of full damages.

The Genesee Chief v. *Fitzhugh*, 53 U. S. 12 How. 461 (13:1066); *The Nichols, supra; The Carroll*, 75 U. S. 8 Wall. 302 (19:392); *The Fairbanks*, 76 U. S. 9 Wall. 420 (19:708); *The*

City of Paris, 76 U. S. 9 Wall. 634 (19:751); *The S. C. Tryon*, 105 U. S. 267 (26:1026); *The Bywell Castle*, L. R. 4 P. Div. 219; *The Elizabeth Jones*, 112 U. S. 514, 526 (28:812, 816).

In the second case, the libelants and petitioners requested the court to decree against the claimants of The Maggie J. Smith, directing them to pay interest on the amount of the stipulation from the date of the stipulation, and costs in the district and circuit courts. The court clearly erred in refusing.

The Wanata, 95 U. S. 600 (24:461); *The Manitoba*, 122 U. S. 97 (30:1095); *The Favorite*, 12 Fed. Rep. 213; *Walsh* v. *Mayer*, 111 U. S. 31 (28:338).

Although matters which are the subject of discretion in the court are not usually entertained, yet where, as here, the court has the whole case before it, it has control over such matters as well as the merits.

The Scotland, 118 U. S. 519 (30:155).

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us from the Circuit Court of the United States for the District of Maryland. It is a libel against the vessel Maggie J. Smith, for damages caused by her collision with the schooner Enoch Robinson, which resulted in sinking the latter, and in the entire loss of both vessel and cargo. The libelants are the owners of The Enoch Robinson. The petitioners are the owners of the property on board, who have intervened for their interest. The claims of libelants and petitioners exceeded the value of The Maggie J. Smith and her freight; and thereupon the owners of that vessel instituted proceedings for the benefit of the limited liability provisions of the Revised Statutes, sections 4283–4289, under which the value of the vessel was appraised at $32,000, to which amount their liability was accordingly limited. A stipulation for that amount was thereupon given by sufficient sureties, with the condition that the claimants would perform the final order and decree in the case, or that execution might issue against the goods, lands and tenements of the stipulators, wherever found.

On the trial before the district court a decree was entered for the claimants, and the libel dismissed. On appeal, the circuit court reversed the decree, and adjudged that the libelants and petitioners were entitled to recover certain specified sums, which, in the aggregate, exceeded the $32,000; that the stipulators should pay that amount into the registry of the court, and that the clerk, after deducting the costs of the circuit and district courts, should pay the balance to the libelants and petitioners *pro rata;* that is, in proportion to their respective claims as allowed. From this decree the claimants have appealed to this court. Subsequently the libelants and petitioners applied to the circuit court for a further decree, directing the claimants to pay interest on the amount of the stipulation from its date, and the costs of the district and circuit courts, but the application was refused. From this refusal they have appealed to this court.

The circuit court having found the facts respecting the collision, our examination will first be directed to a consideration of their sufficiency to sustain the decree. The findings, under the Act of February 16, 1875, have the same effect as a special verdict in an action at law. (18 Stat. at L. chap. 77; *The Adriatic*, 107 U. S. 512 [27:497]. The bills of exception of the claimants in the record embrace only the refusal of the court below to find certain propositions of law, which can as well be presented to the court upon the present findings.

The findings of fact, with the facts admitted by the pleadings, disclose the following case: On the evening of February 26, 1883, The Maggie J. Smith, a three-masted schooner steamer, under sail only, ran into and sunk the three-masted schooner Enoch Robinson, off the coast of New Jersey. The night was clear and starlight; the wind was about northwest, and blowing a whole-sail breeze, and the sea was smooth. The Smith was on a voyage from New York to Newport News, Virginia; her course was southwest; her first mate, and her engineer, who was acting as second mate, were on deck; one man was at the wheel, and another was stationed forward on the lookout; her regulation lights were set; and she had the wind on her starboard side.

The Enoch Robinson was on a voyage from Baltimore to Providence, Rhode Island, with a cargo of coal. When The Maggie J. Smith was first seen by those on board The Robinson the latter vessel was on her regular course, heading northeast, and had the wind on her port. Her regulation lights were set and burning brightly; her master and second mate were on deck; a competent seaman was on the lookout forward on the top gallant forecastle; and one was at the wheel. The court finds that when the vessels were first seen from each other, they were about two miles apart; that they were approaching each other "end on, or nearly so, and on courses involving risks of collision;" that the wheel of The Robinson was put to port almost immediately after the position of The Smith was discovered, and that The Smith starboarded her wheel, and that this starboarding was the direct cause of the collision. The court also finds that when those in charge of The Robinson perceived that The Smith was falling off and that the vessels were approaching in dangerous proximity, they put the wheel of The Robinson hard-a-port, and let go the spanker sheet; and that a few seconds before the collision the wheel of The Smith was first put to port, and then hard-a-port, but the head sheets were not let go, and before the changes to port materially affected the course of The Smith the two vessels came together, The Smith striking The Robinson a square blow on the port side near the mizzen rigging. And the court finds as a conclusion of law that The Smith was in fault in not porting her wheel when The Robinson was first seen approaching her end on, or nearly end on, and was in fault for putting her wheel to starboard, and that this was the immediate cause of the collision.

Upon these findings, there could be but one conclusion as to the liability of The Smith under the Sixteenth Rule of Navigation adopted by Congress, which is as follows: "If two sail vessels are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the other." R. S. 817.

Three cases in this court are cited by the counsel for the libelants in which this rule has been applied, under circumstances not materially different from those in the present case; *The Nichols*, 74 U. S. 7 Wall. 656 [19: 157]; *The Dexter*, 90 U. S. 23 Wall. 69 [23: 84]; and *The Annie Lindsley*, 104 U. S. 185 [26: 716]. In the case of *The Nichols* a schooner and a bark sailing on Lake Erie in nearly opposite directions came into collision by which the schooner was sunk. Each vessel was seen from the other, when two or three miles apart. The schooner had the wind free and on her starboard side; the bark was close hauled, with the wind on her port side. The vessels approached each other on lines that diverged not more than half a point, and at a combined speed of twelve miles an hour. The schooner starboarded her helm; the bark ported. The owner of the schooner filed a libel against the bark, but the court held that the schooner had violated the rule of navigation in not porting also, and therefore the owner had no claim for damages.

In the case of *The Dexter* two schooners came into collision on Chesapeake Bay, by which one was totally lost. When within a half mile of each other, they were approaching from opposite directions, end on, or nearly so. One ported and the other starboarded. It was held that the latter, which was lost, had violated the rule of navigation, and therefore was in fault, and that her owner could not maintain a libel for damages; and the libel filed by him was accordingly dismissed.

In the case of *The Annie Lindsley* there was a collision on Long Island Sound between a brig and a schooner, which resulted in the sinking of the schooner and the total loss of the vessel and cargo. The two vessels approaced each other nearly end on, on courses involving risk of collision; the schooner put her helm to port; the brig put her helm to starboard, thereby violating the Sixteenth Rule of Navigation, and a collision followed. It was held that the brig was liable for the loss.

Some reliance was placed by claimants' counsel on the Twenty Fourth Rule, which provides that, in construing and obeying the rules of navigation, "due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." Important as this qualification of the rules is, it has no application to the case at bar, where the vessels saw each other about two miles apart. It applies only where there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water, or a concealed rock, the approach of a third vessel, or something of that kind.

The contention that if The Smith starboarded her helm when the two vessels, though approaching each other end on, or nearly so, were about two miles apart, her fault is not such as to make her responsible for the damages claimed, does not require consideration, for there is nothing in the record to show that when The Smith starboarded her helm the vessels were that distance apart. It is not stated what the distance then was, nor is the speed of the vessels given, from which such distance could be estimated. The contention assumes, without any foundation, that the vessels were then about two miles apart. The libel alleges that the vessels were running red to red three or four minutes before The Smith fell off her course and showed both her lights; and the answer states that the vessels had been in sight of each other some time when The Smith starboarded her helm, and that the vessels were then from a quarter to a half mile apart.

Nor is there anything in the position that, where two vessels are approaching in opposite directions so as to involve risk of collision, and one of them violates a rule of navigation in directing its helm, and the other vessel sees it, she will be in fault if she does not also turn her helm so as to avoid the consequences of such departure from the rule. Whether it would have been more prudent for The Robinson to take a different course, in consequence of the dangerous position in which she was placed by the disregard of the statutory rule on the part of The Smith, must depend upon the angle at which the vessels were approaching, their distance apart at the time, and their combined speed—circumstances not disclosed in the record. The rule is well stated by counsel, that "If one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages;" or, as stated by the Court of Appeals of England, in the case of *The Bywell Castle* L. R. 4 P. Div. 219, as quoted in the case of *The Elizabeth Jones*, 112 U. S. 526 [28:816], "Where one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind."

As to the second appeal from the refusal to allow interest against the claimants upon the amount of the stipulation from the day it was filed in court, and the costs of the circuit and district courts, it is sufficient to say that the allowance of such interest and costs rested in the discretion of the court below, and its action will not be disturbed on appeal.

Decree affirmed.

J. D. COX, *Plff. in Err.*,
v.
WESTERN LAND AND CATTLE COMPANY.

(See S. C. Reporter's ed. 375, 376.)

Jurisdiction as to amount.

Where a part of the property for which the suit was brought has been settled for after the commencement of the suit, and before judgment, so that the value of the remainder of the property does not exceed $5,000, the writ of error will be dismissed.

[No. 714.]

Submitted Nov. 16, 1887. Decided Nov. 21, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss. *Granted.*

The case is stated by the court.

Mr. **Alexander McCoy**, in support of motion to dismiss:

It was admitted for the purposes of this trial that a settlement had been made between plaintiff below and Plumb, in regard to the fifty-six head of cattle which were claimed by Plumb, so that the controversy remaining to be tried is in regard to the seventy-nine head claimed.

The net proceeds of the seventy-nine head were $4,526.15.

This finding of facts is conclusive.

Mercantile Mut. Ins. Co. v. *Folsom*, 85 U. S. 18 Wall. 237, (21:827).

The amount, as it affects the party prosecuting the writ of error, alone is to be considered.

Tintsman v. *First Nat. Bank*, 100 U. S. 6 (25:530); *Pierce* v. *Wade*, 100 U. S. 444 (25:735); *Hilton* v. *Dickinson*, 108 U. S. 165 (27:688).

Mr. **R. A. Childs,** in opposition:

In *Hilton* v. *Dickinson*, 108 U. S. 165 (27: 688), this court has said: "We have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here."

Mr. Chief Justice **Waite** delivered the opinion of the court.

This motion is granted, on the ground that the record shows that the value of the matter in dispute does not exceed $5,000. The suit was brought originally to recover 135 head of Colorado steers, alleged to be worth $6,000. At the time of the judgment only 79 head were in dispute. As to the rest, a settlement had been made during the pendency of the suit. The court has found as a fact that the 79 head were sold in open market the day after they were taken possession of under the writ in this case, and that the net proceeds of the sale only amounted to $4,526.15. There is nothing to show that they were really any less valuable at the time of the sale than when they were taken. Upon the facts as found the recovery could not have exceeded $5,000 if there had been a judgment in favor of Cox, the plaintiff in error.

Dismissed.

CHAUNCEY DEWEY ET AL., *Appts.*,
v.
WEST FAIRMONT GAS COAL COMPANY ET AL.

WEST FAIRMONT GAS COAL COMPANY, *Appt.*,
v.
CHAUNCEY DEWEY ET AL.

(See S. C. Reporter's ed. 329–334.)

Jurisdiction of circuit court—equity action, when not maintainable.

1. The Circuit Court of the United States may exercise jurisdiction in a suit in equity which is ancillary to an action at law of which it has already acquired jurisdiction, although one of the defendants in the suit in equity is a citizen of the district of which a portion of the complainants were citizens.

2. A suit in equity cannot be maintained for damages arising from the inferior quality of coke sold and delivered, and to subject property to the payment of the damages, where the coke was received, used, and paid for, without objection, and where there was no warranty as to its quality or suitableness, and the sale was not by sample. A cross bill, dependent upon the bill, was also properly dismissed.

[Nos. 60, 179.]

Submitted Nov. 9, 1887. Decided Nov. 21, 1887.

APPEALS from the Circuit Court of the United States for the District of West Virginia. *Affirmed.*

The facts and case are fully stated in the opinion.

Messrs. **Daniel Lamb, Wm. H. Hearne** and **Henry M. Russell,** for Dewey, Vance & Co.:

This suit was ancillary to the action at law of which the Circuit Court of the United States already had undoubted jurisdiction; numerous decisions of this court establish the rule that such a suit will be entertained without regard to the citizenship of the parties.

Pacific R. R. Co. v. *Missouri P. R. Co.* 111 U. S. 506 (28:499); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145); *Jones* v. *Andrews*, 77 U. S. 10 Wall. 327 (19:935).

Where the person who applies for the injunction denies his legal liability, and has also an equitable defense, an injunction will be allowed without a confession of judgment.

Great Falls Mfg. Co. v. *Henry*, 25 Gratt. 575.

The insolvency of the defendant constitutes a sufficient reason for the exercise of equitable jurisdiction.

Lindsay v. *Jackson*, 2 Paige, 581; *Gay* v. *Gay*, 10 Paige, 369; *Hudson* v. *Kline*, 9 Gratt. 379.

The remedy at law was entirely inadequate to the exigencies of the case, and equity might properly take jurisdiction.

2 Lead. Cas. Eq. 4th ed. part II, p. 1848; *Ragsdale* v. *Hagy*, 9 Gratt. 409; *Jaynes* v. *Brock*, 10 Gratt. 211; *Drexel* v. *Berney*, 122 U. S. 241 (30:1219).

In cases of set-off, as well as in cases of recoupment and failure of consideration, the fact that the court of law has refused to admit the defense seems to constitute a reason, especially when other considerations exist, for the exercise of the extraordinary jurisdiction of the court of equity.

Taylor v. *Okey*, 13 Ves. Jr. 180; 2 Lead. Cas. Eq. 4th ed. part II, p. 1389, and citations.

An issue may be directed for the purpose, or the amount of damages may be inquired into by a master.

Kelsey v. *Hobby*, 41 U. S. 16 Pet. 269 (10:961).

If the letter of October 7, and the reply thereto, could be taken as a written memorandum of the contract, and as superseding the oral contract, yet this would not prevent the plaintiffs from showing that a sample had previously been furnished by the vendors, nor from showing that a warranty outside of the written contract had been made.

Foot v. *Bentley*, 44 N. Y. 166; *Swett* v. *Shumway*, 102 Mass. 368; *Stoops* v. *Smith*, 100 Mass. 63.

The representations and promises, coupled with the sample, constituted a warranty that the coke to be delivered under the contract should have the apparent qualities of the sample, and should be low in sulphur, and this whether the sample was low in sulphur or not.

Heilbutt v. *Hickson*, L. R. 7 C. P. 438.

The coke to be furnished was to be manufactured and furnished for a specific purpose which was known to both parties. The pur

pose being known, a warranty arose that the coke should be of merchantable quality and reasonably fit to be used for the purpose for which it was intended.

Kellogg Bridge Co. v. *Hamilton*, 110 U. S. 108 (28:86); *Shepherd* v. *Pybus*, 3 Man. & G. 868; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Hogins* v. *Plympton*, 11 Pick. 100; *Chapin* v. *Dobson*, 78 N. Y. 74; *Gerst* v. *Jones*, 32 Gratt. 518; *White* v. *Miller*, 71 N. Y. 118; *S. C.* 78 N. Y. 393; *Randall* v. *Newson*, L. R. 2 Q. B. Div. 102; *Wolcott* v. *Mount*, 38 N. J. L. 496; *Drummond* v. *Van Ingen*, L. R. 12 H. L. Cas. 284.

The fact that the coke was of poor quality, and especially that it contained an excess of sulphur, constituted a breach of this warranty which gave the plaintiffs the right to recover the damages which they had sustained in the use of the coke, notwithstanding the fact that they had not rejected or returned it.

Kellogg Bridge Co. v. *Hamilton*, *supra*.

Messrs. **Wm. P. Hubbard** and **James Morrow, Jr.,** for the West Fairmont Gas Coal Co.:

The receipt and use of the coke, and the long delay of the plaintiffs in objecting to its quality, amount to a waiver of objections.

2 Benj. Sales, 4th Am. ed. p. 916, notes and cases cited; *Phillips & C. Construction Co.* v. *Seymour*, 91 U. S. 646, 652 (23:341,343); *Davis* v. *Fish*, 1 G. Greene (Ia.) 406; *S. C.* 48 Am. Dec. 387; *Hedden* v. *Roberts*, 134 Mass. 38.

The sale of the coke was not a "sale by sample" in the legal and proper sense of that term.

Barnard v. *Kellogg*, 77 U. S. 10 Wall. 383 (19:987).

Nor is there here any implied warranty that the coke should be reasonably fit for the purpose for which it was to be used. Where one, relying upon his own judgment, buys a specific article from a manufacturer, believing it will answer a particular purpose, he is bound to pay for it; and there is no warranty implied against the vendor.

Chanter v. *Hopkins*, 4 Mees. & W. 399; *Burnby* v. *Bollett*, 16 Mees. & W. 644; *Oliphant* v. *Bayley*, 5 Q. B. 288.

If they were mistaken as to its fitness, they must pay for it, nevertheless.

Chanter v. *Hopkins*, 4 Mees. & W. 404; *Mason* v. *Chappell*, 15 Gratt. 572; *Port Carbon Iron Co.* v. *Groves*, 68 Pa. 149; *Brown* v. *Edgington*, 2 Man. & G. 279; *Williams* v. *Williams*, 40 Eng. Ch. Rep. 371; *Hoe* v. *Sanborn*, 21 N. Y. 553; *Cunningham* v. *Hall*, 4 Allen, 268, 274; *Archdale* v. *Moore*, 19 Ill. 565; *Whitaker* v. *Eastwick*, 75 Pa. 229; *Kirk* v. *Nice*, 2 Watts, 367; *Sands* v. *Taylor*, 5 Johns. 395.

Parol proof that the coke was warranted or sold by sample is inadmissible. In the court below *Chapin* v. *Dobson*, 78 N. Y. 74, was cited. That case is examined and criticised and shown not to be law, in chapter 12 of Jones on Commercial Contracts. See cases cited.

Where there is a written contract of sale without mention of sample, parol evidence is not admissible that the sale was by sample.

Harnor v. *Groves*, 15 C. B. 80 E. C. L. R. 667; Addison, Contr. 622.

A warranty cannot now be superadded to the contract. The "trial lot" was wholly antecedent to the contract and separate from it.

Kain v. *Old*, 2 Barn. & C. 627; *Osborn* v. *Gantz*, 60 N. Y. 540; *Robinson Mach. Wks.* v. *Chandler*, 56 Ind. 575; *Gardiner* v. *Gray*, 4 Camp. 144; *Wood* v. *Ashe*, 1 Strob. 407; *Fisher* v. *Samuda*, 1 Camp. 190.

Duty of vendees to reject. It was their duty to have rescinded the contract if their present pretensions be true, and not by their acquiescence and silence to ensnare their vendor into a ruinous liability in damages.

Couston v. *Chapman*, 2 L. R. H. L. Cas. Sc. App. 250; *Hargous* v. *Stone*, 5 N. Y. 73, 86; *McCormick* v. *Sarson*, 45 N. Y. 265; *Dounce* v. *Dow*, 64 N. Y. 411; *Reed* v. *Randall*, 29 N. Y. 358; *Holden* v *Clancy*, 58 Barb. 590; *Warren Glass Wks. Co.* v. *Keystone Coal Co.* 1 Md. (L. ed.) 209, 3 Cent. Rep. 851, 65 Md. 547.

The cross bill is a sufficient basis for a decree. It should not have been dismissed.

Moore v. *Huntington*, 84 U. S. 17 Wall. 417, 421 (21:642,643); 2 Dan. Ch. Pr. 5th ed. 1553, note 3, and cases cited; *Ragland* v. *Broadnax*, 29 Gratt. 401, 419.

Mr. Justice **Matthews** delivered the opinion of the court:

In October, 1872, a contract was entered into between the firm of Dewey, Vance & Company and the West Fairmont Gas Coal Company, the terms of which are stated in a letter from the former to the president of the Coal Company, dated October 7, 1872 as follows: "We beg to ratify our verbal agreement of October 4, by which you are to deliver us until July, in 1873, an average of three cars of coke per day, at six cents per bushel of 41 pounds, we to settle for same by our note of 90 days from the first of each month for the previous month's delivery." This was acknowledged as an acceptance of a previous offer in identical terms by a letter from the president of the Coal Company to Dewey, Vance & Company. Under this contract the Coal Company were bound to deliver 681 carloads as ordered, equivalent to 424,944 bushels, which at the contract price would amount to $25,496.64. From the date of the contract to November 30, 1873, the Coal Company delivered in all 246 carloads, which had been ordered and were received and paid for according to the terms of the contract, the period during which deliveries were to have taken place having been extended by mutual consent. Dewey, Vance & Company refusing to order or receive any more, the Coal Company, on January 17, 1877, brought an action at law against them in the Circuit Court of Ohio County, West Virginia, for damages for the breach of the contract. The defendants in that action caused it to be removed from the state court to the Circuit Court of the United States for the District of West Virginia on June 7, 1877, on the ground that the parties were citizens of different States, the West Fairmont Gas Coal Company, the plaintiff, being a corporation of the State of New York, and the defendants citizens of West Virginia and Ohio. Thereupon, on October 3, 1877, the surviving partners of the firm of Dewey, Vance & Company filed the present bill in equity against the West Fairmont Gas Coal Company, the plaintiff in the action at law, and the West Fairmont and Marion Consolidated Gas Coal Company, a corporation organized under the

laws of West Virginia, alleging that under the contract of October 4, 1872, the sale of coke was by sample, the quality of which was to be equal to that of a certain trial lot previously tested, accompanied by an implied warranty that the coke to be delivered under the contract should also be fit and suitable for the purpose of being used in the furnace of Dewey, Vance & Company for making pig iron; that in point of fact the coke actually delivered under the contract was not equal to the quality of the sample, and was not fit for the purposes for which it was to be used; that in consequence thereof the complainants had ceased and refused to order or receive any more than that delivered and paid for, and that by reason of the bad quality of the coke actually received and used they had suffered a large amount of damages; that the West Fairmont Gas Coal Company in the mean time had become and was insolvent, and that they had made a fraudulent assignment of their property to their codefendant, the West Fairmont and Marion Consolidated Gas Coal Company. The prayer of the bill was that the amount of damages sustained by the complainant might be ascertained, that the assets of the West Fairmont Gas Coal Company, so fraudulently assigned, be subjected to the payment thereof, and that in the mean time all proceedings in the action at law brought by the West Fairmont Gas Coal Company should be stayed.

The right to maintain such a creditor's bill is based upon the Code of West Virginia, chapter 138, section 2, which provides that "A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may, in such suit, have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

To this bill the defendants in the first instance objected, by way of plea and demurrer, for want of jurisdiction in the court, on the ground that one of the defendants, the West Fairmont and Marion Consolidated Gas Coal Company, was a citizen of the State of West Virginia, of which also a portion of the complainants were citizens. This objection, however, is not well taken. The suit in equity was an exercise of jurisdiction on the part of the circuit court, ancillary to that which it had already acquired in the action at law, which it might well entertain according to the rule adjudged in *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145] and *Pacific R.R. Co.* v. *Missouri P. R. Co.* 111 U. S. 506 [28: 499].

The defendants having answered, denying the equity of the bill, set up their right to recover damages for the alleged breach of the contract on the part of Dewey, Vance & Company, in refusing to receive the remainder of the coke deliverable under the contract, by way of cross bill, in which they sought a decree for the amount thereof. Issues having been made upon the bill and cross bill, the cause was heard upon its merits, when the circuit court rendered a decree dismissing the bill for want of equity, and the cross bill, with costs, to the original defendants as dependent thereon. From this decree an appeal is prosecuted by the original complainants, and also by the defendants, by way of cross appeal, from so much as dismisses their cross bill.

From a careful examination of all the evidence in the cause, we are satisfied with the conclusions of the circuit court. We find as matter of fact that the sale of coke was not by sample. A trial lot of 34 carloads, prior to the making of the contract, was furnished and used, the complainants being satisfied with it; but there was no agreement, either express or implied, that all deliveries under the contract should be equal to it in quality. The object of the test evidently was to determine, on the part of the complainants for themselves, whether they were willing to run the risk of using coke to be manufactured by the Coal Company from the slack of their mines, at the price offered. The coke which was subsequently furnished under the contract was used by the complainants and paid for according to the contract without objection, except as to a lot furnished in December, 1872, which was complained of as being inferior. On investigation it turned out to have been made from material taken from a slack pile outside of the mine which had been for some time exposed, and had become unfit for the purpose. Thereafter no material was used except the fresh slack taken from the inside of the mines, and deliveries continued to be made as ordered until the last which took place in November, 1873. There was no warranty expressed, nor can any be reasonably implied from the circumstances, that the coke under the contract should be suitable for use in the furnace for making pig iron. On the contrary, it was expressly understood that it would not be suitable for that purpose by itself. The only question to be determined was whether it could be used in combination with Connellsville coke, which was the standard for that purpose, and if so, in what proportions; to determine this was the object of testing the trial lot. The complainants continued to use it, as already stated, from time to time, without objection or complaint, paying for what they received according to the terms of the contract, and not at any time giving notice of any intention to refuse the further performance of the contract, although ceasing to give any orders after November, 1873. On November 28, 1873, the Coal Company, in a letter from its president to Dewey, Vance & Company, asked for the reason for the order to discontinue shipping in reply to which, on December 4, 1873, Dewey, Vance & Company wrote: Yours of the 28th inst. was duly received. We were accumulating stock, and stopped shipments from Fairmont and curtailed from Connellsville; have no definite idea at what time we shall again need." No further communications appear to have taken place between the parties until the beginning of the action at law.

We think the circuit court did not err upon the merits in dismissing the complainants' bill; and, as the cross bill was dependent upon it and sought no relief purely equitable, it was also properly dismissed, with costs to the complainant therein, thereby remitting it to its remedy in the pending action at law.

The decree of the Circuit Court is accordingly affirmed.

COLORADO COAL AND IRON COMPANY ET AL., *Appts.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 307-328.)

Fraud in preemption claims—bona fide *purchaser—presumptions in favor of—burden of proof—insufficient proof—mining lands—new discoveries.*

1. Where there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of preemption claims and in the certificates issued thereon, this constitutes a fraud upon the United States, sufficient in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents.

2. To a bill in equity to cancel the patents upon these grounds alone, the defense of a *bona fide* purchaser for value, without notice, is perfect.

3. The title of such a purchaser rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion rests upon the Government, in an action by it to cancel a patent which it has issued, and it is not relieved of this burden by the negative nature of the proposition it is bound to establish.

4. To raise a suspicion, however strong, of the fraud and wrong doing of its own officers is not enough to justify the Government in casting upon the defendants the burden of establishing their title. The proof of a fraud which would render their title void should be stronger than the legal presumptions on which it rests.

5. Where the Government did not make all the proof of which the nature of the case was susceptible and which was within its reach, and the good faith of the defendants is unimpeached, *held*, under the circumstances, that a decree canceling the patent should be reversed.

6. It is not sufficient to constitute "known mines" of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields, of greater or less extent and value, as shown by outcroppings. To constitute the exemption contemplated by the preemption Act under the head of "known mines," there should be, upon the land, ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine than for agricultural purposes.

7. New discoveries, after the sale, by which the land becomes profitable to work as a mine, cannot affect the title as it passed at the time of the sale.

[No. 46.]

Argued Nov. 2, 1887. Decided Nov. 21, 1887.

APPEAL from the Circuit Court of the United States for the District of Colorado. *Reversed. Remanded.*

Reported below, 18 Fed. Rep. 273.

The facts and case are fully stated by the court.

Messrs. **B. H. Bristow,** *Lyman K. Bass* and *David Willcox*, for appellants:

There can be no relief against these defendants by reason of alleged false statements in the proofs of preemption. The defendants' rights as *bona fide* purchasers are sufficiently pleaded.

Boone v. *Chiles*, 35 U. S. 10 Pet. 177, 210 (9: 388, 400); *Graffam* v. *Burgess*, 117 U. S. 180, 195 (29: 839, 844).

The burden of proving notice was upon the complainant.

Calais Steamboat Co. v. *Scudder*, 67 U. S. 2 Black, 372 (17: 282); *Dexter* v. *Harris*, 2 Mason, 531, 536; *Flagg* v. *Mann*, 2 Sumn. 487, 551.

The deeds establish these facts presumptively.

Mutual B. L. Ins. Co. v. *Newton*, 89 U. S. 22 Wall. 32 (22: 793).

Jackson was a *bona fide* purchaser; his rights in that behalf inure to his grantees.

Alexander v. *Pendleton*, 12 U. S. 8 Cranch, 462 (3: 624); *Cole* v. *Gourlay*, 79 N. Y. 527; Pom. Eq. § 754; *Oliver* v. *Piatt*, 44 U. S. 3 How. 410 (11: 657); *White* v. *McGarry*, 2 Flipp. 572; *Chapman* v. *Sims*, 53 Miss. 154.

The consolidated Company was not an incumbrancer *pendente lite.*

Games v. *Stiles*, 39 U. S. 14 Pet. 322 (10: 476); *Miller* v. *Sherry*, 69 U. S. 2 Wall. 250 (17: 830); *Murray* v. *Ballou*, 1 Johns. Ch. 566.

Any right to relief by reason of false statements in the preemption papers would of course be equitable only. It therefore could not be asserted against a *bona fide* purchaser.

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 133 (3: 177); *Dexter* v. *Harris*, *supra*; *Wood* v. *Mann*, 1 Sumn. 506; Pom. Eq. § 777; *U. S.* v. *Minor*, 114 U. S. 233 (29: 110); *S. C.* 29 Fed. Rep. 134; *Beard* v. *Federy*, 70 U. S. 3 Wall. 491, 492 (18: 92); *Smith* v. *Ewing*, 23 Fed. Rep. 741–747; *Somes* v. *Brewer*, 2 Pick. 184; *Deputy* v. *Staples-ford*, 19 Cal. 302; 2 Story, Eq. § 1502; 2 Washb. Real Prop. 597.

There is no proof that these lands were not subject to preemption.

The statute provides that lands on which are situated any "known mines" shall not be liable to entry thereunder.

Act Sept. 4, 1841, 5 Stat. at L. 456, § 10.

The exception refers to the condition of the land at the time of the entry. This was ruled in *Deffeback* v. *Hawke*, 115 U. S. 392 (29: 423); *Western Pac. R. R. Co.* v. *U. S.* 108 U. S. 510, 513 (27: 806, 807); *U. S.* v. *Reed*, 28 Fed. Rep. 482.

The mere presence of minerals in unascertained quantities does not make a given spot a mine.

Westmoreland Coal Co's Appeal, 85 Pa. 346; *Bell* v. *Wilson*, L. R. 1 Ch. App. 308; *Mullan* v. *U. S.* 118 U. S. 271 (30: 170); *Ah Yew* v. *Choate*, 24 Cal. 562; *Alford* v. *Barnum*, 45 Cal. 482.

It is not shown that there were any "known" mines. The meaning of this expression has never been determined.

Reynolds v. *Iron Silver Min. Co.* 116 U. S. 697 (29: 777); *Sullivan* v. *Iron Silver Min. Co.* 109 U. S. 550 (27: 1028); *Western Pac. R. R. Co.* v. *U. S. supra*; *McLaughlin* v. *U. S.* 107 U. S. 526 (27: 621); *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639).

The stability of titles by patent is of the highest public importance.

St. Louis Smelting & Ref. Co. v. *Kemp*, 104 U. S. 641 (26: 876); *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447 (27: 226); *U. S.* v. *Maxwell Land Grant Co.* 121 U. S. 379 (30: 958); 3 Ops. Attys-Gen. 420; *Sullivan* v. *Iron Silver Min. Co. supra.*

The complainant cannot recover upon the ground that the patentees were fictitious.

U. S. v. *Maxwell Land Grant Co.* 121 U. S. 325, 379 (30: 949, 958); *U. S.* v. *Throckmorton*, 98 U. S. 61 (25: 93); *U. S.* v. *Stone*, 69 U. S. 2 Wall. 525, 535 (17: 765, 767); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485).

Courts of equity may correct mistakes and relieve against frauds and impositions.

Moore v. *Robbins*, 96 U. S. 530 (24: 848); *Marquez* v. *Frisbie*, 101 U. S. 473 (25: 800); *U. S.* v. *Atherton*, 102 U. S. 372 (26: 213); *Shepley* v. *Cowan*, 91 U. S. 330 (23: 424); *Atlantic Delaine Co.* v. *James*, 94 U. S. 207 (24: 112); Story, Eq. Jur. § 157; *Lyman* v. *United Ins. Co.* 2 Johns. Ch. 632; *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290.

The proof of wrong or mistake should be clear and satisfactory.

U. S. v. *Iron Silver Min. Co.* 24 Fed. Rep. 568; *U. S.* v. *Maxwell Land Grant Co.* 26 Fed. Rep. 123.

A patent conveys the legal title notwithstanding that it is obtained by fraud.

U. S. v. *Minor*, 114 U. S. 233, 243 (29: 110, 114); *Meader* v. *Norton*, 78 U. S. 11 Wall. 442, 458 (20: 184, 188).

The grant would be equally effectual to pass the legal title whether the grantee called himself by his ordinary name or by one assumed for the occasion.

Thomas v. *Wyatt*, 31 Mo. 188; *Staak* v. *Sigelkow*, 12 Wis. 234; *Boyce* v. *Dane*, 29 Mich. 146; *Sampeyreac* v. *U. S.* 32 U. S. 7 Pet. 222 (8:665); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 88, 98 (3: 666, 669).

The presumption of law is in favor of innocence.

Greenl. Ev. § 80; *Hatch* v. *Bayley*, 12 Cush. 27; *U. S.* v. *San Jacinto Tin Co.* 23 Fed. Rep. 282.

There is nothing in *Moffat* v. *U. S.* 112 U. S. 24 (28: 623) contrary to the views now urged.

The complainant is not entitled to relief in equity. A grantor cannot question his grant.

Calais Steamboat Co. v. *Scudder*, 67 U. S. 2 Black, 372 (17: 282); *Carpenter* v. *Longan*, 83 U. S. 16 Wall. 271 (21: 313); *Knox County* v. *Aspinwall*, 62 U. S. 21 How. 539 (16:208); *Coloma* v. *Eaves*, 92 U. S. 484 (23: 579); *Marcy* v. *Oswego*, Id. 637 (23: 748); *Humboldt* v. *Long*, Id. 642 (23: 752).

When the acts of fraud now alleged were discovered the bill does not state. Presumptively, therefore, they have been known to the complainant ever since the patents were issued.

Harwood v. *Cincinnati & C. A. L. R. R. Co.* 84 U. S. 17 Wall. 78 (21: 558).

Before this claim was asserted the Statute of Limitations had run more than twice.

Gen. Laws. Col. § 2174.

Equity refuses its aid to such claims as this. They are deemed stale (*Stearns* v. *Page*, 48 U. S. 7 How. 819 (12: 928); *Wagner* v. *Baird*, Id. 234 (12: 681); *Burke* v. *Smith*, 83 U. S. 16 Wall. 390 (21: 361); *Preston* v. *Preston*, 95 U. S. 200 (24: 494); and the courts dismiss them *sua sponte* (*Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 836); *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 811 (24: 326); *Kirk* v. *Hamilton*, 102 U. S. 68 (26: 79); *Boone* v. *Chiles*, 35 U. S. 10 Pet. 248 (9: 413); *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587 (23: 329); *Grymes* v. *Sanders*, 93 U. S. 55 (23: 798).

The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States is a party.

U. S. v. *Smith*, 94 U. S. 217 (24: 115); *U. S.* v. *McKnight*, 98 U. S. 179 (25: 115); *U. S.* v. *Flint*, 4 Sawy. 44, 60; affd. 98 U. S. 61 (25: 93). To the same effect are *The Floyd Acceptances*, 74 U. S. 7 Wall. 666 (19: 169); *U. S.* v. *Barker*, 25 U. S. 12 Wheat. 559 (6: 728); *U. S.* v. *State Nat. Bank*, 96 U. S. 30 (24: 647); *U. S.* v. *Bostwick*, 94 U. S. 66 (24: 66); *U. S.* v. *Beebee*, 17 Fed. Rep. 36.

Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel.

U. S. v. *Collier*, 3 Blatchf. 325; *Indiana* v. *Milk*, 11 Fed. Rep. 389; *People* v. *Society for Prop. of Gospel*, 2 Paine, 545; *Cahn* v. *Barnes*, 5 Fed. Rep. 326; *Pengra* v. *Munz*, 29 Fed. Rep. 830, 837; *Hough* v. *Buchannan*, 27 Fed. Rep. 828; *U. S.* v. *McLaughlin*, 30 Fed. Rep. 147; *Commonwealth* v. *Pejepscut Propre.* 10 Mass. 154; *Commonwealth* v. *Andre*, 3 Pick. 224; *People* v. *Stephens*, 71 N. Y. 549, 560; *State* v. *Ober*, 34 La. Ann. 359.

So, too, stale claims are no more enforceable in equity by the United States than by an individual.

U. S. v. *Beebee*, 17 Fed. Rep. 36; *S. C.* 4 McCrary, 12; *U. S.* v. *White*, 17 Fed. Rep. 561; *U. S.* v. *San Jacinto Tin Co.* 23 Fed. Rep. 279.

And the delay which will defeat a recovery must depend upon the particular circumstances of each case.

Harwood v. *Cincinati & C. A. L. R. R. Co.* 84 U. S. 17 Wall. 78 (21:558).

Courts of equity are not bound to adjudge rescission or cancellation.

Willard v. *Tayloe*, 75 U. S. 8 Wall. 557 (19:501); *Jackson* v. *Ashton*, 36 U. S. 11 Pet. 229 (9:698); *King* v. *Hamilton*, 29 U. S. 4 Pet. 311 (7:869); 2 Story, Eq. Jur. §§ 693, 742; *Eckman* v. *Eckman*, 55 Pa. 269; *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87, 99 (3:665, 669); *U. S.* v. *Flint*, 4 Sawy. 43.

All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, although the government be the suitor against him.

U. S. v. *Throckmorton*, and *U. S.* v. *San Jacinto Tin Co. supra*; *U. S.* v. *Central Pac. R. Co.* 11 Fed. Rep. 449, 454; *U. S.* v. *Tichenor*, 12 Fed. Rep. 415; *U. S.* v. *Beebee*, and *U. S.* v. *McLaughlin, supra; Beck* v. *Simmons*, 7 Ala. N. S. 71; *Humbard* v. *Humbard*, 3 Head, 100.

So far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and such increase of value is a lien and a charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his rights in the land.

Bright v. *Boyd*, 2 Story, 605; *Utterbach* v. *Binns*, 1 McLean, 242; *U. S.* v. *McGraw*, 13 Fed. Rep. 449, 452; *U. S.* v. *Marshall Silver Min. Co.* 17 Fed. Rep. 108; *Miner* v. *Beekman*, 50 N. Y. 337, 345; *Carr* v. *Wallace*, 7 Watts, 394; *Smith* v. *Drake*, 23 N. J. Eq. 302; *Bomberger* v. *Turner*, 13 Ohio St. 263; *McLaughlin* v. *Barnum*, 31 Md. 425. *Troost* v. *Davis*, 31 Ind. 34; *Bacon* v. *Cottrell*, 13 Minn. 194; *Green* v. *Dixon*, 9 Wis. 532; *Atty-Gen.* v. *Baliol College*, 9 Mod. 407; *Shine* v. *Gough*, 1 Ball & B. 436; Story, Eq. § 1237; *U. S.* v. *Beebee* and *U. S.* v *Central Pac. R. Co. supra.*

No decree can be rendered annulling or af-

fecting the title of parties to land, without their presence. They are entitled to their day in court.

Shields v. *Barrow*, 58 U. S. 17 How. 130 (15:158); *Coiron* v. *Millaudon*, 60 U. S. 19 How. 113 (15:575); *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 285 (18:826); *Ribon* v. *Chicago, R. I. & P. R. R. Co.* 83 U. S. 16 Wall. 450 (21:368); *Nashville & D. R. R. Co.* v. *Orr*, 85 U. S. 18 Wall. 475 (21:811); *U. S.* v. *San Jacinto Tin Co. supra*.

Mr. **G. A. Jenks,** *Solicitor.-Gen.*, for the United States:

In the detection of fraud great latitude of evidence is allowed.

Zerbe v. *Miller*, 16 Pa. 495; *Stauffer* v. *Young*, 39 Pa. 455.

Necessity, either absolute or moral, is a sufficient ground for dispensing with the usual rules of evidence.

Garwood v. *Dennis*, 4 Binn. 314.

Under the evidence offered by plaintiff the burden of proof was shifted to the defendants.

Stephen, Dig. L. Ev. art. 96; 1 Wharton's L. Ev. § 356; *Moffat* v. *U. S.* 112 U.S. 24 (28:623).

Laches cannot be imputed to the Government.

Gaussen v. *U. S.* 97 U. S. 590 (24:1009); *U.S.* v. *Minor*, 114 U. S. 238 (29:112).

Fraud or imposition on the officers of the land-office, or a radical mistake by them of the law governing the disposition of the public lands, has always been held to be subject to remedy in a court of equity.

Sampeyreac v. *U. S.* 32 U. S. 7 Pet. 222 (8:665).

A quitclaim deed should put on inquiry.

Oliver v. *Piatt*, 44 U. S. 3 How. 405 (11:654).

Lis pendens is notice from the date of the service of the subpena.

Diamond v. *Lawrence County*, 37 Pa. 353.

Since the Act of 1841 mineral lands have been reserved from sale.

5 Stat. at L. 456; Act of 1854, § 4; 10 Stat. at L. 308; §§ 2318, 2258, R. S.

Patents for lands which have been reserved from sale are void.

Morton v. *Nebraska*, 88 U. S. 21 Wall. 674 (22:645); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 99 (3:669); *Minter* v. *Crommelin*, 59 U. S. 18 How. 88 (15:279).

Coal land is valuable mineral land.

Mullan v. *U. S.* 118 U. S. 217 (30:172).

Mr. Justice **Matthews** delivered the opinion of the court:

This is a bill in equity filed in the name of the United States by the Attorney-General on January 22, 1880, the object and prayer of which are to declare void and cancel sixty-one patents for as many distinct pieces of land, situated at different places in Las Animas County, in the State of Colorado, amounting in the aggregate to 9,565$\frac{25}{100}$ acres. To the original bill the Southern Colorado Coal and Town Company, a corporation organized under the laws of Colorado, was the sole defendant. The patents in question were issued at different times between October, 1873, and October, 1874; upon preemption claims, under the Act of 1841. In each case there appeared to be filed all the necessary and proper affidavits, duly verified before the register or receiver of the land-office at Pueblo, showing that the preemptors had entered and settled in person upon the land on a day named, and had made improvements thereon, the nature of which were set out in detail, and that the lands in question were non-mineral lands, and subject to preemption under the Acts of Congress relating thereto. Between May, 1873, and December 1875, warranty deeds in the names of the preemptors and patentees were made, acknowledged, and recorded apparently conveying the premises to William S. Jackson, as trustee, who represented a number of individuals who had deposited money in his hands to be used in the purchase of lands in Colorado. On June 1, 1876, by deed duly acknowledged and recorded, but without covenant of warranty, Jackson conveyed and released all these lands to the defendant, the Southern Colorado Coal and Town Company. On January 20, 1880, that corporation was consolidated with other corporations under the name of the Colorado Coal and Iron Company, to which, upon that date, the lands in question were conveyed. Under date of February 1, 1880, the Coal and Iron Company made a mortgage covering the premises in question, with others, to Louis H. Meyer, as trustee, to secure an issue of bonds amounting to $3,500,000. On January 7, 1882, an amendment to the bill was filed, making the Colorado Coal and Iron Company, the consolidated corporation, together with Meyer, the trustee in the mortgage, parties defendant. The purchase price of the land to the Government was $11,997.45, which was paid at the time to the proper officer, $1,813.14 in cash, and the remainder in certificates known as agricultural college scrip, which by law was receivable for that purpose.

It is charged in the bill that these patents were procured by means of a fraudulent conspiracy entered into by and between Irving W. Stanton, register of the land-office, Charles A. Cook, receiver for the land district, at Peublo, in Colorado, Alexander C. Hunt, and others unknown, who, it is alleged, organized and had incorporated the Southern Colorado Coal and Town Company. In furtherance of this conspiracy, and as the means of accomplishing its purpose, it is alleged "That neither of the supposed preemptors of the land as aforesaid described by their names, as stated in said several proofs of preemption, or in the said certificates of location, ever settled upon the said lands or improved the same, as represented in said several proofs of preemption, and that no person or persons whatsoever, as represented in either of said certificates of location, appeared or presented himself before said Stanton or Cook, or either of them, at any time, and made proof of preemption or agricultural college scrip location, either as preemptor or as witness for any preemptor as aforesaid described, as in and by said proofs of preemption and location certificates, or either of them, as aforesaid, is supposed, but that the same, and each of them, are false and fraudulent, and were designed, made, and executed by said Stanton and Cook and said Hunt, and the said persons to your orator unknown, or some one or more of them, in the manner aforesaid, and for the purpose of fraudulently depriving your orator of its title to the said pieces of land."

It is further alleged that all the said supposed preemptors are fictitious persons, and their names are fictitious names, and that the supposed names that appear as witnesses to the said several proofs of preemption are fictitious names, and that no such person or persons, either as preemptors or as witnesses, have ever lived or been known in the County of Las Animas, where said pieces and parcels of land are located, and, in fact, that no such persons exist.

It is further alleged in the bill "That the aforesaid pieces and parcels of land are not agricultural land, and are not suitable for agricultural or grazing purposes, and are of no value for any purpose except for the coal deposits therein contained. * * * That the said several pieces and parcels of land contain large and valuable deposits of coal, and that the said deposits of coal were known to the said Stanton and Cook and said Hunt, and to the said person or persons to your orator unknown, who wrote out, signed, and executed, or caused to be written out, signed, and executed, the several proofs of preemption and non-mineral affidavits at the time the said several proofs of preemption and non-mineral affidavits were made out, signed, and executed."

It is also charged in the bill that the said Hunt was a stockholder in the Southern Colorado Coal and Town Company, and general manager of its business, and that the incorporators of said company and the trustees thereof, including William S. Jackson, "knew at the time the aforesaid described land was conveyed to said company by said William S. Jackson, as hereinbefore described, that the several patents to said several pieces and parcels of land had been fraudulently obtained from your orator, and knew that the said several supposed preemptors and patentees were myths and fictitious persons, and knew that the said Jackson had no right, title or interest in said land, or any part thereof."

The answer of the Southern Colorado Coal and Town Company, filed November 2, 1881, specifically denies all the allegations of the bill alleging fraud, and denies that the said lands or any portion of them were mineral lands in the sense of not being lands capable of being acquired under the preemption law, and sets up by way of further defense that it was a purchaser of all the said lands in good faith for a valuable consideration without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill alleged. Louis H. Meyer, on June 5, 1882, answered to the same effect, and by a stipulation the answer of the Southern Colorado Coal and Town Company was directed to stand as the answer of the Colorado Coal and Iron Company. Replications were duly filed, and the cause was heard on a large amount of proofs, resulting in a decree in favor of the complainant, declaring all the patents in the bill mentioned, and the subsequent conveyances of the land therein described to the defendants, to be fraudulent and void, and decreeing that they should be held for naught and be delivered up to be canceled. The present appeal is from that decree.

It was held by the circuit court that the charge in the bill, that the supposed preemptors and patentees were fictitious persons, having no existence, was sufficiently proved; that, consequently, there being no grantees, no legal title passed from the United States; and that, as the defendants acquired no legal title by virtue of the supposed conveyances to them, they cannot claim protection as *bona fide* purchasers for value without notice of the fraud. *U. S.* v. *Southern Col. Coal & Town Co.* 18 Fed. Rep. 278.

It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States, sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of *bona fide* purchaser for value without notice is perfect.

In reference to such a case, it was said by this court, in *U. S.* v. *Minor*, 114 U. S. 233, 248 [29:110, 114]: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title; and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value." *Meader* v. *Norton*, 78 U. S. 11 Wall. 442, 458 [20:184, 188]. It is, indeed, an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value. Hence it becomes necessary, to support the decree of the circuit court, to maintain as that court declared, that the legal title to the lands in question did not pass from the United States by virtue of the patents, because there were in fact no grantees. And it was that proposition of fact which, by the proofs introduced into the cause, the United States undertook to establish. The evidence on that point is found in the depositions of fourteen persons examined as witnesses. They were called to prove, and did prove, in the first place, in respect to the several tracts of land in controversy, the facts that they had not been settled upon, and that no improvements had been made upon them by any person. They also testified, in substance, that they were acquainted at the time of the transactions, with the lands, and were acquainted with the people then living in Las Animas County, some of them stating that they knew every white man residing at that time therein; that with the exception of one person, named Martine, there were no persons in the county at the time bearing the names specified as preemption claimants, and no persons bearing the names subscribed as witnesses to their statements; and that they never saw or heard of persons residing in the county having such names. This is the extent of this description of evidence, the weight of which is to be estimated in connection with the fact that the County of Las Animas, although sparsely settled, embraces an area extending about 150

miles from east to west and about 40 miles from north to south. In corroboration of it testimony was introduced, on behalf of the United States, of experts in handwriting, with a view of establishing, by a comparison of the documents, that they were fabricated, which, however, was met by the opposing opinions of other experts called on the part of the defendants. This evidence we think not only inconclusive, but entitled to no weight, not at all supporting the inference sought to be drawn: that the same handwriting is traceable in the signatures of the various names. The conclusion, if warranted at all, must depend upon the statements of the other witnesses, the substance of whose testimony has already been given, and such presumptions of fact or law as legitimately arise thereon.

It is charged in the bill that these title papers were falsely and fraudulently made by the register and receiver combining with Hunt and others unknown in a conspiracy for that purpose, but there is no direct proof of such a conspiracy. It is sought to be inferred from the fact that the preemption statements were falsely made, and from the evidence tending to show that the persons named were fictitious. There is no proof to connect the register and receiver with such a conspiracy, except the fact that the affidavits purport to have been made before them, and were certified to by them. Hunt's connection with it rests upon the fact that he procured deeds from the supposed patentees, conveying the lands to Jackson in pursuance of a bargain with him. It may well be admitted that if there were no actual persons who made applications as preemption settlers, none who made and signed the necessary declarations and affidavits, and no persons as witnesses who attested the same, the register and receiver must have known the fact; but the fact of the conspiracy depends upon prior proof that the alleged transactions were mere fictions. The proof necessary to justify that conclusion is supposed to be found in the facts testified to by the witnesses, a summary of which has been given.

It certainly does not follow that no such persons in fact existed, as a necessary conclusion from the testimony of these witnesses that they knew no such person as named in these papers. The utmost that can be said, as was said by the learned judge of the circuit court in delivering judgment in the case, is that "If none of them were ever in the county, and no improvements were ever made upon the land, then the proofs upon which the patents issued were false, and the inference that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees is not more unreasonable than would be the inference that sixty-one actual persons committed perjury themselves, and suborned as many others to perjure themselves as witnesses, in order to acquire the title." This, it is argued, establishes at least that it is more probable that the grantees were fictitious than that they were real persons, and that, in view of the difficulty, if not the impossibility, of proving the negative proposition that no such persons existed, and of the fact that the defendants connect their title and right with a transaction which must have occurred with these grantees if they had an actual existence, the burden of proof is shifted from the United States to the defendants, and that, as the latter introduced no evidence tending to show the fact as they claimed it to be, the case of the complainants must be considered as established by a preponderance of proof.

We have had recent occasion to consider the question of the character and degree of proof necessary in such cases to invalidate titles held by purchasers in good faith for value and without notice, under patents issued by the United States. In the *Maxwell Land Grant Case*, 121 U. S. 325, 379 [30:949, 958] it is said: "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. * * *. We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidence of title emanating from the Government of the United States under its official seal? In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Govern-

ment. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: "When the negative ceases to be a simple one—when it is qualified by time, place, or circumstance—much of this objection is removed: and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative." Best, Law of Ev. Am. ed. 1888, § 270. See also *Ibid*, § 273: "When a presumption is in favor of the party who asserts the negative it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative." Also *Ibid*, § 276: "This appears from the case of *Doe* v. *Whitehead*, 8 Ad. & E. 571, which was an ejectment by a landlord against a tenant on an alleged forfeiture by breach of a covenant in his lease to insure against fire in some office in or near London, in which it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge. The argument *ab inconvenienti* was strongly urged, viz.: that the plaintiff could not bring persons from every insurance office in or near London to show that no such insurance had been effected by the defendant; and *Rex* v. *Turner*, 5 Maule & S. 206; *Apothecaries Co.* v. *Bently*, 1 Car. & P. 538, & Ry. & M. 159, and some other cases of that class, were cited. But *Lord* Denman, *C. J.*, in delivering judgment, said: 'I do not dispute the cases on the game laws which have been cited; but there the defendant is in the first instance shown to have done an act which was unlawful unless he was qualified, and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law.' And in the same case Littledale, *J.*, said: 'In the cases cited as to game, the defendant had to bring himself within the protection of the statutes; and a like observation applies to *Apothecaries Co.* v. *Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff.' And this ruling has been held by subsequent cases. *Toleman* v. *Portbury*, L. R. 5 Q. B. 288; *Wedgwood* v. *Hart*, 2 Jur. N. S. 288; *Price* v. *Worwood*, 4 Hurl. & N. 512."

Mr. Greenleaf states the rule in equivalent terms. He says (1 Greenl. Ev. § 78): "To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of course, this negative is an essential element in his case." And in section 80: "So, where the negative allegation involves a charge of *criminal neglect of duty*, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property—the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In the present case the facts shown are, in our opinion, not sufficient to overcome the presumption of innocence on the part of the register and receiver of the land office. It is quite consistent with these facts that real persons, whether under their own or under assumed names, did actually appear before them and make preemption claims. There is no testimony whether tending to establish directly any complicity on their part with the fraud which may have been practiced upon them and not through them. It is certain that there were real persons acting in the matter. The purchase price due on the entry of the lands was in fact paid. There is no proof of any actual fabrication of the papers, the genuineness of which is not negatived by any internal evidence. The allegations in the bill, that they were in fact manufactured by the register and receiver and Hunt, or by anyone with their connivance, are entirely unsupported by direct evidence.

It is alleged in the bill also that "By the rules and regulations which then and since have governed it in the issue of patents for land located with agricultural college scrip, no patent was issued by your orator except on presentation at its General Land-Office, by the person making such location, his agent, or his assign, of the duplicate certificate as aforesaid delivered to the locator for the land for which a patent is claimed," and "that after the forwarding by the said Stanton and Cook of said supposed proofs of preemption, said agricultural college scrip, said money, said non-mineral affidavit, and said duplicate certificate, in each of the said pretended preemption claims as aforesaid mentioned, to your orator's General Land-Office at Washington, the said Alexander C. Hunt, pretending to act as agent of each of said supposed preemptors, presented to the officers of the General Land-Office such other duplicate certificate of location, and requested said officers to cause a patent for each of the said several pieces of land to issue from your orator to the said supposed persons in each case purporting to claim and apply for the same." And it is added that the officers of the General Land-Office, confiding in the honesty of the register and receiver, and believing the statements contained in the proofs to be true, did issue its patents therefor. The allegation is that the patents were issued to Hunt. In point of fact, it appears from the evidence that a number of patents were delivered to Britton & Gray, W. P. Dunwoody, and W. W. Cowling, respectively, through whom the duplicate certificates were presented to the General Land-Office for that purpose. There is no allegation that these were not real persons, nor are any charges made against them as participants in the fraud. They profess to represent the parties entitled

to the patents; they must have known for whom in fact they were acting. There is nothing to show that they were not accessible as witnesses. From the correspondence in the record it appears that Britton & Gray were transacting business in the City of Washington, and that Cowling was also a resident of the District of Columbia. None of these parties were called by the Government as witnesses. Whatever may be said as an excuse for the failure to call Hunt and Stanton and Cook, on the ground that they are charged with being the actual conspirators in the fraud, no reason can be assigned for not calling Britton & Gray, Dunwoody and Cowling.

Neither do we think the reason assigned, as an excuse on the part of the Government for not calling the register and receiver as witnesses, is valid or satisfactory. One of them, it was said at the bar, had died. But the other might and ought to have been examined. He was one of its own officers, through whom the Government had received the price of the lands sold, and which it has ever since retained. If his official conduct was impugned, nevertheless his misconduct, if proved, was not imputable to the defendants, and they should not be prejudiced by the odium of an accusation against him. The United States had trusted him, and, inspired by that confidence, the defendants also had relied upon his official acts. In this faith they had paid full value for what they had reason to believe was a perfect title. They were not accused of any complicity with, nor had they any knowledge of, the fraud charged. In the absence of direct proof of his guilt the Government could not properly treat the defendants as his confederates, nor deprive them of any defense which as a witness he might be able to make for himself. The United States had no higher interest at stake than to establish the truth and justice of the transaction. It was due from it to these parties, whose estate this suit was instituted to defeat, to produce and examine as witnesses those who must have had the best knowledge of the facts, so as not to force the defendants to explanations which, by the very theory of their innocence and ignorance, they were incapable of making. To raise a suspicion, however strong, of the fraud and wrong doing of its own officers is not enough to justify the Government in casting upon the defendants the burden of establishing their title.

In addition, warranty deeds, made to Jackson as trustee, were put in evidence by the Government, reciting a consideration in each case, amounting in the aggregate to $52,200, to the payment of which Jackson also testifies. Each of these deeds was executed, acknowledged, and recorded in conformity with law. They were regular on their face, the acknowledgments purporting to have been taken by public officers before whom, it is recited, the grantors severally appeared and acknowledged their execution. These officers, if called and examined as witnesses, would probably have thrown some light upon the transaction, and should have been examined upon the points in issue. It is to be presumed that they could have testified whether any persons in fact appeared before them at the times and places named in their certificates, and whether, if so, they were identified as being the persons named as grantors in the deeds. None of them were in fact called on the part of the United States, and no reason is assigned for not having done so. It thus appears that the Government did not make all the proof of which the nature of the case was susceptible, and which was apparently within its reach.

On the other hand, the defendants by their evidence, have fully established all the steps by which they became connected with the transaction. The lands were bought and paid for at their full value by William S. Jackson, acting for himself and associates, who united together for the purpose of making purchases of land in that region, upon Jackson's belief and assurance of its ultimate value, expecting it to increase by the building of railroads and general growth of the country. He arranged with Hunt, who was engaged in dealing in lands, and had been Governor of the Territory, to pay for titles to such lands as he might accept. Hunt submitted to him descriptions of lands which he said he could control, from which Jackson made selections. For these Hunt sent to Jackson deeds duly executed, attested and acknowledged, accompanied by receiver's certificates in regular form, showing that the party named as grantor was entitled to a patent. These he was advised by counsel to accept, and did accept in good faith, as being equivalent to patents. In many instances the patents were issued before the deeds were executed. Jackson had no connection whatever with making the proofs of preemption, and had no knowledge in reference thereto, except such as was disclosed by the deeds and certificates, in reliance upon which, and without visiting the lands or having them examined, he bought. The deeds to Jackson were duly acknowledged before competent officers by persons certified to be the grantors therein named. The transactions were several, as regards the various tracts of land, and successive, during more than two years, the deeds being delivered within a period extending from May 2, 1873, to May 21, 1875. The circumstance that many of the acknowledgments of the deeds were taken in Arapahoe County before a notary in Hunt's office, while the grantors purported to be residents of Las Animas County, was not calculated to raise any suspicion of fraud, as Jackson supposed that Hunt was dealing with the preemptors, and was procuring their deeds to be executed for delivery to him, and it was natural to expect that this would be done at Hunt's own office. In fact, fourteen of the acknowledgments were taken before other officers, and some of them in Las Animas County. That Jackson and his assigns, the Coal and Town Company, and its successor, the Coal and Iron Company, in good faith believed that they had acquired a valid title to these lands, is manifest from their subsequent dealing with them. They not only paid full value for the lands in the condition in which they were, but they made large investments thereon in the way of improvements. At the time of the organization of the consolidated Company there were upon the premises described in the bill coke ovens and machinery in connection therewith, buildings constituting the Town of El Moro, and coal mine improvements, consisting of en-

tries, rooms, gangways, tracks, chutes, repair shops, houses, and store buildings. Coal was then, between six and seven years after Jackson's purchase, being mined upon one quarter section, and the Town of El Moro covered thirty or forty acres, comprising twenty to twenty-five buildings, erected by various individuals, to whom the Company had sold lots, in accordance with a regular survey and map of the town site. The entire value of the mine and coke improvements was estimated to be about $250,000. The property was used by the Company in connection with works which they had established at South Pueblo for the manufacture of iron and steel, on which there had been an expenditure of from one to two millions of dollars, the coal and coke necessary for carrying on which was obtained from the coal mines on part of the premises in dispute. As against interests of this magnitude and value rested upon a claim of title, the good faith of which on the part of the defendants is absolutely unimpeached, the proof of a fraud which renders their title absolutely void should be stronger than the legal presumptions on which it may rightfully rest.

It is urged in argument by the Solicitor-General that this case cannot be distinguished from that of *Moffat* v. *U. S.* 112 U. S. 24 [28: 623]. The two cases are undoubtedly similar in their general aspects, but, nevertheless, differ in some particulars most material to the decision. It is stated in the report of the case cited that "The testimony taken fully established the truth of the allegations and charges, except as to the knowledge by Moffat and Carr of the alleged frauds." The charges proven, or to be taken as proven, therefore, as set forth in the bill, were, that the title papers in the case were manufactured by a clerk in the office of the receiver, and that the receiver was also the owner of the agricultural college scrip used to pay for the lands located, and that, for the purpose of locating the land with it in the name of Quinlan, the register and receiver had inserted in a blank indorsement his fictitious name and and residence, and in that name had located the scrip on the land, there being no such person, nor any settlement and improvement on the land; and that the duplicate certificate on which the patent issued was presented to the General Land-Office by the defendant himself, who was thus brought into direct connection with the officers who had committed the fraud, and with the transaction before the issue of the patent. In that case Moffat did not offer his deed in evidence, was not examined as a witness, and attempted no proof either of his own innocence or of the payment of value, but stood without explanation as to who his immediate grantors were, or how he came in contact with them. The receiver was examined as a witness, but wholly failed to meet the charges alleged against him. There was further proof tending to show that the acknowledgments of the deeds to Moffat had been taken without identification of the grantors from whom Moffat received his deeds directly, and in respect to whom he must have had some knowledge. These circumstances, in our opinion, clearly distinguish that case from the present one.

There is, however, another ground on which it is contended by the Government that the patents described in the bill are void. It is alleged that the lands in controversy were not subject to settlement and sale under the pre emption laws, being "known mines" within the description of those laws. The Act of Sept. 4, 1841, 5 Stat. at L., 455, chap. 16, § 10, provided that no preemption entry should be made on "lands on which are situated any known salines or mines." By the Act of July 1, 1864, 13 Stat. at L., 343, chap. 205, section 1, it is enacted "That where any tracts embracing coal beds or coal fields constituting portions of the public domain, and which as 'mines' are excluded from the Preemption Act of 1841, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum."

The language of the Preemption Act of 1841 is preserved in section 2258 of the Revised Statutes. The Act of 1864 and its supplemental Act of March 3, 1865, 13 Stat. at L., 529, chap. 107, were substantially re-enacted by the Act of March 3, 1873, 17 Stat. at L., 607, chap. 279, now embodied in section 2347 of the Revised Statutes, and the sections immediately following. The force and meaning of the original legislation remains unchanged. The subsequent provisions relate to the classification and terms and mode of entry and sale of the coal lands excluded from preemption by the laws on that subject. In reference to coal lands which are noted on public surveys and plats as such, of course it is not to be disputed that their character is thereby made known so as to withdraw them from entry under the Preemption and Homestead Acts. Where this is not done it remains, as in the present case, to determine how the character of the lands is to be ascertained, so that they may be classified as those "on which are situated any known salines or mines."

It is argued by the Solicitor-General, upon the facts as disclosed by the evidence in this record, that the lands covered by these patents embraced "known mines" of coal, and that, as such lands were expressly excepted out of the preemption laws, the patents issued therefor were void for want of power on the part of the officer to issue them, as decided in *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87 [3: 665]; *Minter* v. *Crommelin*, 59 U. S. 18 How. 87 [15: 279]; *Reichart* v. *Felps*, 73 U. S. 6 Wall. 160 [18: 849]; *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 660 [22: 639]. In the last named case, *Morton* v. *Nebraska*, it was said, page 674 [645]: "The salines in this case were not hidden as mines often are, but were so incrusted with salt that they resembled 'snow-covered lakes,' and were consequently not subject to preemption." In *McLaughlin* v. *U. S.* 107 U. S. 526 [27: 621] the decree of the circuit court canceling the patent, on the ground that it purported to convey lands as part of a railroad grant, which were excepted therefrom as mineral lands, was affirmed. The court says, page 528 [621]: "It is satisfactorily proven, as we think, that

cinnabar, the mineral which carries quicksilver, was found there as early as 1863; that a man named Powell resided on the land and mined this cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by the defendant McLaughlin, as agent of the Western Pacific Railroad Company, and that these facts were known to him. He is not, therefore, an innocent purchaser." See *Western Pacific R. R. Co.* v. *U. S.* 108 U. S. 510 [27: 806].

In the case of *Mullan* v. *U. S.* 118 U. S. 271 [30: 170] after referring to the Acts of Congress above recited, the court, speaking of the Act of July 1, 1864, says, page 277 [172]: "This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that after it was made coal lands were to be treated as mineral lands. That the land now in dispute was 'known' coal land at the time it was selected, no one can doubt. It had been worked as a mine for many years before, and it had upon its surface all the appliances necessary for reaching, taking out, and delivering the coal. That Barnard knew what it was when he asked for its location for his use is absolutely certain, because he was one of the agents of the coal company at the time, and undoubtedly acted in its behalf in all that he did. If Mullan and Avery were ignorant of the fact when they acquired their respective interests in the property, it was because they willfully shut their eyes to what was going on around them, and purposely kept themselves in ignorance of notorious facts. But the evidence satisfies us entirely that they were not ignorant."

It will thus be seen that, so far as the decisions of this court have heretofore gone, no lands have been held to be "known mines" unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine which had been worked or was capable of being worked.

In the case of *Deffeback* v. *Hawke*, 115 U. S. 392 [29: 428], the legislation on the subject was reviewed at length. It was there held that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such land, except in the States of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. The court says, page 404 [426]: "We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. * * * We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler, and patented by the Government, under the preemption laws, may be found years after the patent has been issued to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

It is not sufficient, in our opinion, to constitute "known mines" of coal, within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent and of greater or less value, as shown by outcroppings. The Act of 1864 evidently contemplates a distinction between coal beds or coal fields excluded from the preemption Act of 1841 as "known mines," and other coal beds or coal fields not coming within that description. We hold, therefore, that to constitute the exemption contemplated by the Preemption Act under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the Preemption Act cannot be successfully assailed, In the present case, the testimony, in our opinion, does not justify us in finding that at the time Jackson acquired his title there were upon any part of the premises in controversy any "known mines" of coal, in the sense of the statute.

For these reasons the decree of the Circuit Court is reversed and the cause remanded, with a direction to dismiss the bill; and it is so ordered.

PLINY JEWELL ET AL., *Appts.*,

v.

JOHN KNIGHT ET AL.

(See S. C. Reporter's ed. 426–436.)

Certificate of division—how points certified—case, when dismissed—statement of facts—mixed question—lawful preference.

1. Under the statutes authorizing questions upon which two judges of the circuit are divided in opinion to be certified to this court, the points certified must be questions of law only, and not questions of fact, or of mixed law and fact.

2. The whole case, even when its decision turns upon matter of law only, cannot be sent up by certificate of division. Nor can a splitting up of the whole case into the form of several questions enable the court to take jurisdiction.

3. Whenever the jurisdiction of this court depends upon a certificate of division of opinion, and the questions certified are not such as this court is authorized to answer, the case must be dismissed.

4. The statement of facts should be one of ultimate facts, leaving nothing but a conclusion of law to be drawn; not a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found.

5. Whether a sale of goods was fraudulent as against the plaintiffs is not a pure question of law, but a question either of fact, or of mixed law and fact.

6. In the absence of any bankrupt or insolvent law, a debtor may lawfully give a preference to one of his creditors if he does not thereby intend to defraud the others; and a sale and delivery of goods in satisfaction of an honest debt cannot be avoided by other creditors, unless made and received with intent in fact to defraud them. The fact that one of the creditors preferred was the debtor's wife does not affect the question.

[No. 48.]

Argued Nov. 3, 4, 1887. Decided Dec. 5, 1887.

APPEAL from the Circuit Court of the United States for the District of Indiana. *Dismissed.*

The facts are stated by the court.

Messrs. **Benjamin Harrison** and **Horace Speed,** for appellants:

The cognovit itself was an impending lien upon John Knight's property—the store merchandise.

Buckingham v. *McLean*, 54 U. S. 13 How. 150 (14: 90).

A man who buys goods on credit, not intending to pay for them, commits a fraud. The phrase "intends to pay" means that he honestly believes and expects that he will pay for them. It does not include a mere speculative possibility of payment, nor speculative experiments at the risk of the persons who sell on credit.

Johnson v. *Monell*, 2 Keyes, 663, 664; *Hilliard* v. *Cagle*, 46 Miss. 339; *Talcott* v. *Henderson*, 31 Ohio St. 162; *Davis* v. *Stewart*, 8 Fed. Rep. 804.

And if the purchaser has been for a long time trading with old customers, and so establishing a proper confidence, he must, if there is a sudden, serious, unfavorable change in his affairs, known only to himself, inform them of that change.

Brown v. *Montgomery*, 20 N. Y. 287; *Mitchell* v. *Worden*, 20 Barb. 253; *Pike* v. *Wieting*, 49 Barb. 315; *Stewart* v. *Emerson*, 52 N. H. 316; *Chaffee* v. *Fort*, 2 Lans. 86; *Johnson* v. *Monell*, 2 Keyes, 655; Kerr, Fraud & M. 109; *Bank of Republic* v. *Baxter*, 31 Vt. 111; *Bufe* v. *Turner*, 6 Taunt. 338; *Irving* v. *Motly*, 7 Bing. 543; *Conyers* v. *Ennis*, 2 Mason, 239, 240; *Hilliard* v. *Cagle*, 46 Miss. 337.

The fraud on Knight's part was gross.

Devoe v. *Brandt*, 53 N. Y. 462; *Durell* v. *Haley*, 1 Paige, 492; *Buckingham* v. *McLean*, 54 U. S. 13 How. 150, 166, 167 (14:90, 97); *Re Pitts*, 8 Fed. Rep. 264.

It is not necessary both that John Knight should have had a fraudulent intent, and that his codefendants should have had knowledge of that fact. It would be amply sufficient if they had notice.

Distilled Spirits, 78 U. S. 11 Wall. 366 (20: 171); *Hilliard* v. *Cagle*, 46 Miss. 309.

A sale under the execution by the sheriff would have been fraudulent.

Bunn v. *Ahl*, 29 Pa. 387; *D'Ivernois* v. *Leavitt*, 23 Barb. 63; *Mackie* v. *Cairns*, 5 Cow. 571, 579.

This series of actions belongs to that class which the court would not permit, because they are injurious to the community and therefore contrary to public policy.

Ex parte Russell, L. R. 19 Ch. Div. 598, 599; *Mackay* v. *Douglas*, L. R. 14 Eq. 118; *Mullen* v. *Wilson*, 44 Pa. 413; *Fisher* v. *Lewis*, 69 Mo. 630; *Beeckman* v. *Montgomery*, 14 N. J. Eq. 111; Pom. Eq. Jur. § 978.

Such stipulations tend inevitably to give a fraudulent advantage to the debtor over his other creditors.

Tennessee Nat. Bank v. *Ebbert*, 9 Heisk. 153; *Nailer* v. *Young*, 7 Lea (Tenn.) 735; *Joseph* v. *Levi*, 58 Miss. 843; *Hilliard* v. *Cagle*, *supra*; *Pettibone* v. *Stevens*, 15 Conn. 26; *State* v. *Mueller*, 10 Mo. App. 87; *Clow* v. *Woods*, 5 Serg. & R. 275.

The policy of the law makes the acts illegal. *McKibbin* v. *Martin*, 64 Pa. 352.

It has already been decided in *Kehr* v. *Smith*, 87 U. S. 20 Wall. 36 (22: 315), that where a deed is set aside for fraud as to existing creditors, it is set aside as to both prior and subsequent creditors. And conversely, the cases there cited, particularly.

Maganley's Trust, 5 De Gex. & S. 1; *Jenkyn* v. *Vaughan*, 3 Drew. 424.

A cognovit cannot be taken and held while an insolvent merchant makes many purchases and afterwards makes one effort to get free, and when that effort fails the cognovit is entered, and a levy thereunder is made upon all his property including that he had bought on credit while the cognovit was so held, without the cognovit being subject to the same objection made to the trust deed, held for the same purpose.

Hilliard v. *Cagle*, *supra*; *Gill* v. *Griffith*, 2 Md. Ch. 270; *Hildeburn* v. *Brown*, 17 B. Mon. 779; *Scrivenor* v. *Scrivenor*, 1 B. Mon. 374; *Hungerford* v. *Earle*, 2 Vern. 261; *Blennerhassett* v. *Sherman*, 105 U. S. 118–120 (26: 1086).

The certificate asks several questions, which might, perhaps, have been included in one general question, as in *Leland* v. *Wilkinson*, 35 U. S. 10 Pet. 293 (9: 430); *U. S.* v. *Chicago*, 48 U. S. 7 How. 191 (12: 663); *Harris* v. *Elliott*, 35 U. S. 10 Pet. 25 (9: 333); *Somerville* v. *Hamilton*, 17 U. S. 4 Wheat. 230 (4: 558).

Where all the facts are stated, fraud becomes a question of law.

Robinson v. *Elliott*, 89 U. S. 22 Wall. 522 (22: 762); *Jenners* v. *Doe*, 9 Ind. 461; *New Albany Ins. Co.* v. *Wilcoxson*, 21 Ind. 358; *Louthain* v. *Miller*, 85 Ind. 163, 164; *Connor* v. *Citizens St. R. Co.* 1 Ind. (L. ed.) 585, 2 West. Rep. 625, 105 Ind. 65, 66.

By the cognovit Knight, in law, procured the seizure of his property on execution.

Balfour v. *Wheeler*, 18 Fed. Rep. 896, 897; *Pike* v. *Wieting*, 49 Barb. 317; *Chaffee* v. *Fort*, 2 Lans. 86.

The judgment and execution, in pursuance of the plan which made the cognovit bad, were bad also, and so was the sale in satisfaction of them.

D'Ivernois v. *Leavitt*, and *Bunn* v. *Ahl*, *supra;* Bump, Fr. Conv. 3d ed. 433; *Vandibur* v. *Love*, 10 Ind. 54; *Sidener* v. *White*, 46 Ind. 588.

Messrs. **Joseph E. McDonald**, *John M. Butler* and **Ferdinand Winter**, for appellees:

The questions which may be considered by the court upon a certificate of division of opinion must be:

1. Questions material to, and which have actually arisen upon the facts of the case, and not mere abstract questions.

2. Questions of law only, and not questions of fact, or of mixed law and fact for the determination of which it is necessary to examine the facts of the case.

3. Questions presenting but a single point, and not, separately or altogether, involving a decision of the whole case.

State Nat. Bank v. *St. Louis R. F. Co.* 122 U. S. 21 (30: 1121); *Williamsport Nat. Bank* v. *Knapp*, 119 U. S. 357 (30: 446); *Waterville* v. *Van Slyke* 116 U. S. 699 (29: 772); *California etc., Paving Co.* v. *Molitor*, 113 U. S. 609 (28: 1106); *Weeth* v. *New England Mortgage S. Co.* 106 U. S. 605 (27: 99); *Brobst* v. *Brobst*, 71 U. S. 4 Wall. 2 (18: 387); *Havemeyer* v. *Iowa County*, 70 U. S. 3 Wall. 294 (18: 38); *Dennistoun* v. *Stewart*, 59 U. S. 18 How. 565 (15: 489.)

The Statute of Indiana makes the question of whether a transfer of property is voidable by creditors on account of fraud, in all cases, a question of fact.

R. S. 1881, § 4924; *Pence* v. *Croan*, 51 Ind. 336.

And this is the settled rule as decided in many cases.

Sherman v. *Hogland*, 54 Ind. 578; *Leasure* v. *Coburn*, 57 Ind. 274; *Parton* v. *Yates*, 41 Ind. 456; *Kane* v. *Drake*, 27 Ind. 29; *Luce* v. *Shoff*, 70 Ind. 152; *Sedgwick* v. *Tucker*, 90 Ind. 271; *Willis* v. *Thompson*, 93 Ind. 62; *Medsker* v. *Bonebrake*, 108 U. S. 66 (27: 654); *Jones* v. *Simpson*, 116 U. S. 609 (29: 742); *Prewit* v. *Wilson*, 103 U. S. 22 (26: 360); *Magniac* v. *Thompson*, 32 U. S. 7 Pet. 348 (8: 709); *Warner* v. *Norton*, 61 U. S. 20 How. 448 (15: 950.)

The question of fraud being one of fact, none of the questions certified can properly be considered by the court.

The questions present the whole case for decision.

Wilson v. *Barnum*, 49 U. S. 8 How. 258 (12: 1070); *U. S.* v. *Bailey*, 34 U. S. 9 Pet. 265 (9: 123.)

The same end is sought to be attained here by separating the whole case into several questions. This cannot be done.

White v. *Turk*, 37 U. S. 12 Pet. 238 (9: 1069); *Nesmith* v. *Sheldon*, 47 U. S. 6 How. 41 (12: 335); *Webster* v. *Cooper*, 51 U. S. 10 How. 54 (13: 325); *Dennistoun* v. *Stewart*, *supra.*

A cognovit, until it is put in judgment, is not a lien upon any property of the debtor.

R. S. 1881, §§ 608, 686; *Buckingham* v. *McLean*, 54 U. S. 13 How. 150 (14: 90); *Blennerhassett* v. *Sherman*, 105 U. S. 100 (26: 1080); *Hilliard* v. *Cagle*, 46 Mass. 309; *Bunn* v. *Ahl*, 29 Pa. 387; *Devoe* v. *Brandt*, 53 N. Y. 462.

At common law cognovits might be held for a considerable time.

Manufacturers & M. Bank v. *St. John*, 5 Hill, 497.

The cognovit itself was not vitiated by this delay; but, even if it had been, the subsequent transaction, entirely disconnected, and the *bona fide* of which is not questioned, would not be affected.

Stewart v. *Dunham*, 115 U. S. 61 (29: 329); *Harvey* v. *Mix*, 24 Conn. 406; *Matthews* v. *Buck*, 48 Me. 265; *Oriental Bank* v. *Haskins*, 3 Met. 332; Bump, Fr. Conv. 467, 483.

Even where there is a fraudulent intent on the part of the vendor, the vendee for value will not be affected unless he has knowledge of such fraudulent intent.

Medsker v. *Bonebrake*, *Jones* v. *Simpson*, *Prewit* v. *Wilson*, and *Magniac* v. *Thompson*, *supra; Lipperd* v. *Edwards*, 39 Ind. 165; *Bunnel* v. *Witherow*, 29 Ind. 123.

Mr. Justice **Gray** delivered the opinion of the court:

The claim of each plaintiff being for less than $5,000, the amount in dispute, as was admitted at the bar, is insufficient of itself to give this court jurisdiction. *Stewart* v. *Dunham*, 115 U. S. 61 [29:329]; *Gibson* v. *Shufeldt*, 122 U. S. 27 [30:1083].

The jurisdiction of this case therefore depends upon the statutes which provide that when, on the trial or hearing of any civil suit or proceeding before the circuit court held by the circuit judge and the district judge, or by either of them and a justice of this court, any question occurs upon which the opinions of the judges are opposed, the opinion of the presiding judge shall prevail and be considered as the opinion of the court for the time being; "The point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record;" and the final judgment or decree "may be reviewed, and affirmed or reversed or modified, by the supreme court, on writ of error or appeal." R. S. §§ 650, 652, 693.

Under these statutes, and the earlier ones authorizing questions upon which two judges of the circuit court were divided in opinion to be certified to this court, it has been established by repeated decisions that each question so certified must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered, without regard to other issues of law or of fact in the case.

The points certified must be questions of law only, and not questions of fact, or of mixed law and fact—"not such as involve or imply conclusions or judgment by the court upon the weight or effect of testimony or facts adduced in the cause." *Dennistoun* v. *Stewart*, 59 U. S. 18 How. 565, 568 [15: 489, 490]; *Wilson* v. *Barnum*, 49 U. S. 8 How. 258 [12:1070]; *Silliman* v. *Hudson River Bridge Co.* 66 U. S. 1 Black, 562 [17:81] *Daniels* v. *Chicago & R. I. R. R. Co.* 70 U. S. 3 Wall. 250 [18:224]; *Brobst* v. *Brobst*, 71 U. S. 4 Wall. 2 [18:387]; *Weeth* v. *New England Mortgage S. Co.* 106 U. S. 605 [27: 99]; *California, etc., Paving Co.* v. *Molitor*, 113 U. S. 609 [28:1106]; *Waterville* v. *Van*

Slyke, 116 U. S. 699 [29:772]; *Williamsport Nat. Bank* v. *Knapp*, 119 U. S. 357 [30:446]. The question of fraud or no fraud is one necessarily compounded of fact and of law, and the fact must be distinctly found before this court can decide the law upon a certificate of division of opinion. *Ogilvie* v. *Knox Ins. Co.* 59 U. S. 18 How. 577, 581 [15:490, 492]; *U. S.* v. *City Bank*, 60 U. S. 19 How. 385 [15:662]; *Havemeyer* v. *Iowa County*, 70 U. S. 3 Wall. 294 [18:38]; *Watson* v. *Taylor*, 88 U. S. 21 Wall. 378 [22:576].

The whole case, even when its decision turns upon matters of law only cannot be sent up by certificate of division. *Saunders* v. *Gould*, 29 U. S. 4 Pet. 392 [7:897]; *U. S.* v. *Bailey*, 34 U. S. 9 Pet. 267 [9:124]; *Harris* v. *Elliott*, 35 U. S. 10 Pet. 25 [9:333]; *White* v. *Turk*, 37 U. S. 12 Pet. 238 [9:1069]; *U. S.* v. *Briggs*, 46 U. S. 5 How. 208 [12:119]; *Sadler* v. *Hoover*, 48 U. S. 7 How. 646 [12:855]; *U. S.* v. *Northway*; 120 U. S. 327 [30:664]; *State Bank* v. *St. Louis R. F. Co.* 122 U. S. 21 [30:1121]. Nor can a splitting up of the whole case and of the form of several questions enable the court to take jurisdiction. *White* v. *Turk*, above cited; *Nesmith* v. *Sheldon*, 47 U. S. 6 How. 41 [12:335]; *Luther* v. *Borden*, 48 U. S. 7 How. 1, 47 [12:581,601]; *Webster* v. *Cooper*, 51 U. S. 10 How. 54 [13:325].

In *Webster* v. *Cooper*, decided at December Term, 1850, it appearing by the record that the whole case had been divided into points and sent up to this court, and that several of the latter points could not have arisen until the previous ones had been first decided, this court declined to take jurisdiction, and *Chief Justice* Taney said: "This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intented it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, which might or might not arise as previous questions were ruled the one way or the other." P. 55 [325].

As the Chief Justice there observed, in some earlier instances, questions irregularly certified had been acted upon and decided. But the later decisions already referred to show that this court has since been careful not to exceed its lawful jurisdiction in this class of cases; and that under the existing statutes, as under those which preceded them, whenever the jurisdiction of this court depends upon a certificate of division of opinion, and the questions certified are not such as this court is authorized to answer, the case must be dismissed.

In the present case, general creditors of Knight seek to set aside, as fraudulent against them, a warrant of attorney to confess judgment, executed by Knight to secure the payment of money lent to him in good faith by his wife and his bankers, and a subsequent sale of his stock of goods to satisfy those debts.

The statement (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call "the facts found" is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditors' knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts, in the nature of matters of evidence, upon which no decision can be made without inferring a fact which is not found.

The main issue in the case, upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a pure question of law, but a question either of fact or of mixed law and fact.

In the absence of any bankrupt or insolvent law, a debtor may lawfully give a preference to one of his creditors, if he does not thereby intend to defraud the others; and a sale and delivery of goods in satisfaction of an honest debt cannot be avoided by other creditors, unless made and received with intent in fact to defraud them. This is well settled by the decisions of this court, as well as by those of the highest court of the State of Indiana, where these transactions took place. *Buckingham* v. *McLean*, 54 U. S. 13 How. 151, 167]14:91, 97]; *Warner* v. *Norton*, 61 U. S. 20 How. 448 [15:950]; *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 513, 520 [22:758, 761]; *Medsker* v. *Bonebrake*, 108 U. S. 66 [27:654]; *Stewart* v. *Dunham*, 115 U. S. 61 [29:329]; *Jones* v. *Simpson*, 116 U. S. 609 [29:742]; *People's Savings Bank* v. *Bates*, 120 U. S. 556 [30:754]; *Huiskamp* v. *Moline Wagon Co.* 121 U. S. 310, 319 [30:971, 974]; *Pence* v. *Croan*, 51 Ind. 336; *Leasure* v. *Coburn*, 57 Ind. 274; *Willis* v. *Thompson*, 93 Ind. 62. The fact that one of the creditors preferred was the debtor's wife does not affect the question. *Magniac* v. *Thompson*, 32 U. S. 7 Pet. 348 [8:709]; *Bean* v. *Patterson*, 122 U. S. 496 [30:1126].

Many of the cases cited in the learned arguments at the bar were of voluntary conveyances, or arose under a Bankrupt Act, or presented the question whether there was sufficient evidence of fraudulent intent to be submitted to a jury, or were decided by a court authorized to pass upon the facts as well as the law, and therefore have no direct or important bearing upon this case.

Not one of the questions certified presents a distinct point of law; and each of them, either in express terms or by necessary implication, involves in its decision a consideration of all the circumstances of the case. The first question, whether the six weeks' delay in taking judgment upon the warrant of attorney made the subsequent sale voidable by the plaintiffs, as well as the second question, whether evidence of the debtor's fraudulent intent and of the preferred creditors' knowledge of that intent was requisite to render "said sale" void as against the plaintiffs, could not be determined except upon a view of all the attendant circumstances. The third question, whether "such sale," if fraudulent, would be voidable in favor of the whole or of part only of the plaintiff's debts, could not arise until the sale had been decided to be fraudulent. The fourth and fifth questions frankly submit in two subdivisions the general question, whether "under the circumstances" the sale was fraudulent as against the plaintiffs.

As was recently said by this court, speaking of questions certified in similar form: "They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone;" and "It is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so." *Waterville* v. *Van Slyke*, 116 U. S. 699, 704 [29:772, 774].

Upon this record, therefore, this court cannot decide, either that the decree of the Circuit Court should be affirmed, or that it should be reversed or modified, but must order the *appeal to be dismissed.*

THOMAS H. STRYKER, EXR. of JOHN STRYKER, Deceased, *Plff. in Err.*,

v.

GEORGE CRANE, Admr. of EDWARD K. GOODNOW, Deceased.

RICHARD B. CHAPMAN, *Plff. in Err.*, v. SAME.

GEORGE W. WELLES, EXR., ET AL., *Plffs. in Err.*, v. SAME.

EDWARD H. LITCHFIELD, EXR., *Plff. in Err.*, v. SAME.

EDWARD H. LITCHFIELD, Admr., *Plff. in Err.*, v. SAME.

See S. C. "*Stryker* v. *Goodnow*," Reporter's ed. 527–540.)

Federal question—town tax law—state judgments, when reviewable—prior decision—estoppel—upon whom binding.

1. Whether lands sold by the United States are taxable within a year after the title passed out of the United States, is not a federal question.

2. There was nothing in the Act of Congress admitting Iowa into the Union as a State, which in any manner interfered with the power of the State to tax lands as soon as they ceased to be the property of the United States. The only prohibition was against taxation whilst the United States was the owner.

3. A judgment of a state court which relates only to the construction of a state statute, which is in no way in conflict with the Constitution or any law of the United States, is final, and not reviewable here.

4. The decision in the case of *Homestead Company* v. *Valley R. R.* is not a judgment in a suit between the same parties, upon the same cause of action, as here involved, and is not a bar to the recovery in these cases; and the state court did not fail to give full faith and credit to that decision, by deciding that it was not such a bar.

5. The judgment of this court in the case of *Wolcott* v. *Des Moines Co.* is not an estoppel upon the parties in this suit, although it may be referred to by them as a precedent; its effect as an estoppel was confined to the title of the parties in that suit to the land then in controversy.

6. A brief filed at a hearing in this court, by one interested in the question to be decided, does not make him a party to the suit, or bind him, or estop him, by the decree.

[Nos. 42, 215, 669, 670, 671.]

Argued Nov. 1, 1887. Decided Dec. 5, 1887.

IN ERROR to the Supreme Court of the State of Iowa. *Affirmed.*

The facts and case are stated in the opinion.

Messrs. **C. H. Gatch** and *William Connor*, for plaintiffs in error:

Was the question, whether or not the lands upon which the taxes in question were levied were subject to taxation for the year 1861, a federal question? And, if so, was it erroneously decided?

McGregor & M. R. R. Co. v. *Brown*, 39 Iowa, 655; *Iowa Falls & S. C. R. R. Co.* v. *Cherokee County*, 37 Iowa, 483; *Goodrich* v. *Beaman*, Id. 563; *Iowa Falls & S. C. R. Co.* v. *Woodbury County*, 38 Iowa, 498; *Stryker* v. *Polk County*, 22 Iowa, 131; *Litchfield* v. *Hamilton County*, 40 Iowa, 66; *Litchfield* v. *Webster County*, 101 U. S. 773 (25:925).

Was the question whether or not defendant in error was estopped by the judgment of the court in the case of *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 (21:622) a federal question; and, if so, was it erroneously decided?

Goodnow v. *Litchfield*, 59 Iowa, 226; *Tarleton* v. *Johnson*, 25 Ala. 300; *S. C.* 60 Am. Dec. 515; Freem. Judg. §§ 174, 175; *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657 (18:427); *Conger* v. *Chilcote*, 42 Iowa, 18; *Barney* v. *Dewey*, 13 Johns. 224; *Stoddard* v. *Thompson*, 31 Iowa, 80; *Mackay* v. *Dillon*, 45 U. S. 4 How. 421 (11:1038); *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586 (12:892.)

Mr. **George Crane**, for defendant in error:

It is a well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings.

Williamson v. *Berry*, 49 U. S. 8 How. 540 (12:1189) *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 340 (7:170); *Rose* v. *Himely*, 8 U. S. 4 Cranch, 241 (2:608); *Hickey* v. *Stewart*, 44 U. S. 3 How. 762 (11:819); *Bloom* v. *Burdick*, 1 Hill, 130.

The Homestead Company had a perfect right to join the navigation company and all its grantees as defendants in that suit.

Story, Eq. Pl. §§ 72, 78; *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6:289).

It was clearly competent for the Homestead Company to test the title to all the lands mentioned in its petition in a single suit, and to such a suit that company and all its grantees were absolutely necessary and indispensable parties.

Piric v. *Tvedt*, 115 U. S. 41 (29:331); *Starin* v. *New York*, 115 U. S. 248 (29:388); *Crump* v. *Thurber*, 115 U. S. 56 (29:328); *Ayers* v. *Wiswall*, 112 U. S. 187 (28: 693).

If an indispensable party is a citizen of the same State with the plaintiff, the jurisdiction will be defeated because the controversy will not be between citizens of different States, and thus not within the judicial power of the United States as defined by the Constitution.

Ober v. *Gallagher*, 93 U. S. 201 (23:829); *Ayers* v. *Chicago*, 101 U. S. 184 (25:838).

Was it competent for the parties to confer jurisdiction by consent, acquiescence or agreement? This question has been repeatedly answered by this court in the negative.

Mansfield C. & L. M. R. Co. v. *Swan*, 111 U. S. 385 (28:464); *Capron* v. *VanNoorden*, 6 U. S. 2 Cranch, 126 (2:229); *Jackson* v. *Ashton*, 33 U. S. 8 Pet. 148 (8:898).

It was competent for the state court to disregard or annul a judgment of the Federal Court in a collateral proceeding.

Freem. Judg. § 120; *Elliott* v. *Peirsol*, and *Williamson* v. *Berry*, *supra*.

The jurisdiction in any court exercising authority over a subject may be inquired into in every other court.

Latham v. *Edgerton*, 9 Cow. 227; *Hickey* v. *Stewart*, *supra*; *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 466 (21:900); *Harris* v. *Hardeman*, 55 U. S. 14 How. 334 (14:444).

When the record shows that there was no jurisdiction either over the parties or the subject matter, any judgment rendered by the court is absolutely void, and may be so declared in any collateral proceeding.

Galpin v. *Page*, 85 U. S. 18 Wall. 366 (21:962); *Harris* v. *Hardeman*, 55 U. S. 14 How. 342 (14:447); *New York L. Ins. Co.* v. *Bangs*, 103 U. S. 435 (26:580); *Elliott* v. *Peirsol*, *supra*; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 162 (7:383); *Voorhees* v. *Jackson*, 35 U. S. 10 Pet. 477 (9:501); *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 468 (21:901).

The Homestead suit was brought to restrain the prosecution of a large number of actions at law, and to establish in a single proceeding the plaintiff's title to the lands in controversy and as to this part of the case the suit was strictly a proceeding in equity.

1 Story, Eq. Jur. § 457: 2 *Id.* § 854; 1 Pom. Eq. Jur. § 254; Bisph. Eq. § 417; *Woods* v. *Monroe*, 17 Mich. 238; *Third Ave. R. R. Co.* v. *Mayor of N. Y.* 54 N. Y. 159.

Courts of equity cannot take cognizance of law issues.

Russell v. *Clark*, 11 U. S. 7 Cranch, 69 (3:271); *Crane* v. *Bunnell*, 10 Paige, 335; *Roberts* v. *Taliaferro*, 7 Iowa 112; 1 Story, Eq. § 74; 1 Pom. Eq. § 229; *Hipp* v. *Babin*, 60 U. S. 19 How. 278 (15:635); *Parker* v. *Winnipiseogee Lake & W. Cotton Co.* 67 U. S. 2 Black, 550 (17:336).

The bill in the Homestead suit was dismissed, and no ground stated upon which the dismissal was made. The clear presumption of law is, that as to the legal issues it was dismissed by the court for want of jurisdiction.

Wright v. *Deklyne*, 1 Pet. C. C. 202; *Foster* v. *The Richard Busteed*, 100 Mass. 409; *Griffin* v. *Seymour*, 15 Iowa, 32.

To render the judgment conclusive, it must appear by record of the prior suit that the particular matter sought to be concluded was necessarily tried and determined.

Washington Packet Co. v. *Sickles*, 72 U. S. 5 Wall. 592 (18:553); *Supples* v. *Cannon*, 44 Conn. 429; *Foster* v. *The Richard Busteed*, 100 Mass. 411; *Hughes* v. *U. S.* 71 U. S. 4 Wall. 237 (18:305).

To give this court jurisdiction, it must appear affirmatively on the face of the record that the state court decided, either actually or by necessary intendment, that the lands were taxable prior to the second of March, 1861.

Chouteau v. *Gibson*, 111 U. S. 200 (28:400); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 686 (22:444); *Litchfield* v. *Webster County*, 101 U. S. 774 (25:926); *Stryker* v. *Polk County*, 22 Iowa, 135.

The lands were assessed for taxation in 1876; properly, if they were subject to taxation at any time before the fourth Monday in June of that year, otherwise not.

Wisconsin C. R. R. Co. v. *Lincoln County*, 57 Wis. 137; *Bell* v. *Pierce*, 51 N. Y. 12; *People* v. *Chenango Co.* 11 N. Y. 563; *Goodnow* v. *Wells*, 67 Iowa, 654.

As the judgment of the state court is sustainable on the ground that the lands were taxable after March 2, 1861, under the laws of Iowa, a ruling that they were taxable prior to that date would not in this case authorize this court to reverse the case.

Rector v. *Ashley*, 73 U. S. 6 Wall. 142 (18:783); *Moore* v. *Mississippi*, 88 U. S. 21 Wall. 636 (22:653); *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 (20:635).

In actions brought in the names of corporations, the corporations and not the stockholders are the parties to the action.

Bank of Kentucky v. *Wister*, 27 U. S. 2 Pet. 322 (7: 438); *Louisville, C. & C. R. R. Co.* v. *Letson*, 43 U. S. 2 How. 558 (11:377).

Messrs. **C. H. Gatch** and *William Connor*, for plaintiffs in error in reply:

If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

Kennedy v. *Georgia State Bank*, 49 U. S. 8 How. 586 (12:1209).

In *Washington Bridge Co.* v. *Stewart*, 44 U. S. 3 How. 413 (11:658), it was held, after a case has been decided upon its merits and remanded to the court below, if it is again brought up on a second appeal it is then too late to allege that the court had not jurisdiction to try the first appeal.

DeSobry v. *Nicholson*, 70 U. S. 3 Wall. 420 (18:263).

As to when and how far this court will consider and determine questions of state or common law, for purposes which involve questions giving it jurisdiction:

Martin v. *Hunter*, 14 U. S. 1 Wheat. 304 (4:97); *Smith* v. *Maryland*, 10 U. S. 6 Cranch, 286 (3:225).

Mr. Chief Justice **Waite** delivered the opinion of the court:

These suits all grew out of the delay which attended the settlement of the controversies in reference to the Des Moines River improvement land grant made by Congress to the Territory of Iowa, August 8, 1846, which will be hereafter referred to as the river grant. 9 Stat. at L. 77. The character of those controversies may be seen by referring to the cases of *Dubuque & P. R. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 [16: 500]; *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 [18: 689]; *Williams* v. *Baker*, 84 U. S. 17 Wall. 144 [21: 561]; *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* Id. 153 [21: 622]; *Wolsey* v. *Chapman*, 101 U. S. 755 [27: 915]. At first it was supposed, both by the officers of the United States and of the State, that the grant embraced lands above the Raccoon Fork of the river; and the State of Iowa made conveyances to the Des Moines Navigation and Railroad Company, under which John Stryker.

Richard B. Chapman, Grace H. Litchfield, Edwin C. Litchfield, J. B. Plumb, and William B. Welles each claimed title to a separate tract in that locality as *bona fide* purchasers.

On the 15th of May, 1856, Congress made another grant of lands to the State to aid in the construction of railroads. 11 Stat. at L. 9, chap. 28. This grant conflicted with the river grant if the last named grant extended above the Raccoon Fork. The title of the State under the railroad grant to some of the lands above the Fork, was transferred to the Dubuque and Pacific Railroad Company; and that company, on the 25th of October, 1859, began a suit in ejectment against Edwin C. Litchfield to recover possession of one of the tracts. In that suit it was decided by this court April 9, 1860, that the river grant did not extend above the Fork. *Dubuque & P. R. R. Co.* v. *Litchfield, ubi supra.* Thereupon Congress, on the second of March, 1861, passed a Joint Resolution relinquishing the interest of the United States in the lands above the Fork to the State for the benefit of *bona fide* purchasers under the river grant.

The Des Moines Navigation and Railroad Company, holding title from the State to the lands above the Fork under the river grant, conveyed one of the tracts, on the 8th of August, 1859, to Samuel G. Wolcott, by deed, with full covenants of warranty. In 1865 Wolcott brought suit against the Navigation and Railroad Company in the Circuit Court of the United States for the Southern District of New York to recover damages for a breach of the covenants in that deed, alleging that the title had failed. In that case it was decided by this court, May 13, 1867, that the railroad grant in 1856 did not include any of the lands above the Raccoon Fork which had been claimed under the river grant, and that the title of Wolcott under his deed from the Navigation and Railroad Company had not failed. *Wolcott* v. *Des Moines Nav. & R. R. Co. ubi supra.* While that case was pending in this court, the attorney of the Dubuque and Pacific Railroad Company was allowed to file a brief in support of the claim of Wolcott that the title was in that company and not in the Navigation Company.

The title which the Dubuque and Pacific Railroad Company claimed from the State under the railroad grant passed to the Dubuque and Sioux City Railroad Company in the month of August, 1861, and that company afterwards paid the taxes assessed and levied on the lands in dispute for the years 1861, 1862, and 1863. Those for the year 1861 were paid October 31, 1866; those for 1862, December 9, 1863; and those for 1863, January 20, 1864. On the 12th of November, 1863, the railroad company conveyed to the Iowa Homestead Company, an Iowa corporation, its title to the hands in dispute between the railroad company and the claimants under the river grant. The Homestead Company afterwards paid the taxes on the lands for the years 1864, 1865, 1866, 1867, 1868, 1869, 1870, and 1871.

On the 12th of October, 1869, the Homestead Company began a suit in equity in the District Court of Webster County, Iowa, to quiet its title to the lands, making the Des Moines Navigation and Railroad Company, Samuel G. Wolcott, William B. Welles, Roswell S. Burrows, Edwin C. Litchfield, William J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade, John Stryker, the Des Moines Valley Railroad Company, Thomas Colter, Jacob Crouse, and John P. McDermott, defendants. In the bill it was alleged that the Homestead Company had been in possession of the lands since 1861, and "that they have paid taxes thereon to the State of Iowa since, * * * and if their title has failed they are entitled to have their taxes refunded since 1861 by the holder of the legal title who has not paid them."

As to the defendants Wolcott, Welles, Burrows, Edwin C. Litchfield, McAlpine, Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Wade, and Stryker, it was alleged that they held title to certain parcels of the lands under the river grant. The defendants Colter, Crouse, and McDermott were alleged to be preemption claimants. The Des Moines Navigation and Railroad Company was the corporation to which the State transferred the river grant, and from which the other defendants, who hold under that grant, got their respective titles. The Des Moines Valley Railroad Company was made a defendant because of its claim of title to lands involved in the suit but which did not pass to the Des Moines Navigation and Railroad Company under the river grant. The prayer of the bill as to the several claimants under the river grant was that the Homestead Company might be quieted in its title, and "that, in the event of a decree that the plaintiff's present title, or any part of it, has failed, the Des Moines Navigation and Railroad Company and its assigns may be decreed to repay to the plaintiff all taxes which he has paid on said lands, and interest thereon."

Afterwards, on the 13th of October, 1868, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, three of the defendants, and citizens of New York, filed their petition for the removal of the suit to the Circuit Court of the United States for the District of Iowa, under the Act of March 2, 1867, 14 Stat. at L. 558, chap. 196, on the ground of "prejudice or local influence." This petition was accepted by the state court and an order entered "That this cause be transferred to the said circuit court * * * as to said defendants *in re.*" Under this order the petitioning parties entered a copy of the record in the circuit court on the 17th of March, 1869; and during the summer or fall of that year the defendants, the Des Moines Navigation and Railroad Company, the Tracys, the Litchfields, Wolcott, Chapman, McAlpine, Welles, Wade, and Stryker, all answered, setting up their titles under the river grant to the specific tracts of land held by them respectively, and, as to the taxes paid by the Homestead Company averring that they were paid "voluntarily, with a knowledge of all the facts, and that the complainant is not entitled to have the same or any part thereof refunded."

On the 13th of May, 1870, the following entry was made by the circuit court in the cause: "The Iowa Homestead Company, Complainant,

v.

"The Des Moines Navigation & Railroad Company, Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Edwin C. Litchfield,

Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, Electus B. Litchfield, Edward Wade. John Stryker *et al.*, Defendants.

"This action was commenced in the District Court of Webster County, Iowa, at the October Term of said district court. The defendants, Edwin C. Litchfield, Electus B. Litchfield, and John Stryker, filed their affidavit, bond, and petition asking the removal of this action from said district court to this court, under the provisions of the Act of Congress approved March 2, 1867, entitled 'An Act to Amend an Act for the Removal of Causes in Certain Cases from the State Court,' approved July 27, 1866.

"And it appearing to said district court that said Edwin C. Litchfield, Electus B. Litchfield, and John Stryker were nonresidents of the State of Iowa and residents of the State of New York, and that their application for the removal of this cause to this court in all respects conformed to the requirements of said Act of Congress, the said district court, at the October Term thereof, in the year 1868, made the usual order transferring and removing this cause to this court as to the defendants Edwin C. Litchfield, Electus B. Litchfield, and John Stryker; and this cause as to said defendants was removed to this court for trial.

"And it appearing that the defendants, Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, are, each and every of them, nonresidents of the State of Iowa and District of Iowa, and under the statute above referred to are also entitled to a removal of this cause from the state court, and that said defendants, with the express consent and approval of the plaintiff, have appeared and answered the bill herein, and asked to be made parties defendant, and that their rights may be heard and determined in this court and on the trial of this action.

"And it further appearing to this court that the defendants so asking to be made parties defendant hold under the same title as the defendants Edwin C. Litchfield, Electus B. Litchfield and John Stryker, and that their defense is in all respects identical, with the said plaintiff consenting, it is ordered that said Samuel G. Wolcott, Wm. B. Welles, Roswell S. Burrows, Wm. J. McAlpine, Richard B. Chapman, Albert H. Tracy, Francis W. Tracy, Harriet Tracy, and Edward Wade, and each and every of them, be made parties defendant herein; that the answer filed by said persons be taken and deemed their answer to the complainant's bill; and that by their appearance and answer herein the said persons be deemed and treated as defendants herein and their rights in the premises adjudicated in and by this court in this action."

Afterwards the case came to this court in due course on appeal, where, on the 28th of April, 1873, it was decided that the defendants holding under the river grant had the better title, and that the Homestead company could not recover for the taxes because they were paid voluntarily, without any request from the owners of the land and with a full knowledge of all the facts. A decree was thereupon entered affirming a decree of the circuit court dismissing the bill. *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 [21:622].

The Dubuque and Sioux City Railroad Company assigned to Edward K. Goodnow, then in life, all its claims against the owners of the lands in dispute for taxes paid; and he, on the 26th of July, 1880, brought suits in the Circuit Court of Webster County, one against John Stryker, one against the executor of Edwin C. Litchfield, one against Richard B. Chapman, one against Grace H. Litchfield, and, on the 30th of June, 1881, another against the executor and grantees of William B. Welles, to recover from them respectively the amounts due for the taxes of 1861, 1862 and 1863, paid by the railroad company on their several tracts of land.

As defenses to the actions each of the defendants set up in his answer:

1. That, as to the taxes of 1861 and 1862, the lands belonged at the time of the levies respectively to the United States; "that the title thereto was in the United States, and that said lands were not subject to taxation by Webster County for any purpose for said years, and that if any taxes were assessed and levied thereon for the years aforesaid the same were not a valid or binding lien upon said lands."

2. That Goodnow and his assignor were estopped by the decree in the suit of the *Homestead Company* against the *Des Moines Navigation and Railroad Company and others* from a recovery in this action, that suit having been brought, among other things, for the same taxes, and having been prosecuted under the advice and direction of the Dubuque and Sioux City Railroad Company, before its assignment to Goodnow.

In the suits against Chapman, Welles, the executor of Edwin C. Litchfield, and Grace H. Litchfield, an additional defense was made, to wit: that the decision of this court, at December Term, 1866, in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 [18:689], was a final determination of the disputed questions as to the title and ownership of the lands above the Raccoon Fork in controversy between the Dubuque and Sioux City Railroad Company and the Des Moines Navigation and Railroad Company and its grantees under their respective claims, and that, as these suits were not brought within either five or six years after that decision, they were barred by the Statute of Limitations.

The Supreme Court of Iowa, on appeal from the decree of the Webster Circuit Court in each of the cases, overruled these defenses, denied to the defendants the rights, privileges, and immunities by them respectively set up and claimed under the laws and authority of the United States, and gave judgment against them for the taxes sued for. To reverse those judgments these writs of error were brought. The cases are reported as *Goodnow* v. *Stryker*, 62 Iowa, 221; *Goodnow* v. *Chapman*, 64 Iowa, 602; *Goodnow* v. *Litchfield*, 67 Iowa, 692; *Goodnow* v. *Wells*, 67 Iowa, 654.

The federal questions relied on in argument are:

1. That as the title to the lands remained in the United States until March 2, 1861, and as

by the Act of March 3, 1845, chap. 48, § 7, 5 Stat. at L. 743, admitting Iowa into the Union as a State, it was provided that the State should not levy any tax on public lands within its limits "whilst the same remained the property of the United States," the taxes for the year 1861 were illegal and void, because levied in violation of that Act of Congress.

2. That the decree in the case of *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* was in its legal effect a bar to the recovery in this action, and as the Supreme Court of the State decided otherwise it failed to give full faith and credit to the judicial proceedings of this court acting under the authority of the United States.

3. That the judgment of this court in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* was a final determination on the 13th of May, 1867, against the right of the Dubuque and Sioux City Railroad Company to claim the lands on which the taxes were levied in these cases, and that the legal effect of that judgment was to bar the right of the railroad company, and Goodnow as its assignee, to recover in this action, because the action was not commenced within the time prescribed by the Statute of Limitations after the rendition of that judgment.

These will be considered in their order.

1. As to the taxes of 1861. It is not contended that these taxes were actually levied upon the lands until after the title had passed out of the United States; but the claim is that, by the laws of Iowa in force at the time, "government lands entered or located, or lands purchased from the State, shall not be taxed for the year in which the entry, location, or purchase was made," and that, as these taxes were levied within the year after the title passed out of the United States, they were illegal.

Whether the lands were taxable within a year after the title passed out of the United States is not a federal question. There was nothing in the Act of Congress admitting Iowa into the Union, or in any other Act of Congress to which our attention has been directed, which in any manner interfered with the power of the State to tax lands as soon as they ceased to be the property of the United States. The only prohibition was against taxation whilst the United States were the owners.

The Supreme Court of Iowa has decided that the statute of the State referred to does not apply to these cases, because these lands were neither "entered" nor "located" within the meaning of those terms as applied to the acquisition of lands from the government. Consequently there was nothing in the laws of Iowa to prevent the levy of the taxes for 1861 as soon as the Resolution of March 2, 1861, went into effect. *Goodnow* v. *Wells*, 67 Iowa, 654. This, it was said, is in accordance with previous cases bearing on the same question, among which *Stryker* v. *Polk County*, 22 Iowa, 131, and *Litchfield* v. *Hamilton County*, 40 Iowa, 66, were referred to. With the correctness of this decision we have nothing to do. It relates only to the construction of a state statute which is in no way in conflict with the Constitution or any law of the United States. The judgment of the state court on that question is final, and not reviewable here.

We are referred, however, to *Litchfield* v. *Hamilton County*, 101 U. S. 781 [25: 928] as an authority to the contrary of this. That was a suit in equity brought by Edwin C. Litchfield against the County of Hamilton, in a court of the State, to restrain the collection of taxes for the years 1859, 1860, 1861, 1862, 1863, 1864 and 1865 on lands owned by him in that county, and held under a title similar to that in these cases. The Supreme Court of the State decided (*Litchfield* v. *Hamilton County*, 40 Iowa, 66) that the taxes for all the years were collectible, and to reverse a decree to that effect the case was brought here upon a writ of error. It was submitted on printed arguments when it was reached in the regular call of the docket. A few days before this submission was made an appeal in the suit of *Litchfield* v. *Webster County*, 101 U. S. 773, [25: 925] brought in the Circuit Court of the United States for the District of Iowa, to enjoin the collection of taxes levied by the County of Webster, for the same years, on lands similarly situated in that county, was submitted under Rule 20, and the two cases were before us for consideration at the same time. We decided unanimously that the lands were not taxable for the years 1859, 1860, and 1861, and the principal opinion was prepared in the case of Webster County, which, being here on appeal from the circuit court, was open for consideration upon its merits, without any reference to the limitation of our authority for the review of the judgments of the courts of the States. There was no doubt of our jurisdiction in that case to decide as to the taxes of 1861; and in doing so we held that, as under the Statute of Iowa government lands could not be taxed during the year they were entered or located, these lands were exempt for that year. The case of Hamilton County involved precisely the same questions in the state courts as did that of Webster County in the circuit court. The two cases were argued here substantially in the same way, and in that of Hamilton County our attention was not specially directed to any difference in the federal question presented by the tax for 1861 from that involved in the taxes for 1859 and 1860. The ground of decision in the court below was the same for all the years; and, without noticing the distinction which is now made as to our right to decide in that case upon the validity of the tax of 1861, we allowed the judgment to follow that in the case of Webster County, the two cases being exactly the same on their merits. It now appears we were in error in taking jurisdiction and reversing the judgment in the *Hamilton County Case* for the tax of 1861. The Supreme Court of the State has also decided in the case of *Goodnow* v. *Wells, ubi supra*, that we erred in the decision of the question involved in the tax of 1861 on its merits, because we held that lands acquired from the United States by the title which was then and now under consideration came within the statutory exemption from taxation in the State for one year after the United States ceased to be the owner, having been misled, as is supposed, by an incorrect statement of the law in *McGregor & M. R. Co.* v. *Brown*, 39 Iowa, 655, to the effect that "Government lands are not taxable until a year after they are patented." We may remark also, that, in our opinion, the conclusion then reached by us received further support

from the cases of the *Iowa Falls & S. C. R. R. Co.* v. *Cherokee County*, 37 Iowa, 483; *Goodrich* v. *Beaman*, *Id.* 563; *Iowa Falls & S. C. R. R. Co.* v. *Woodbury County*, 38 Iowa, 498. But whether we were right then on this question or not, it is unnecessary now to consider, as upon the present record we are clearly of opinion that the decision of the court below, to the effect that the lands were taxable for the year 1861, is not reviewable here. That question is one on which the decision of the highest court of the State is conclusive.

2. As to the estoppel by the decree in the case of the *Iowa Homestead Co.* v. *Des Moines Valley R. Co. supra:*

That suit did not embrace the taxes for the years 1861, 1862 and 1863 paid by the Dubuque and Sioux City Railroad Company. The Homestead Company did not acquire title to the lands until November 12, 1863, and it only paid the taxes for 1864 and thereafter. The conveyance by the Railroad Company to the Homestead Company did not profess to transfer the claim of the Railroad Company against the holders of the river-grant title for taxes paid or to be paid. The suit of the Homestead Company was for the land, or the taxes *it* had paid. There was no reference in the pleadings to taxes paid by the Railroad Company, and no claim was made for anything except the payments by the Homestead Company itself. The Homestead Company did not profess to sue as trustee for the Railroad Company. It is true that the Railroad Company, as warrantor of the title of the Homestead Company, aided in the prosecution of that suit, and that the decree may be conclusive evidence of a failure of title in a suit brought by the Homestead Company against the Railroad Company to recover damages for a breach of the covenants of warranty in the deed for the lands; but as the taxes paid by the Railroad Company were in no way involved in the suit, neither the Railroad Company nor the defendants in that suit were concluded as to them by anything contained in the decree. The decision may be referred to as a judicial precedent for holding that taxes paid under the circumstances in which these were paid could not be recovered by the party paying them from the true owners of the land; but it is in no sense a judgment in a suit between the same parties upon the same cause of action as is here involved, and therefore a bar to the recovery in these cases. In our opinion the court below did not fail in its decision to give full faith and credit to that decree.

3. As to the effect of the judgment in *Wolcott* v. *Des Moines Nav. & R. R. Co.* upon the operation of the Statute of Limitations in these cases:

That was a suit between a purchaser of a single half section of the river lands above the Raccoon Fork against his vendor, the Des Moines Navigation and Railroad Company, to recover damages for a breach of the covenants of warranty in the deed of conveyance to him. There was no party to the suit except Wolcott and the Navigation Company. Wolcott claimed nothing under the railroad grant or under the railroad company. It is true that the ground of his action was the superior title of the railroad company as against that of the Navigation Company at the time of the conveyance of the latter company to himself; but he was neither suing for the railroad company nor representing it in the action, so far as anything appears in these records or in that. His suit was nothing more or less than to recover damages from the Navigation Company for a breach of covenants of warranty with himself, in which neither the railroad company nor anyone claiming under it had any interest. The judgment in the action was conclusive as between him and the Navigation Company upon the cause of action involved, but as to no one else. It settled no title between the Navigation Company or its grantees and the Railroad Company or those claiming under that company. That decision is indeed referred to in the case of *Iowa Homestead Co.* v. *Des Moines Valley R. Co. ubi supra*, as "settling" "the question of title to the Des Moines River lands," but that was only in the way of judicial authority as a precedent, and not as an estoppel. The legal operation and effect of the judgment as an estoppel was confined to the title of the parties in that suit to the particular half section of land then in controversy. As to any other tract of the river lands and as to any other parties, it stood, in the language of *Mr. Justice* Miller in *Williams* v. *Baker*, 84 U. S. 17 Wall. 144 [21: 561] only as "an authoritative exposition" of the views of the court on a question which "was argued fully by parties deeply interested on both sides" and which "received attentive consideration," and was, therefore, "entitled to the same weight as other well considered cases." The judgment can be referred to by the parties to this suit as a precedent, but not as an estoppel.

We have not overlooked the fact that a brief was filed at the hearing in this court on behalf of the Railroad Company to support the claim of Wolcott that the title of that company was the best. Such a proceeding did not make the Railroad Company a party to the suit, or bind it by the decree. Being interested in the question to be decided, the company was anxious to secure a judgment that could not be used as a precedent against its own claims in any litigation that might thereafter arise in repect to its own property. It is not an uncommon thing in this court to allow briefs to be presented by or on behalf of persons who are not parties to the suit, but who are interested in the questions to be decided; and it has never been supposed that the judgment in such case would estop the intervener in a suit of his own which presented the same questions. It could be used as a precedent, but not as an estoppel in the second suit.

We find no error in the decisions of the Supreme Court of Iowa upon any of the federal questions involved in these cases, and *each of the judgments is consequently affirmed.*

EDWARD H. LITCHFIELD, Admr. of GRACE H. LITCHFIELD, *Plff. in Err.*,
v.
GEORGE CRANE, Admr. of EDWARD K. GOODNOW.

(See S. C. "*Litchfield* v. *Goodnow*," Reporter's ed. 549, 552.)

Prior adjudication—estoppel.

1. A prior adjudication is not binding on, nor conclusive as to the rights of, one who was not a party to the suit in which the adjudication was had, although he interested himself in securing the adjudication and paid part of the expenses of the suit; those only who are represented by the parties, and claim under them, or in privity with them, are bound by a judgment.

2. Estoppels to be good must be mutual.

[No. 44.]

Argued Nov. 1, 1887. *Decided Dec. 5, 1887.*

IN ERROR to the Supreme Court of the State of Iowa. *Affirmed.*

Reported below, 68 Iowa, 275.

The facts and case are stated in the opinion.

Messrs. **C. H. Gatch** and *William Connor*, for plaintiff in error:

The record presents two federal questions:

First. Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, under the decision and judgment of this court in the case of *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 (21:622).

Second. The plaintiff in error claimed immunity from the demand of the defendant in error, because, by force and virtue of the decision of this court in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 (18: 689), and *Burr* v. *Des Moines Nav. & R. R. Co.* 68 U. S. 1 Wall. 99 (17:561), the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the Statute of Limitations of the State of New York.

If Grace H. Litchfield was a party to the *Homestead Company Case* in such sense that she might claim the benefit of the adjudication, then it will not be denied that the claim of immunity thereunder involves a federal question of which this court has jurisdiction.

In *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657 (18: 427), this court, on page 674 [430] stated the rule generally as to when persons other than parties of record are bound by the adjudication.

In *Conger* v. *Chilcote*, 42 Iowa, 18, it was held that one who is benefited by the prosecution of an action of which he has notice is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment rendered.

Stoddard v. *Thompson*, 31 Iowa, 80.

One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein.

Tarleton v. *Johnson*, 25 Ala. 300; *S. C.* 60 Am. Am. Dec. 515; Freem. Judg. §§ 174, 175; *Barney* v. *Dewey*, 13 Johns. 224.

If Mrs. Litchfield was a "real defendant," though not "a party to the record," the dependence of the defense of prior adjudication upon the question whether she was or not makes that question as above claimed a federal question.

Mackay v. *Dillon*, 45 U. S. 4 How. 421 (11: 1088); *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586 (12:829).

Does the question, whether or not the decision of this court in the case of *Wolcott* v. *Des Moines Nav. R. R.* 72 U. S. 5 Wall. 681 (18:689) was a final determination of the question of title, and the decision of the Supreme Court of Iowa, holding it not to have been, and thereby defeating the defense of the New York Statute of Limitations, present a federal question?—and if so, was the decision of the Supreme Court of Iowa, holding the decision in question not to have been such final determination, erroneous?

Murdock v. *Memphis*, 87 U. S. 20 Wall. 632 (22:443); *Wolcott* v. *Des Moines Nav. & R. R. Co.* and *Burr* v. *DesMoines Nav. & R. R. Co. supra.*

Plaintiff in error maintained that the decision in these cases was a final determination of the question, while the court held that the question was not finally decided until the cases of *Williams* v. *Baker*, 84 U. S. 17 Wall. 144 (21: 561), and *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.*, *supra.*

The Homestead Company must be treated as having been a party to the *Wolcott* and *Burr Cases* for the purposes of this question.

Williams v. *Baker*, *supra.*

The *Wolcott-Burr* decision has repeatedly been reaffirmed.

Iowa Homestead Co. v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 162 (21:622); *Litchfield* v. *Webster County*, 101 U. S. 777 (25:927).

Upon this point the case is within the principle of the following decisions of this court: *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130 (22:588;) *Embry* v. *Palmer*, 107 U. S. 20 (27:352); *Crescent City L. S. Co.* v. *Butchers Union S. H. & L. S. L. Co.* 120 U. S. 143, (30:615); *Factors & T. Ins. Co.* v. *Murphy*, 111 U. S. 738 (28:582).

Mr. **George Crane**, for defendant in error:

Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute and with jurisdiction of the case and the parties, a question is undoubtedly raised which under the Act of 1867 may be brought to this court for decision.

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 134 22:590); *Embry* v. *Palmer*, 107 U. S. 3 (27:346).

Under the rule recognized since the Act of Congress of July 5, 1867, this court is authorized to examine the opinions of the state courts to ascertain what has been decided.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 633 (23:443); *McManus* v. *O'Sullivan*, 91 U. S. 578 (23:390).

The simple payment of a portion of the expenses of defending a lawsuit will not entitle the person so paying to the protection or benefit of the judgment therein rendered, though the person paying may be interested in questions similar to those involved in that suit.

New York L. Ins. Co. v *Hendren*, 92 U. S. 287 (23:710); *Rockhold* v. *Rockhold*, 92 U. S. 130 (23:507).

Messrs. **C. H. Gatch** and *William Connor*, for plaintiff in error, in reply:

In answer to our opening argument that defendant in error is estopped by the adjudication in the case of *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 (21: 622), it is objected that that adjudication was void for want of jurisdiction because all of the defendants in the former suit were not citizens of a different State from that of which the plaintiff was a citizen.

It is too late to question the jurisdiction of

the circuit court after the cause has been sent back by mandate.

Skillern v. *May*, 10 U. S. 6 Cranch. 267 (3:220); *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 192 (6:300).

If the jurisdiction of a circuit court be not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

Kennedy v. *Georgia State Bank*, 49 U. S. 8 How. 586 (12:1209).

In *Washington Bridge Co.* v. *Stewart*, 44 U. S. 3 How. 413 (11:658) it was held: After a case has been decided upon its merits and remanded to the court below, if it is again brought up on a second appeal it is then too late to allege that the court had not jurisdiction to try the first appeal.

In *DeSobry* v. *Nicholson*, 70 U. S. 3 Wall. 420 (18:263), it was held: A motion to dismiss a case for want of proper citizenship in the parties cannot be made at the trial and after pleading a general issue and special defenses.

As to when and how far this court will consider and determine questions of state or common law for purposes which involve questions giving it jurisdiction, we refer to the following authorities:

Martin v. *Hunter*, 14 U. S. 1 Wheat. 304 (4:97); *Smith* v. *Maryland*, 10 U. S. 6 Cranch, 286 (3:225).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, in his lifetime, against Grace H. Litchfield, in her lifetime, to recover the amount of taxes for the years 1864 to 1871, both inclusive, paid by the Homestead Company on certain tracts of Des Moines River lands held and owned by her, by and through conveyances from the Des Moines Navigation and Railroad Company. For a general statement of the facts reference is made to *Stryker* v. *Crane*, *ante*. The taxes were paid before the decree in *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 [21: 622], and the assignment was made to Goodnow afterwards. As defenses to the action, the prior adjudication in that case was pleaded in bar, and also the Statute of Limitations, based on the decision as to title in *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 [18: 689], the same as in *Stryker* v. *Crane*.

Both these defenses were overruled by the Supreme Court of the State, and judgment was entered in that court for the amount of taxes paid and interest. *Goodnow* v. *Litchfield*, 68 Iowa, 275.

As to the federal question arising on the Statute of Limitations, it is only necessary to refer to what was said on that subject in *Stryker* v. *Crane*, *ante*. There was no error in the decision of the court below on that point.

The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands, and they were described in the bill; but neither she nor anyone who represented her title was named as a defendant. She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision. If it had been adverse to her interest no decree could have been entered against her personally, either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them and their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to but not identical with those of the persons who were actually parties to the litigation.

Greenleaf, in his Treatise on the Law of Evidence, Vol. I, section 523, states the rule applicable to this class of cases thus: "Under the term *parties*, in this connection, the law includes all who are directly interested in the subject matter and had a right to make defense or to control the proceedings and to appeal from the judgment. This right involves also the right to adduce testimony and to cross examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term *privity* denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood or in law, are estopped from litigating that which is conclusive on him with whom they are in privity." The correctness of this statement has been often affirmed by this court (*Lovejoy* v. *Murphy*, 70 U. S. 3 Wall. 1, 19 [18: 129, 134]; *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657, 673 [18: 427, 430]), and the principle has been recognized in many cases. Indeed, it is elementary. *Hale* v. *Finch*, 104 U. S. 261, 265 [26: 732, 733]; *Brooklyn, C. & N. R. R. Co.* v. *National Bank*, 102 U. S. 14, 22 [26: 61, 64]; *Butterfield* v. *Smith*, 101 U. S. 570 [25: 868].

In the condition of parties to the record during the whole course of the litigation between the Homestead Company and those who were named as defendants, Mrs. Litchfield had no right to make a defense in her own name; neither could she control the proceedings nor appeal from the decree. She could not in her own right adduce testimony or cross examine witnesses. Neither was she identified in interest with anyone who was a party. She owned her lands; the parties to the suit owned theirs; her rights were all separate and distinct from the rest, and there was no mutual or successive relationship between her and the other owners.

She was neither a party to the suit nor in privity with those who were parties; consequently she was in law a stranger to the proceedings and in no way bound thereby. As she was not bound, the Homestead Company and its assigns were not. Estoppels to be good must be mutual. This was in effect the decision of the court below, and it was right.

It follows that there is no error in the record, and the judgment is affirmed.

DES MOINES NAVIGATION AND RAILROAD COMPANY, *Plff. in Err.*,

v.

IOWA HOMESTEAD COMPANY.

(See S. C. Reporter's ed. 552–559.)

Federal question—decree of this court, when valid.

1. That a federal question was not presented in the brief of counsel in the state court is not sufficient reason for that court omitting to consider it, when it was fairly presented by the pleadings, proofs, and assignment of errors, and necessarily involved in the determination of the case. A refusal to consider a federal question which is controlling in a case is equivalent to a decision against the federal right involved therein.

2. Where a suit was removed from a state court into the Circuit Court of the United States, and all the parties in the suit appeared in the circuit court, without objection, the decree of this court, on appeal, is not void for want of jurisdiction, if it appears on the face of the record that some of the defendants who did not join in the petition for the removal were citizens of the same State with the plaintiff, but is a valid and subsisting adjudication of the matters in controversy, binding on the parties, and a bar to a subsequent action for the same cause.

[No. 45.]

Argued Nov. 1, 1887. *Decided Dec. 5, 1887.*

IN ERROR to the Supreme Court of the State of Iowa. *Reversed.*

The facts and case are fully stated in the opinion.

Messrs. **C. H. Gatch** and *William Connor*, for plaintiff in error:

The record presents two federal questions, either decided or the decision of which was necessary to the decree rendered by the Supreme Court of Iowa.

First. The plaintiff in error claimed immunity from the demand of the defendant in error, because, by force and virtue of the decisions of this court in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 (18: 689), and *Burr* v. *Des Moines Nav. & R. R. Co.* 1 Wall. 99 (17: 561); and the cause of action accrued, if ever, at the date of said decision, and was, therefore, at the commencement of this suit, barred by the Statute of Limitations of the State of Iowa.

The decision of this question, and the necessity therefor, by the Supreme Court of Iowa, are thus stated in the certificate:

Our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of our said decision that said determination was not final.

Second. Whether or not the plaintiff in error was entitled to immunity from the demand of the defendant in error, under the decision and judgment of this court in the case of *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 (21: 622), the controversy therein having been, as plaintiff in error claims, and, as is alleged in its answer, between the same parties, and upon the same issue, and for the same demand, and the decision and judgment therein having been against the validity of such demand.

Plaintiff in error maintained that the decision in these cases was a final determination of the question; while the court held that the question was not finally decided until 1873, meaning in the cases of *Williams* v. *Baker*, 84 U. S. 17 Wall. 144 (21. 561), and *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co. supra;* and, because of so holding necessarily further held that the action was not barred.

The *Wolcott-Burr* decision has repeatedly been reaffirmed.

Iowa Homestead Co. v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 162 (21: 622); *Litchfield* v. *Webster County*, 101 U. S. 777 (25: 927).

The case is within the principle of the following decisions of this court:

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Embry* v. *Palmer*, 107 U. S. 3 (27: 346); *Crescent City L. S. Co.* v. *Butchers Union S. H. & L. S. L. Co.* 120 U. S. 143 (30: 615).

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a federal question.

Factors & T. Ins. Co. v. *Murphy*, 111 U. S. 738 (28: 582).

That the defense of former adjudication by this court, as shown by the record, presents a federal question is not controverted; but it is claimed that it was waived by failure of plaintiff in error to insist upon it in his printed argument filed in the state court.

Where the judgment of the state court is not in favor of the party claiming the right or immunity, the case is within the jurisdiction of this court.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *Chouteau* v. *Gibson*, 111 U. S. 200 (28: 400).

It is sufficient to give jurisdiction, if a federal question, essential to the decision of the case, is properly before the court for decision.

Crowell v. *Randell*, 35 U. S. 10 Pet. 368 (9: 458); *Miller* v. *Nicholls*, 17 U. S. 4 Wheat. 311 (4: 578); *Hickie* v. *Starke*, 26 U. S. 1 Pet. 98 (7: 69) *Wilson* v. *Blackbird Cr. M. Co.* 27 U. S. 2 Pet. 245 (7: 412); *Craig* v. *Missouri*, 29 U. S. 4 Pet. 410 (7: 903); *Williams* v. *Norris*, 25 U. S. 12 Wheat. 117 (6: 571); *Williams* v. *Bruffy*, 102 U. S. 248 (26: 135); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 (28: 1084); *Brown* v. *Colorado*, 106 U. S. 97 (27: 133); *McManus* v *O'Sullivan*, 91 U. S. 578 (23: 390); *Murdock* v. *Memphis*, *supra.*

It must appear that the federal question was actually decided, or that its decision was necessary to the judgment or decree in the case.

Chouteau v. *Gibson*, 111 U. S. 200 (28: 400); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 636 (22: 444); *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 (29: 118); *Mackay* v. *Dillon*, 45 U. S. 4

How. 421 (11: 1033); *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586 (12: 829).

Mr. **George Crane**, for defendant in error:

The opinion of the state court shows conclusively that the question whether the judgment in the *Homestead suit* constituted a bar to appellee's claim in this suit, was not considered or passed upon by the Supreme Court of Iowa.

This court will examine the opinion of the state court to ascertain what was decided by that court. In its opinion the Supreme Court of Iowa uses this language:

In view of the want of agreement between counsel we are required to hold that the question of prior adjudication cannot be determined in this case.

In Iowa errors assigned which are not discussed or insisted upon in argument will not be considered. Only errors presented in argument will be considered.

Shaw v. *Brown*, 18 Iowa, 508; *Cook* v. *Sioux City & P. R. R. Co.* 37 Iowa, 426; *Bremer County Bank* v. *Bremer County*, 42 Iowa, 394.

In order to give this court jurisdiction it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 633 (22: 443); *Chouteau* v. *Gibson*, *supra*.

Messrs. **C. H. Gatch** and *William Connor*, for plaintiff in error, in reply:

In *Skillern* v. *May*, 10 U. S. 6 Cranch, 267 (3: 220), it was held too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate.

McCormick v. *Sullivant*, 23 U. S. 10 Wheat. 192 (6: 300); *Kennedy* v. *Georgia State Bank*, 49 U. S. 8 How. 586 (12: 1209); *Washington Bridge Co.* v. *Stewart*, 44 U. S. 3 How. 413 (11: 658); *De Sobry* v. *Nicholson*, 70 U. S. 3 Wall. 420 (18: 263).

When and how far this court will consider and determine questions of state or common law, for purposes which involve questions giving it jurisdiction:

Martin v. *Hunter*, 14 U. S. 1 Wheat, 304 (4: 97); *Smith* v. *Maryland*, 10 U. S. 6 Cranch, 286 (3: 225).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by the Iowa Homestead Company against the Des Moines Navigation and Railroad Company, to recover the same taxes for the years 1864 to 1871, both inclusive, which formed part of the subject matter of the litigation between the same parties in *Iowa Homestead Co.* v. *Des Moines Valley R. R. Co.* 84 U. S. 17 Wall. 153 [21: 622], referred to in *Stryker* v. *Crane*, *ante*—. The Railroad Company set up the decree in its favor in that suit as a bar to the present action; and to this the Homestead Company replied "that the decree or judgment referred to is null and void, for the reason that the courts of the United States had no jurisdiction of said suit, and no legal power or authority to render said decree or judgment."

Upon this part of the case the facts admitted were substantially the same as are set forth in *Stryker* v. *Crane*, *ante*, with the addition of this stipulation made by the parties and filed in the circuit court:

"And it is further stipulated that the defendants, Samuel G. Wolcott, Edwin C. Litchfield, Edward Wade, and John Stryker, each and every one of whom are citizens of New York, and the Des Moines Navigation and Railroad Company, duly appeared in this court and filed their joint and several answers to complainant's bill, duly verified; that the said answers are not now found with the papers in this cause; that the said answers of said defendants were substantially in all respects like those of the defendants William B. Welles and Albert Tracy, on file herein and duly verified by them, respectively, except such changes, variations, and alterations as were necessary to present the interests held by said defendants respectively, in the land in this action."

Other defenses were set up in the answer similar to those in *Stryker* v. *Crane*, *ante*; *Chapman* v. *Crane*, *ante*; and *Litchfield* v. *Crane*, *ante*; but it is unnecessary to restate them here.

The case was taken to the Supreme Court of the State on appeal, and among the errors assigned there was this:

"The court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication in the former suit of the *Iowa Homestead Company* against the *Des Moines Navigation and Railroad Company and others*."

At the hearing in the Supreme Court a final decree was entered against the Navigation and Railroad Company for the full amount of taxes paid and the interest. The opinion of the court, so far as it related to the question of former adjudication, was in these words:

"The question of former adjudication, discussed in the fifth point of the foregoing opinion, is not discussed by counsel for defendant in this case in his printed brief, though it was pleaded as a defense. Counsel for plaintiff in this case filed a printed brief used in the former case, but upon the fifth point it is not at all applicable, for the reason that the facts involved in the pleas of former adjudication are not identical in each case. The two cases were discussed at the oral argument together, all the points involved in each case being considered; but we were left to the printed briefs and abstracts in order to make application of the arguments properly to the separate cases. Since the submission of the cases counsel for each party has been called upon to express his understanding of the points to be determined in the cases separately. Counsel for defendant claims that the question of prior adjudication, while not presented in his printed brief, was argued orally, and is, therefore, in this case; counsel for plaintiff claims that it is not. Certain is it that it is not made in the printed brief for defendant, and we are unable to say that it was made on the oral argument as applicable to this case. The counsel for defendant having failed to present this point in his brief, he cannot, according to the spirit of our rules, urge it in oral argument. In view of the want of agreement between counsel, we are required to hold that the question of prior adjudication cannot be determined in this case." *Iowa*

Homestead Co. v. *Des Moines Nav. & R. R. Co.* 68 Iowa, 285.

The "foregoing opinion" referred to was that in the case of the *Administrator of Mrs. Grace H. Litchfield* v. *Crane, ante*, 199. The record in that case, taken in connection with that in this, shows that the answer setting up the former adjudication, the reply thereto, and the assignment of errors on this point, were the same in both of the cases. They differed in their facts only in that Mrs. Litchfield was not actually a party to the former suit upon the face of the record, and the Navigation and Railroad Company was.

We cannot look upon the reason given by the court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling federal question fairly presented by the pleadings, proofs, and assignment of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation, and, if decided in favor of the Navigation and Railroad Company, ended the whole matter. To give a judgment the other way, without considering it, was simply to ignore one of the most important elements of the case as it stood in the record. There can be no escape from this conclusion.

It seems from the opinion, which, as part of the record, we must take notice of, that this case was argued in connection with that of the administrator of Mrs. Grace H. Litchfield. The defense of prior adjudication was made in both, though the facts in the case of Mrs. Litchfield were different from those in this. Mrs. Litchfield was not an actual party to the suit in which the prior adjudication was had, while the Navigation and Railroad Company was; but the question of the jurisdiction of the court for the determination of the rights of the parties was the same in both. In the oral argument, there being but one for the two cases, this point was raised and discussed; but in the printed briefs it was referred to only in that entitled in the suit of the administrator of Mrs. Litchfield. As it was *the* defense in this case, and, if sustained, made it unnecessary to consider anything else, we cannot decide that the court was justified in holding that it could not be determined. Such action was, in our opinion, equivalent to a decision against the federal right which was actually set up and claimed; and thus our jurisdiction for the review of the judgment on this question, as well as the others, is complete.

We proceed, then, to consider the only objection which has been made to this defense, and that is, the alleged want of jurisdiction in the courts of the United States—both this court and the circuit court—to entertain and finally dispose of the suit in which the prior adjudication was had. It must be conceded that the Homestead Company and the Navigation and Railroad Company were both Iowa corporations, and, therefore, in law, citizens of the same State; but the defendants, the Litchfields and Stryker, who caused the removal to be made, as well as Wolcott, Burrows, McAlpine, Chapman, the Tracys, and Wade, were citizens of the State of New York. After the removal was effected, all the above-named defendants, as well as Welles and the Navigation and Railroad Company, appeared, filed answers, and defended the action. The Homestead Company took issue on all the answers, and actually contested the matters in dispute with the Navigation and Railroad Company, as well as the other defendants, in the circuit court, and in this court on appeal, without taking any objection to the jurisdiction.

The precise question we have now to determine is whether the adjudication by this court, under such circumstances, of the matters then and now at issue between the Homestead Company and the Navigation and Railroad Company was absolutely void for want of jurisdiction. The point is not whether it was error in the circuit court to take jurisdiction of the suit, or of so much of it as related to the Navigation and Railroad Company, originally, but as to the binding effect of the decree of this court so long as it remains in force, and is not judicially annulled, vacated, or set aside.

It was decided in *Hancock* v. *Holbrook*, 119 U. S. 587 [30:538], that if a suit, in which there was but one controversy, between a citizen of the State in which the suit was brought and a citizen of another State, was removed from a state court to a circuit court of the United States on the ground of "prejudice or local influence," under subsection 3 of section 639 of the Revised Statutes, which is the reenactment, in the revision, of the Act of March 2, 1867, chap. 196, 14 Stat. at L. 558, in force when the proceedings now under consideration were had, it was not error in the circuit court to remand the suit if all the defendants were not citizens of different States from all the plaintiffs; but here the question is whether, if all the parties were actually before the circuit court, the decree of this court on appeal is absolutely void if it appears on the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same State with the plaintiff.

It was settled by this court at a very early day that, although the judgments and decrees of the circuit courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different States from the defendants, yet that they were not nullities, and would bind the parties until reversed or otherwise set aside. In *Skillern* v. *May*, 10 U. S. 6 Cranch, 267 [3:220], the circuit court had taken jurisdiction of a suit and rendered a decree. That decree was reversed by this court on appeal, and the cause remanded with directions to proceed in a particular way. When the case got back it was discovered that the cause was "not within the jurisdiction of the court," and the judges of the circuit court certified to this court that they were opposed in opinion on the question whether it could be dismissed for want of jurisdiction after this court had acted thereon. To that question the following answer was certified back: "It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry the decree into execution, although the jurisdiction of that court be not alleged in the pleadings." That was in 1810. In 1825, *McCormick* v. *Sul-*

livant, 23 U. S. 10 Wheat. 192 [6:300], was decided by this court. There a decree in a former suit was pleaded in bar of the action. To this a replication was filed, alleging that the proceedings in the former suit were *coram non judice*, the record not showing that the complainants and defendants in that suit were citizens of different States; but this court held on appeal that "The courts of the United States are courts of *limited*, but not of *inferior*, jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on a writ of error or appeal; but until reversed they are conclusive between the parties and their privies." "But they are not nullities." There has never been any departure from this rule.

It is said, however, that these decisions apply only to cases where the record simply fails to show jurisdiction. Here it is claimed that the record shows there could be no jurisdiction, because it appears affirmatively that the Navigation and Railroad Company, one of the defendants, was a citizen of the same State with the plaintiff. But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to its jurisdiction. The Act of 1867, under which the removal was had, provided that when a suit was pending in a state court "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, * * * such citizen of another State, * * * if he will make and file an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may * * * file a petition in such state court for the removal of the suit" into the Circuit Court of the United States; and, when all things have been done that the Act requires, "It shall be * * * the duty of the state court to * * * proceed no further with the suit," and, after the record is entered in the circuit court, "the suit shall then proceed in the same manner as if it had been brought there by original process."

In the suit now under consideration there was a separate and distinct controversy between the plaintiff, a citizen of Iowa, and each of the citizens of New York, who were defendants. Each controversy related to the several tracts of land claimed by each defendant individually, and not as joint owner with the other defendants. Three of the citizens of New York caused to be made and filed the necessary affidavit and petition for removal, and thereupon, by common consent apparently, the suit as an entirety was transferred to the circuit court for final adjudication as to all the parties. The plaintiff, as well as the defendants, appeared in the circuit court without objection, and that court proceeded as if its authority in the matter was complete. Whether in such a case the suit could be removed was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizen of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous; but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal. As the circuit court entertained the suit, and this court, on appeal, impliedly recognized its right to do so, and proceeded to dispose of the case finally on its merits, certainly our decree cannot, in the light of prior adjudications on the same general question, be deemed a nullity. It was, at the time of the trial of the present case in the court below, a valid and subsisting prior adjudication of the matters in controversy, binding on these parties, and a bar to this action. In refusing so to decide the court failed to give full faith and credit to the decree of this court, under which the Navigation and Railroad Company claimed an immunity from all liability to the Homestead Company on account of the taxes sued for; and this was error.

For this reason, the judgment is reversed, and the cause is remanded for further proceedings, not inconsistent with this opinion.

PETER MUGLER, *Plff. in Err.*,
v.
STATE OF KANSAS.

SAME *v.* SAME.

STATE OF KANSAS, *Appt.*,
v.
HERMAN ZIEBOLD ET AL.

(See S. C. Reporter's ed. 123-178.)

Kansas "Prohibition Law," constitutional—state liquor laws—police power—rights of property—Fourteenth Constitutional Amendment—private damages—common nuisance—equity proceedings—jury trial—evidence.

1. The Prohibition Law of the State of Kansas is not in conflict with that clause of the Fourteenth Amendment of the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

2. Legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States.

3. It belongs to the legislative department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the Constitution.

4. Government does not interfere with, nor impair, anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage.

5. The Fourteenth Amendment of the Constitution does not take from the States those powers of

police that were reserved at the time the original Constitution was adopted. The States did not intend, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.

6. A prohibition simply upon the use of property, for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. The State cannot be stayed from providing for the discontinuance of any manufacture or traffic which is injurious to the public morals, by any incidental inconvenience which individuals or corporations may suffer.

7. A State has power to declare that any place, kept and maintained for the illegal manufacture and sale of intoxicating liquors, shall be deemed a common nuisance and be abated; and at the same time to provide for the indictment and trial of the offender.

8. Proceedings in equity for the purposes indicated in the 13th section of the Kansas Act of 1885 are not inconsistent with due process of law. A jury trial is not required in suits in equity brought to abate a public nuisance.

9. The provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, does not deprive him of the presumption that he is innocent of any violation of law.

[Nos. 19, 20, 934.]

Nos. 19, 20, argued and submitted Apr. 11, 1887, and No. 934, argued and submitted Oct. 11, 1887. Decided Dec. 5, 1887.

NOS. 19, 20 are "In error to the Supreme Court of the State of Kansas." *Affirmed.*

No. 934 is an "Appeal from the Circuit Court of the United States for the District of Kansas." *Reversed—Remanded.*

The facts are fully stated in the opinion.

Mr. **George G. Vest,** for plaintiff in error in Nos. 19, 20, and for appellees, in No. 934:

These cases involve the constitutionality of what is known as the Prohibition Law of the State of Kansas.

The amendment to the State Constitution which prohibits the manufacture and sale of intoxicating liquors and the law of Kansas prohibiting the manufacture of any spirituous, malt, vinous, fermented, or other intoxicating liquors, except for medical, scientific, and mechanical purposes are in conflict with article 14 of the Constitution, which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

John Stuart Mill, "Liberty," 145–6; 2 Kent, Com. 1; 1 Cooley, Bl. 122, 3; *Munn* v. *Illinois*, 94 U. S. 124 (24:83); *Thorpe* v. *Rutland & B. R. R. Co.* 27 Vt. 143; *Butchers Union S. H. & L. S. L. Co.* v. *Crescent City L. S. Co.* 111 U. S. 53 (28:588); *Commonwealth* v. *Alger*, 7 Cush. 84; *License Cases*, 46 U. S. 5 How. 583 (12:291); *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

The right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our law.

Cooley, Const. Lim. 385.

Citizens have the natural right to manufactor individual use.

The Statute of Kansas now in question is not "due process of law."

Cooley, Const. Lim. 356, 541, 588; *Wynehamer* v. *People*, 13 N. Y. 432; *State* v. *Allen*, 2 McCord, 56; *Sears* v. *Cottrell*, 5 Mich. 251; *Taylor* v. *Porter*, 4 Hill, 140; *Hoke* v. *Henderson*, 4 Dev. L. 15; *Janes* v. *Reynolds*, 2 Tex. 251; *Kennard* v. *Louisiana*, 92 U. S. 480 (23:478); *Murray* v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 276 (15:374); *Brown* v. *Hummel*, 6 Pa. 86; *Norman* v. *Heist*, 5 Watts & S. 171.

Under the power to regulate, the State cannot deprive the citizen of the lawful use of his property if it does not injuriously affect or endanger others.

Lake View v. *Rose Hill Cemetery Co.* 70 Ill. 191.

It is not within the power of the General Assembly, under the pretense of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community,—that will be oppressive and burdensome to the citizen.

Toledo, W. & W. R. Co. v. *Jacksonville*, 67 Ill. 37–40; *Re Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377; *Intoxicating Liquor Cases*, 25 Kan. 765; *Calder* v. *Bull*, 3 U. S. 3 Dall. 386 (1:648); *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 135 (3:177); *Dash* v. *Van Kleeck*, 7 Johns. 477; *Taylor* v. *Porter*, 4 Hill, 146; *Goshen* v. *Stonington*, 4 Conn. 225.

The Prohibition Statute of Kansas deprives the plaintiff in error, directly and absolutely, of his property without "due process of law."

Bartemeyer v. *Iowa*, 85 U. S. 18 Wall. 133 (21:930); *Wynehamer* v. *People*, 13 N. Y. 387; *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 657 (7:553); *Munn* v. *Illinois*, 94 U. S. 113, 141 (24:77, 89); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24:989); Sedgw. Stat. & Const. L. 519–24, and notes; *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 (11:143); *Pumpelly* v. *Green Bay Co.* 80 U. S. 13 Wall. 177 (20:560).

Plaintiff claims that his right to operate his brewery, as vested in him by the laws of Kansas, cannot be taken away by the State without just compensation.

Wynehamer v. *People*, 13 N. Y. 378; *Beebe* v. *State*, 6 Ind. 501; *Re Jacobs*, 98 N. Y. 98.

Messrs. Robert M. Eaton, John C. Tomlinson and **Joseph H. Choate,** for appellees in Nos. 19 and 934:

The thirteenth section of the Prohibitory Liquor Law of Kansas, as amended in 1885, is an attempt to deprive these persons of their property and their liberty without "due process of law," and is therefore absolutely void.

Fisher v. *McGirr*, 1 Gray, 1; *Greene* v. *Briggs*, 1 Curt. 328; *Hibbard* v. *People*, 4 Mich. 129; *Taylor* v. *Porter*, 4 Hill, 147; *Neitzel* v. *Concordia*, 14 Kan. 446; *Boyd* v. *U. S.* 116 U. S. 616 (29:746).

Such a declaration cannot make that a nuisance which is not such in fact.

Rights of property cannot be in this way "arbitrarily or capriciously destroyed or injured."

Yates v. *Milwaukee*, 77 U. S. 10 Wall. 497, 504, 505 (19:984, 986); *Hutton* v. *Camden*, 39 N. J. L. 122, 129, 130; Cooley, Const. Lim. 5th ed. 110, 446, and cases cited; *Lowry* v. *Rainwater*, 70 Mo. 152; *Ieck* v. *Anderson*, 57 Cal. 251; *People* v. *Marx*, 99 N. Y. 386.

The question of nuisance or not must, in cases of doubt, be tried by a jury; and the injunction will be granted or not as that fact is decided.

2 Story, Eq. Jur. § 923; 1 Bish. Crim. Pro. § 1417; *Hudson* v. *Thorne*, 7 Paige, 261; *Davis*

v. *Am. Soc. Prevention Cruelty*, 75 N. Y. 362, 368; *Kramer* v. *Police Dept. of New York*, 21 Jones & S. 492; *Murray* v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 280 (15:376); *Walker* v. *Sauvinet*, 92 U. S. 90, 93 (23:678, 679).

Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State.

Walker v. *Sauvinet*, *supra*; *Atchison St. R.* v. *Missouri Pac. R.* 31 Kan. 660; *Re Rolfs*, 30 Kan. 762; *Kimball* v. *Connor*, 3 Kan. 415, 432; *Ross* v. *Crawford Co.* 16 Kan. 418; *Neitzel* v. *Concordia*, 14 Kan. 446.

Within the meaning of the Fourteenth Amendment this Act deprived the appellees of their liberty and property without due process of law, and abridged the privileges and immunities of the appellees as citizens of the United States.

Boyd v. *U. S.* 116 U. S. 635 (29: 752); *Barbier* v. *Connolly*, 113 U. S. 31 (28: 924); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 135 (3: 177); *Calder* v. *Bull*, 3 U. S. 3 Dall. 386 (1: 648); *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37; *Intoxicating Liquor Cases*, 25 Kan. 751; *People* v. *Marx*, 99 N. Y. 377; *Pumpelly* v. *Green Bay Co.* 80 U. S. 13 Wall. 177 (20: 560); *Babcock* v. *Buffalo*, 56 N. Y. 268; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 188-190; Wood, Nuisances, § 788.

But if the power and authority of the State Legislature to prohibit the manufacture of beer, whether for sale outside of the State or within it, shall be held to be absolute and unlimited, then we submit, upon the doctrines maintained by the Court of Appeals of New York, in the case of *Wynehamer*, 13 N. Y. 378, and by the circuit judge below, that in its application to the appellees' brewery, owned, possessed and used by them when the Act took effect, the Statute of Kansas violates the Fourteenth Amendment, because it deprives them of their property "without due process of law."

Norman v. *Heist*, 5 Watts & S. 173; *Taylor* v. *Porter*, 4 Hill, 145; *Hoke* v. *Henderson*, 4 Dev. L. 15; 2 Kent, Com. 13; *Sinnickson* v. *Johnson*, 17 N. J. L. 129; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *Pumpelly* v. *Green Bay Co.* 80 U. S. 13 Wall. 166 (20: 557).

Messrs. **S. B. Bradford,** *State Atty-Gen.*, *Geo. R. Peck*, *J. B. Johnson*, *Geo. J. Barker*, *Gleed & Gleed*, *Edwin A. Austin*, *Asst. Atty-Gen.*, and *J. F. Tufts*, *Asst. Atty-Gen. for Atchison County*, for the State:

The right of property consists in the free use, enjoyment and disposal of all one's acquisitions, without any control or diminution save only by the law of the land.

Bl. Com. 138.

Without the privilege of sale, the privilege of manufacture is barren.

Bartemeyer v. *Iowa*, 85 U. S. 18 Wall. 129 (21: 929); *Wynehamer* v. *People*, 13 N. Y. 378; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 32 (24: 991).

The absolute prohibition of the sale of intoxicating drinks is not contravened by anything in the Constitution of the United States.

Foster v. *Kansas*, 112 U. S. 201 (28: 629); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989); *Bartemeyer* v. *Iowa*, *supra*.

The law was within the police power of the State.

License Cases, 46 U. S. 5 How. 504, 631 (12: 256, 313); *Commonwealth* v. *Kendall*, 12 Cush. 414; *Commonwealth* v. *Clapp*, 5 Gray, 97; *Commonwealth* v. *Howe*, 13 Gray, 26; *Santo* v. *State*, 2 Iowa, 202; *Our House No. 2* v. *State*, 4 Greene (Iowa), 172; *Zumhoff* v. *State*, Id. 526; *State* v. *Donehey*, 8 Iowa, 396; *State* v. *Wheeler*, 25 Conn. 290; *Reynolds* v. *Geary*, 26 Conn. 179; *Oviatt* v. *Pond*, 29 Conn. 479; *People* v. *Hawley*, 3 Mich. 330; *People* v. *Gallagher*, 4 Mich. 244; *Jones* v. *People*, 14 Ill. 196; *State* v. *Prescott*, 27 Vt. 194; *Lincoln* v. *Smith*, Id. 328; *Gill* v. *Parker*, 31 Vt. 610. But see *Beebe* v. *State*, 6 Ind. 501; *Meshmeier* v. *State*, 11 Ind. 482; *Wynehamer* v. *People*, 13 N. Y. 378.

It has also been held competent to declare the liquor kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram shop on the same ground.

Our House No. 2 v. *State*, *supra*. See also *Lincoln* v. *Smith* and *Oviatt* v. *Pond*, *supra*; *State* v. *Robinson*, 33 Me. 568; *License Cases*, 46 U. S. 5 How. 589 (12: 294). But see *Wynehamer* v. *People*, and *Boston Beer Co.* v. *Massachusetts*, *supra*; *Barbier* v *Connelly*, 113 U. S. 27 (28: 923); *Schmidt* v. *Cobb*, 119 U. S. 292 (30: 321); *Weil* v. *Calhoun*, 25 Fed. Rep. 872; *U. S.* v. *Nelson*, 29 Fed. Rep. 202; *Welch* v. *Stowell*, 2 Doug. (Mich.) 332.

The proposition presented in this case falls within the rule laid down by this court in *Boston Beer Co.* v. *Massachusetts*, *supra*; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Stone* v. *Mississippi*, 101 U. S. 814 (25: 1079), and *Butchers Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. Co.* 111 U. S. 746 (28: 585); *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650 (29: 516).

Defendants did not secure a vested right to carry on a particular, private business, detrimental to the public health or public morals, because of the absence of any legislation on the subject.

Dill. Mun. Corp. 136; Tiedeman, Lim. Police Power, §§ 122, 122a; 2 Kent, Com. 340; *People* v. *Hawley*, 3 Mich. 330; *Commonwealth* v. *Tewksbury*, 11 Met. 55; *Coates* v. *Mayor of N. Y.* 7 Cow. 585; *Commonwealth* v. *Intoxicating Liquors*, 115 Mass. 153; *St. Louis* v. *Stern*, 3 Mo. App. 48; Bish. Stat. Crimes, §§ 564, 995; *State* v. *Mugler*, 29 Kan. 252; *New Orleans Gas Co.* v. *Louisiana Light Co. supra*.

Vested property rights which do not rest on contract may be devested by state legislation.

Satterlee v. *Matthewson*, 27 U. S. 2 Pet. 380 (7: 458); *Watson* v. *Mercer*, 33 U. S. 8 Pet. 88 (8: 876) and cases cited; *Louisiana* v. *New Orleans*, 109 U. S. 285 (27: 936).

Mr. Justice **Harlan** delivered the opinion of the court:

These cases involve an inquiry into the validity of certain Statutes of Kansas relating to the manufacture and sale of intoxicating liquors.

The first two are indictments, charging Mugler, the plaintiff in error, in one case, with having sold, and in the other, with having manufactured, spirituous, vinous, malt, fermented, and other intoxicating liquors, in Saline County, Kansas, without having the license or permit required by the statute. The defendant, having been found guilty, was fined, in

each case, $100, and ordered to be committed to the county jail until the fine was paid. Each judgment was affirmed by the Supreme Court of Kansas; and thereby, it is contended, the defendant was denied rights, privileges, and immunities guaranteed by the Constitution of the United States.

The third case—*Kansas* v. *Ziebold & Hagelin*,—was commenced by petition filed in one of the courts of the State. The relief sought is: (1) that the group of buildings in Atchison County, Kansas, constituting the brewery of the defendants, partners, as Ziebold & Hagelin, be adjudged a common nuisance, and the sheriff or other proper officer directed to shut up and abate the same; (2) that the defendants be enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors may be sold, bartered, or given away, or kept for barter, sale or gift, otherwise than by authority of law.

The defendants answered, denying the allegations of the petition, and averring: *First.* That said buildings were erected by them prior to the adoption, by the people of Kansas, of the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, and before the passage of the prohibitory liquor statute of that State. *Second.* That they were erected for the purpose of manufacturing beer, and cannot be put to any other use; and, if not so used, they will be of little value. *Third.* That the statute under which said suit is brought is void under the Fourteenth Amendment of the Constitution of the United States.

Upon the petition and bond of the defendants the cause was removed into the Circuit Court of the United States for the District of Kansas upon the ground that the suit was one arising under the Constitution of the United States. A motion to remand it to the state court was denied. The pleadings were recast so as to conform to the equity practice in the courts of the United States; and, the cause having been heard upon bill and answer, the suit was dismissed. From that decree the State prosecutes an appeal.

By a Statute of Kansas, approved March 8, 1868, it was made a misdemeanor, punishable by fine and imprisonment, for any one, directly or indirectly, to sell spirituous, vinous, fermented, or other intoxicating liquors, without having a dramshop, tavern, or grocery license. It was also enacted, among other things, that every place where intoxicating liquors were sold in violation of the statute should be taken, held and deemed to be a common nuisance; and it was required that all rooms, taverns, eating houses, bazaars, restaurants, groceries, coffee houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances. Gen. Stat. Kan. 1868, chap. 35.

But in 1880 the people of Kansas adopted a more stringent policy. On the second of November of that year, they ratified an amendment to the State Constitution, which declared that the manufacture and sale of intoxicating liquors should be forever prohibited in that State, except for medical, scientific and mechanical purposes.

In order to give effect to that amendment, the Legislature repealed the Act of 1868, and passed an Act approved February 19, 1881, to take effect May 1, 1881, entitled "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors, Except for Medical, Scientific, and Mechanical Purposes, and to Regulate the Manufacture and Sale Thereof for Such Excepted Purposes." Its first section provides "That any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor; *Provided, however*, That such liquors may be sold for medical, scientific, and mechanical purposes as provided in this Act." The second section makes it unlawful for any person to sell or barter for either of such excepted purposes any malt, vinous, spirituous, fermented, or other intoxicating liquors without having procured a druggist's permit therefor, and preseribes the conditions upon which such permit may be granted. The third section relates to the giving by physicians of prescriptions for intoxicating liquors to be used by their patients, and the fourth, to the sale of such liquors by druggists. The fifth section forbids any person from manufacturing or assisting in the manufacture of intoxicating liquors in the State, except for medical, scientific and mechanical purposes, and makes provision for the granting of licenses to engage in the business of manufacturing liquors for such excepted purposes. The seventh section declares it to be a misdemeanor for any person not having the required permit, to sell or barter, directly or indirectly, spirituous, malt, vinous, fermented, or other intoxicating liquors; the punishment prescribed being, for the first offense, a fine of not less than $100 nor more than $500, or imprisonment in the county jail not less than twenty nor more than ninety days; for the second offense, a fine of not less than $200 nor more than $500, or imprisonment in the county jail not less than sixty days nor more than six months; and for every subsequent offense, a fine not less than $500 nor more than $1,000, or imprisonment in the county jail not less than three months nor more than one year, or both such fine and imprisonment in the discretion of the court. The eighth section provides for similar fines and punishments against persons who manufacture, or aid, assist, or abet the manufacture of any intoxicating liquors without having the required permit. The thirteenth section declares, among other things, all places where intoxicating liquors are manufactured, sold, bartered, or given away, or are kept for sale, barter, or use, in violation of the Act, to be common nuisances; and provides that upon the judgment of any court having jurisdiction finding such place to be a nuisance, the proper officer shall be directed to shut up and abate the same.

Under that statute, the prosecutions against Mugler were instituted. It contains other sections in addition to those above referred to; but as they embody merely the details of the general scheme adopted by the State for the prohibition of the manufacture and sale of intoxicating liquors, except for the purposes specified, it is unnecessary to set them out.

On the 7th of March, 1885, the Legislature passed an Act amendatory and supplementary to that of 1881. The thirteenth section of the

former Act, being the one upon which the suit against Ziebold & Hagelin is founded, will be given in full in a subsequent part of this opinion.

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments (constructed especially for that purpose), for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the Statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the State, and after May 1, 1881, that is, after the Act of February 19, 1881, took effect, and was of beer manufactured before its passage.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing Statutes of Kansas are in conflict with that clause of the Fourteenth Amendment which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment, to some of which, in view of questions to be presently considered, it will be well to refer.

In the *License Cases*, 46 U. S. 5 How. 504, [12: 256], the question was whether certain Statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States. In determining that question it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any Act of Congress. *Chief Justice* Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper." *Mr. Justice* McLean, among other things, said: "A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare. Over these subjects the Federal Government has no power. * * * The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed." *Mr. Justice* Woodbury observed: "How can they (the States) be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when and where it shall be conducted in articles intimately connected either with public morals or public safety or public prosperity?" *Mr. Justice* Grier, in still more emphatic language, said: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. * * * Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint or punishment of crime, for the preservation of the public peace, health and morals must come within this category. * * * It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils; and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."

In *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 [21: 929], it was said that prior to the adoption of the Fourteenth Amendment, state enactments, regulating or prohibiting the traffic of intoxicating liquors, raised no question under the Constitution of the United States; and that such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own Constitutions, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the Fourteenth Amendment, the court said that "So far as such a right exists it is not one of the rights growing out of citizenship of the United States." In *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 33 [24:992], it was said, that "As a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States." Finally, in *Foster* v. *Kansas*, 112 U. S. 206 [28:697], the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the General Government, or violate rights secured by the Constitution of the United States. The

power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 203 [6:71], reaches everything within the territory of a State not surrendered to the National Government.

It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or Legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn* v. *Illinois*, 94 U. S. 124 [24: 83], while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U. S. 718 [25: 501], the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. "To what purpose," it was said in *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137, 167 [2: 60, 70], "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation." The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the Legislature, the manufacture of intoxicating

liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, delares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier* v. *Connolly*, 113 U. S. 31 [28: 924] that the Fourteenth Amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the General Government. *Henderson* v. *Mayor of N. Y.* 92 U. S. 259 [23: 543]; *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 465 [24:527]; *New Orleans Gas Light Co.* v. *Louisana Light Co.* 115 U. S. 650 [29: 516]; *Walling* v. *Michigan*, 116 U. S. 446 [29: 691]; *Yick Wo.* v. *Hopkins*, 118 U. S. 356 [30: 220]; *Morgan's Steamship Co.* v. *Louisana Board of Health*, Id. 455 [30: 287].

Upon this ground—if we do not misapprehend the position of defendants—it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile state legislation, this court in *Butchers Union S. H. & L. S. L. Co.* v. *Cresent City L. S. Co.* 111 U. S. 751 [28: 587], said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone* v. *Mississippi*, 101 U. S. 816 [25: 1079], where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No Legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants. * * * Government is organized with a view to their preservation, and cannot devest itself of the power to provide for them."

Again, in *New Orleans Gas Light Co.* v. *Louisana Light Co.* 115 U. S. 650, 672 [29: 516, 524]: "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle,—equally vital, because essential to the peace and safety of society,—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 32 [24: 991]; *Commonwealth* v. *Alger*, 7 Cush. 53. An illustration of this doctrine is afforded by *Patterson* v. *Kentucky*, 97 U. S. 501 [24: 1115]. The question there was as to the validity of a Statute of Kentucky, enacted in 1874, imposing a penalty upon anyone selling or offering for sale oils and fluids, the product of coal, petroleum, or other bituminous substances, which would burn or ignite at a temperature below 130° Fahrenheit. Patterson, having sold within that Commonwealth a certain oil, for which letters patent were issued in 1867, but which did not come up to the standard required by said statute, and having been indicted therefor, disputed the State's authority to prevent or obstruct the exercise of that right. This court upheld the legislation of Kentucky, upon the ground that while the State could not impair the exclusive right of the patentee, or of his assignee, in the discovery described in the letters patent, the tangible property, the fruit of the discovery, was not beyond control in the exercise of her police powers. It was said: "By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise, by any citizen, of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the National Government. The Kentucky Statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere police regulation, deemed essential to the protection of the lives and property of citizens." Referring to the numerous decisions of this court guarding the power of Congress to regulate commerce against encroachment, under the guise of state regulations, established for the purpose and with the effect of destroying or impairing rights secured by the Constitution, it was further said: "It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." See also *U. S.* v. *Dewitt*, 76 U. S. 9 Wall. 41 [19: 593]; *License Tax Cases*, 72 U. S. 5 Wall. 462 [18: 497]; *Pervear* v. *Commonwealth*, Id. 475 [18: 608].

Another decision, very much in point upon this branch of the case, is *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667 [24: 1036, 1038], also decided after the adoption of the Fourteenth Amendment. The court there sustained the validity of an ordinance of the Village of Hyde Park, in Cook County, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive or unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The fertilizing company had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and often sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: "We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions."

It is supposed by the defendants that the doctrine for which they contend is sustained by *Pumpelly* v. *Green Bay Co.* 80 U. S. 13 Wall. 168 [20:557]. But in that view we do not concur. That was an action for the recovery of damages for the overflowing of the plaintiff's land by water, resulting from the construction of a dam across a river. The defense was that the dam constituted a part of the system adopted by the State for improving the navigation of Fox and Wisconsin Rivers; and it was contended that as the damages of which the plaintiff complained were only the result of the improvement, under legislative sanction, of a navigable stream, he was not entitled to compensation from the State or its agents. The case, therefore, involved the question whether the overflowing of the plaintiff's land, to such an extent that it became practically unfit to be used, was a taking of property, within the meaning of the Constitution of Wisconsin, providing that "The property of no person shall be taken for public use without just compensation therefor." This court said it would be a very curious and unsatisfactory result, were it held that, "If the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

These principles have no application to the case under consideration. The question in *Pumpelly* v. *Green Bay Co.* arose under the State's power of eminent domain; while the

question now before us arises under what are, strictly, the police powers of the State, exerted for the protection of the health, morals, and safety of the people. That case, as this court said in *Transportation Co.* v. *Chicago*, 99 U. S. 642 [25:338] was an extreme qualification of the doctrine, universally held, that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use," do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the State or its agents, or give him any right of action. It was a case in which there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true that when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, 101 U. S. 814 [25:1079] the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 32 [24:991]: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

It now remains to consider certain questions relating particularly to the thirteenth section of the Act of 1885. That section—which takes the place of section 13 of the Act of 1881—is as follows:

"Sec. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this Act, or where intoxicating liquors are kept for sale, barter or delivery in violation of this Act, are hereby declared to be common nuisances; and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance; and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The attorney-general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding, shall be punished as for contempt, by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, in the discretion of the court."

It is contended by counsel in the case of *Kansas* v. *Ziebold & Hagelin* that the entire scheme of this section is an attempt to deprive persons who come within its provisions of their property and of their liberty without due process of law; especially, when taken in connection with that clause of section 14 (amendatory of section 21 of the Act of 1881) which provides that "In prosecutions under this Act, by indictment or otherwise, * * * it shall not be necessary in the first instance for the State to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes."

We are unable to perceive anything in these regulations inconsistent with the constitutional guarantees of liberty and property. The State having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechanical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender.

It is said that by the thirteenth section of the Act of 1885, the Legislature, finding a brewery within the State in actual operation, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation, the court is not to *determine* whether it is a common nuisance, but, under the command of the statute, is to *find it* to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry—and, it may be, contrary to the fact and against his own judgment—the edict of the Legislature, the court is commanded to take possession by its officers of the place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offense, but merely because the Legislature so commands; and it is done by a *court of equity*, without any previous conviction first had, or any trial known to the law.

This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, the court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen. But those statutes have no such scope and are attended with no such results as the defendants suppose. The court is not required to give effect to a legislative "decree" or "edict," unless every enactment by the law making power of a State is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxicating liquors. The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the Legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used as to make it a common nuisance.

Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. "In regard to public nuisances," *Mr. Justice* Story says, "the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction." 2 Story, Eq. §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury. *District Atty.* v. *Lynn & B. R. R. Co.* 16 Gray, 245; *Atty-Gen.* v. *New Jersey R. R. & T. Co.* 3 N. J. Eq. 139; *Atty-Gen.* v. *Tudor Ice Co.* 104 Mass. 244; *State* v. *Mobile*, 5 Port. (Ala.) 279, 294; *Hoole* v. *Atty-Gen.* 22 Ala. 194; *Atty-Gen.* v. *Hunter*, 1 Dev. Eq. 13; *Atty-Gen.* v. *Forbes*, 2 Myl. & C. 123, 129, 133; *Atty-Gen.* v. *Great Northern R. Co.* 1 Drew. & S. 161; Eden, Inj. 259; Kerr, Inj. 2d ed. 168.

As to the objection that the statute makes no provision for a jury trial in cases like this one, it is sufficient to say that such a mode of trial is not required in suits in equity brought to abate a public nuisance. The statutory direction that an injunction issue at the commencement of the action is not to be construed as dispensing with such preliminary proof as is necessary to authorize an injunction pending the suit. The court is not to issue an injunction simply because one is asked, or because the charge is made that a common nuisance is maintained in violation of law. The statute leaves the court at liberty to give effect to the principle that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. Here the fact to be ascertained was, not whether a place, kept and maintained for purposes forbidden by the statute, was, *per se*, a nuisance—that fact being conclusively determined by the statute itself—but whether the place in question was so kept and maintained. If the proof upon that point is not full or sufficient, the court can refuse an injunction, or postpone action until the State first obtains the verdict of a jury in her favor. In this case it cannot be denied that the defendants kept and maintained a place that is within the statutory definition of a common nuisance. Their petition for the removal of the cause from the state court, and their answer to the bill, ad-

mitted every fact necessary to maintain this suit, if the statute under which it was brought was constitutional.

Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the manufacture or sale of intoxicating liquors—such manufacture or sale being unlawful except for specified purposes, and then only under a permit—the prosecution need not prove a negative; namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the State.

A portion of the argument in behalf of the defendants is to the effect that the Statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other States and, upon that ground, are repugnant to the clause of the Constitution of the United States, giving Congress power to regulate commerce with foreign Nations and among the several States. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us.

For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the Constitution of the United States, *and its judgment, in each case, is accordingly, affirmed.* We are, also, of opinion that the Circuit of the United States erred in dismissing the bill of the State against Ziebold & Hagelin. *The decree in that case is reversed, and the cause remanded, with directions to enter a decree granting to the State such relief as the Act of March 7, 1885, authorizes. It is so ordered.*

Mr. Justice **Field** delivered the following opinion:

I dissent from the judgment in the last case, the one coming from the Circuit Court of the United States.

I agree to so much of the opinion as asserts that there is nothing in the Constitution or laws of the United States affecting the validity of any Act of Kansas prohibiting the sale of intoxicating liquors manufactured in the State, except under proper regulations for the protection of the health and morals of the people. But I am not prepared to say that the State can prohibit the manufacture of such liquors within its limits if they are intended for exportation, or forbid their sale within its limits, under like regulations, if Congress has authorized their importation, though the Act of Kansas is broad enough to include both such manufacture and sale. The right to import an article of merchandise, recognized as such by the commercial world—whether the right be given by Act of Congress or by treaty with a foreign country—would seem necessarily to carry the right to sell the article when imported. In *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 447 [6: 688] *Chief Justice* Marshall, in delivering the opinion of this court, said as follows: "Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

If one State can forbid the sale within its limits of an imported article, so may all the States, each selecting a different article. There would then be little uniformity of regulations with respect to articles of foreign commerce imported into different States; and the same may be also said of regulations with respect to articles of interstate commerce. And we know it was one of the objects of the formation of the Federal Constitution to secure uniformity of commercial regulations against discriminating state legislation. The construction of the commercial clause of the Constitution, upon which the *License Cases* in the 7th of Howard were decided, appears to me to have been substantially abandoned in later decisions. *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547]; *Welton* v. *Missouri*, 91 U. S. 275 [23: 347]; *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238]; *Parkersburg & O. R. Transportation Co.* v. *Parkersburg*, 107 U. S. 691 [27: 584]; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29: 158]; *Wabash, St. L. & Pac. R. Co.* v. *Illinois*, 118 U. S. 557 [30: 244]. I make this reservation that I may not hereafter be deemed concluded by a general concurrence in the opinion of the majority.

I do not agree to what is said with reference to the case from the United States Circuit Court. That was a suit in equity brought for the abatement of the brewery owned by the defendants. It is based upon clauses in the 13th section of the Act of Kansas, which are as follows:

"All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this Act, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this Act, *are hereby declared to be common nuisances;* and upon the judgment of any court having jurisdiction finding such place to be a nuisance under this section, the sheriff, his deputy, or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance; and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not

less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. The Attorney-General, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action and no bond shall be required."

By a previous section all malt, vinous, and fermented liquors are classed as intoxicating liquors, and their manufacture, barter, and sale are equally prohibited. By the 13th section, as is well said by counsel, the Legislature, without notice to the owner or hearing of any kind, declares every place where such liquors are sold, bartered, or given away, or kept for sale, barter, or delivery—in this case a brewery, where beer was manufactured and sold, which, up to the passage of the Act, was a lawful industry—to be a common nuisance; and then prescribes what shall follow, upon a court having jurisdiction finding one of such places to be what the Legislature has already pronounced it. The court is not to determine whether the place is a common nuisance in fact, but is to find it to be so if it comes within the definition of the statute; and, having thus found it, the executive officers of the court are to be directed to shut up and abate the place by taking possession of it; and, as though this were not sufficient security against the continuance of the business, they are to be required to destroy all the liquor found therein, and all other property used in keeping and maintaining the nuisance. It matters not whether they are of such character as could be used in any other business, or be of value for any other purposes. No discretion is left in the judge or in the officer.

These clauses appear to me to deprive one who owns a brewery and manufactures beer for sale, like the defendants, of property without due process of law. The destruction to be ordered is not as a forfeiture upon conviction of any offense, but merely because the Legislature has so commanded. Assuming, which is not conceded, that the Legislature, in the exercise of that undefined power of the State, called its police power, may, without compensation to the owner, deprive him of the use of his brewery for the purposes for which it was constructed under the sanction of the law, and for which alone it is valuable, I cannot see upon what principle, after closing the brewery, and thus putting an end to its use in the future for manufacturing spirits, it can order the destruction of the liquor already manufactured, which it admits by its legislation may be valuable for some purposes, and allows to be sold for those purposes. Nor can I see how the protection of the health and morals of the people of the State can require the destruction of property like bottles, glasses, and other utensils, which may be used for many lawful purposes. It has heretofore been supposed to be an established principle, that where there is a power to abate a nuisance the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it. *Babcock* v. *Buffalo*, 56 N. Y. 268; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 189. The decision of the court, as it seems to me, reverses this principle.

It is plain that great wrong will often be done to manufacturers of liquors, if legislation like that embodied in this 13th section can be upheld. The Supreme Court of Kansas admits that the Legislature of the State, in destroying the values of such kinds of property, may have gone to the utmost verge of constitutional authority. In my opinion it has passed beyond that verge, and crossed the line which separates regulation from confiscation.

Ex Parte:
In the Matter of RUFUS A. AYERS, *Petitioner.*

Ex Parte:
In the Matter of JOHN SCOTT, *Petitioner.*

Ex Parte:
In the Matter of J. B. McCABE, *Petitioner.*

(See S. C. Reporter's ed. 443–516.)

Suit against a State—orders for contempt—habeas corpus—*Eleventh Constitutional Amendment—contract of State—remedy on—state officers as parties—suits against such officers.*

1. A suit by aliens, the object of which is to enjoin the Attorney-General and the Commonwealth's attorneys of the several counties, cities and towns of Virginia, from bringing any suit in the name of the Commonwealth to enforce the collection of taxes for the payment of which coupons originally attached to her bonds had been tendered, is a suit which the Circuit Court of the United States had no jurisdiction to entertain; such suit is, in law and fact, a suit by subjects of a foreign State against the State of Virginia, and within the prohibition of the Eleventh Amendment to the Constitution.

2. The orders, in such suit, of the circuit court forbidding the officers of the Commonwealth charged with the supervision and management of legal proceedings in her behalf to bring such suits in her name, and the orders of such court adjudging them in contempt for bringing such suits were void, and their imprisonment under such orders is without authority of law.

3. When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order punishing for contempt is void, and when the proceeding for contempt in such a case results in imprisonment this court will, by its writ of *habeas corpus*, discharge the prisoner.

4. Whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, but by a consideration of the nature of the case.

5. For a breach of its contract by the State, there is no remedy by suit against the State itself; and a bill the object of which is by injunction indirectly to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, is a suit against the State.

6. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which

constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the State.

7. Suits are justifiable against individual defendants who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs; and against officers in their official capacity, either to arrest or direct their official action by injunction or *mandamus*, where such suits are authorized by law, and the act to be done or omitted is purely ministerial.

[Nos. 4, 5, 6, Orig.]

Argued Nov. 14, 15, 1887. Decided Dec. 5, 1887.

PETITIONS for writs of *habeas corpus*. *Granted*, and petitioners ordered discharged.

Statement by *Mr. Justice* **Matthews**:

A writ of *habeas corpus*, directed to the Marshal of the United States for the Eastern District of Virginia, having heretofore been issued by this court on the application of Rufus A. Ayers, Attorney-General of the State of Virginia, the marshal has made return thereto that the petitioner, whose body he produces, was in his custody and detained by him by virtue of an order, judgment, decree and commitment of the Circuit Court of the United States for the Eastern District of Virginia, a certified copy of which is attached as a part of the return; and further returned that the petitioner had not paid and refuses to pay the fine imposed upon him by said order. The order of commitment, dated at Richmond, October 8, 1887, is as follows:

"*On Attachment for Contempt.*

"In the Circuit Court of the United States for the Eastern District of Virginia.

In Re RUFUS A. AYERS.

"This matter came on this day to be heard upon the rule heretofore issued against Rufus A. Ayers, Attorney-General of the State of Virginia, to show cause why he should not be attached for contempt in disobeying the restraining order heretofore granted in the suit of *Cooper et al.* v. *Marye et al.*, on the 6th day of June, 1887, and his answer thereto.

"On consideration whereof the court is of opinion and doth order and adjudge that the said Rufus A. Ayers is guilty of contempt in his disobedience of said order, and that he do forthwith dismiss the suit of *The Commonwealth* v. *The Baltimore & Ohio Railroad Company*, instituted by him in the Circuit Court of the City of Richmond, and that for his said contempt he be fined the sum of $500, and stand committed in the custody of the marshal of this court until the same be paid and he purge himself of his contempt by dismissing said suit last herein mentioned."

A transcript of the proceedings, orders, and decrees of the Circuit Court of the United States for the Eastern District of Virginia in the suit of *Cooper et al.* v. *Marye et al.*, referred to in the order of commitment, is also produced, and set out in full as a part of the record in this matter. From that it appears that on June 6, 1887, James P. Cooper and others, suing on their own behalf and for all others similarly situated, being aliens, subjects of Great Britain, filed their bill of complaint in the Circuit Court of the United States for the Eastern District of Virginia against Morton Marye, Auditor of the State of Virginia, Rufus A. Ayers, the Attorney-General thereof, and the treasurers of counties, cities, and towns in Virginia, and the commonwealth attorneys of counties, cities, and towns in said State, whose names they prayed they might be allowed to insert in the bill as defendants when discovered.

In that bill it is alleged that, by an Act of the General Assembly of Virginia, approved March 30, 1871, and another approved March 28, 1879, the State of Virginia had provided for the issue of a large number of bonds bearing interest coupons, which she thereby contracted should be received in payment of all taxes, debts, and demands due to her, of which large numbers, amounting to many millions of dollars, had been in fact issued; that said coupons issued under both of said Acts, are payable to bearer, and, both as a contract to pay interest and as a contract that they shall be received in payment of taxes, are negotiable instruments, free in the hands of any *bona fide* purchaser for value from any equity or burden whatever; that there are outstanding and overdue in the hands of the public at large more than $4,000,000 of these overdue coupons; that in pursuance of a plan subsequently conceived and adopted to destroy the marketable value of these coupons, the General Assembly of the State of Virginia, by the 15th section of an Act dated February 14, 1882, forbade all the officers of the State to pay and redeem the same according to the tenor of the contract contained therein, and, by an Act dated January 26, 1882, the collectors of taxes were forbidden to receive the same in payment of any taxes due to them; that, nevertheless, these statutes were declared by the Supreme Court of the United States to be unconstitutional and void; that thereafter the complainants, on the faith of said decision and the belief caused thereby that the said State would be utterly unable by any legislative enactment to impair the value of said coupons as a tender for taxes, had bought a large quantity of said coupons in the open money market of the City of London and elsewhere, amounting to more than $100,000 nominally, at a cost of more than $30,000; that this purchase was made for the purpose of selling said coupons to the taxpayers of Virginia, to be used by them as tenders for taxes due said State, the complainants believing that they would be able to sell said coupons to such taxpayers at a considerable advance on the price paid for them; many of which the complainants have sold to said taxpayers; that the General Assembly of Viginia, enacted another statute, dated May 12, 1887, a copy of which is set out as an exhibit to the bill, whereby, as is alleged, "The treasurer of each county, city, and town in the State is ordered to furnish to the Commonwealth's attorney thereof a list of all persons who have tendered the said State's coupons in payment of their taxes, and said Commonwealth's attorneys are ordered to institute suits by summary proceedings in the name of said State against all such persons to recover a judgment against them for the amount of said taxes so previously due by them; that the said taxpayers are thereby required to submit to a judgment against them by default or to appear in court and plead a tender of said coupons, and then prove affirmatively that the coupons tendered by them are the State's coupons and not counterfeit and spurious coupons, the burden of proving the same being placed upon the tax

payer and the coupon being taken to be *prima facie* spurious and counterfeit."

In the bill it is further alleged "That said Act is repugnant to section 10 of article 1 of the Constitution of the United States, for the reason that, taking in connection with said Act before mentioned of January 26, 1882, it first commands the State's officers to refuse to receive those coupons which are undoubtedly her own as well as those which are spurious (and your orators charge that there are none such), and then commands her officers to bring said suits against those who have tendered said coupons of said State, as well as against those who have tendered spurious coupons; that it imposes upon the defendants heavy costs and fees, although all taxes due by them were paid by said tender, and it makes the judgment to be recovered in said suit a perpetual lien upon all the property of said taxpayer for said taxes, and for said costs and fees also, thus fixing a perpetual cloud upon the title of said taxpayer to his property."

It is further alleged in the bill "That, by another Act of the General Assembly of said State approved January 26, 1886, it is provided that upon a trial of the issue to be made up under said Act of May 12, 1887, the defendant shall produce the bond from which the coupon so tendered by him was cut, and prove that it was cut from said bond;" and that, as very few of said bonds are owned by persons residing in Virginia, the taxpayers would be utterly unable to produce said bonds as required by said Act.

It is further alleged therein "That, by another Act of said General Assembly, approved ——, 1886, it is provided that the taxpayer undertaking to prove said tender shall not be allowed to introduce expert evidence to prove the genuineness of said coupons, and all that have been issued under either of said Acts are engraved only, as said Acts provided they may be, and are not signed manually." Wherefore, it is alleged, that "Said taxpayers who cannot produce said bonds will be utterly unable to prove their coupons to be genuine upon said trial, the State thus forcing them into a lawsuit in her own courts, in which she has taken effectual precautions beforehand to make it impossible they can win, and to make it a legal certainty that they must lose when they cannot produce said bonds; that said Act is a device and trick enacted to take away from and deprive said coupons of their value as tender for taxes."

It is further alleged therein that the Supreme Court of Appeals of the State of Virginia has decided that said last named two Acts, requiring said bonds to be produced, and forbidding the use of expert testimony, are valid laws, not repugnant to the Constitution of the United States.

It is further alleged in the bill that, as the great bulk of the taxpayers of Virginia pay small sums, "If her officers are allowed to enforce said Act of May 12, 1887, against them, the profit to be derived from purchasing your orator's coupons will be too small to induce them to do so; and, indeed, it will be impossible for them to use said coupons at all, except in the very limited cases in which they can produce said bonds;" and that "your orators will not only lose the profit which they had a right to expect they would make when they purchased said coupons, but they will be unable to sell them to Virginia's taxpayers at any price, and thus their entire property in the same will be destroyed; and your orators charge and aver that, in any event, unless they are granted the injunction hereinafter prayed for, they will lose a sum greater than $2,000."

It is further charged in the bill "That the treasurer of each county, city and town in said State is about to report to each Commonwealth's attorney the name of every taxpayer who has tendered coupons, and each Commonwealth's attorney is going at once to institute the suits provided for by said Act of May 12, 1887, against persons holding coupons bought from your orators, as well as against all others; and they are informed and believe and so charge, that, in every case in which tenders of coupons have been made to the Auditor of the State, who is Morton Marye (and many have been made to him), the said Auditor, and Hon. R. A. Ayers, who is Attorney-General thereof, are about to institute the suits which said Act provides for their instituting, whereby all coupons which your orators have sold to Virginia taxpayers will be condemned as spurious, although they are all genuine coupons issued by the State of Virginia, and all her taxpayers will be intimidated and deterred from buying from your orators and all others in the future any more of said coupons."

It is further charged in an amended bill "That Acts of the General Assembly of the State of Virginia, which are repugnant to section 10 of article I of the Constitution of the United States, commanded the treasurer of each county to levy on and sell the property of each taxpayer who has tendered coupons in payment of his taxes; and said Acts also command said treasurers to return the real property of such taxpayers delinquent where no personal property can be found to be seized and sold; and your orators charge, therefore, that unless said officers are enjoined from bringing said suits hereinbefore described the treasurer of each county will proceed to execute said other unconstitutional Acts by levying on such taxpayer's property, or by returning the same delinquent where no personal property can be found, thus creating a cloud upon the title of such taxpayer's property."

The prayer of the bill is that "The said Morton Marye, Auditor of Virginia, R. A. Ayers, the Attorney-General thereof, and the treasurer and Commonwealth's attorney of each county, city, and town in the State of Virginia, may be made parties defendant hereto, and that they, their agents and attorneys, may be restrained and enjoined from bringing or commencing any suit provided for by said Act of May 12, 1887, or from doing any other act to put said statute into force and effect, and that until the hearing of a motion for said injunction a restraining order may be made to that effect," and for general relief.

The Act of May 12, 1887, set out as an exhibit to the bill, is as follows:

"An Act to Provide for the Recovery, by Motion, of Taxes and Certain Debts due the Commonwealth, for the Payment of Which Papers Purporting to be Genuine Coupons

of the Commonwealth Have Been Tendered. Approved May 12, 1887.

"1. *Be it enacted by the General Assembly of Virginia*, That all taxes, including taxes on licenses, now due or which may hereafter become due to the Commonwealth, in payment of which any paper or instrument purporting to be a coupon detached from a bond of this State shall have been or may hereafter be tendered and not accepted as payment and not otherwise paid, may be recovered in the circuit court having jurisdiction over the county or corporation in which said taxes shall have been assessed, or if the tender was made to the auditor of public accounts in payment of taxes which he is authorized by law to receive, the said taxes may be recovered in the Circuit Court of the City of Richmond.

"2. The court shall have jurisdiction without regard to the amount of taxes claimed and though the amount be less than twenty dollars.

"3. The proceeding shall be by motion, in the name of the Commonwealth, on ten days' notice, and shall be instituted and prosecuted by the attorney for the Commonwealth or corporation in which the proceeding is, or if it be instituted by direction of the auditor of public accounts in the Circuit Court of the City of Richmond.

"4. The notice may be served in any county or corporation in the State in the mode prescribed by the first section of chapter one hundred and sixty-four of the Code (edition of eighteen hundred and seventy-three), or it may be served on any agent of the defendant in the county or corporation in which the proceeding is, and the word 'agent,' as here used, shall include any person who shall have made the tender aforesaid on behalf of the defendant, or if there be no known agent of the defendant in the said county or corporation it may be served by the publishing the same one time in some newspaper printed in the county or city where the tax was assessed, or if there be no paper printed in such county or city, then in some newspaper published in some county or city nearest to the county or city where such tax was assessed.

"5. The motion may be tried or heard by the court or jury as motions in other civil cases. If the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered, and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name in his official character, across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account.

"6. If the defendant fails in his defense and the taxes claimed are found to be due the State, any coupon filed by him with a plea of tender (and not spurious) shall be returned to him, and there shall be judgment for the Commonwealth for the aggregate amount of the taxes due and the interest thereon from the time they became due till the date of the judgment, with interest on the said aggregate amount from the date of the judgment until payment, and costs.

"7. No antecedent lien of the Commonwealth for the taxes for which any judgment is rendered shall be deemed to be merged in the judgment or otherwise impaired by the recovery of the same, but such lien shall continue in force notwithstanding the judgment.

"8. Every such judgment shall be docketed, as prescribed by law in other cases, and the clerk thall issue execution thereon, directed to the sheriff of any county (or sergeant of any city), who shall account for the money collected thereon to the auditor of public accounts.

"9. Should coupons be tendered the officer in satisfaction of said execution, he shall note the fact of such tender upon the execution and return it to the clerk's office; and thereupon the auditor of public accounts may direct an action to be brought upon the judgment. This action shall be instituted and prosecuted in the mode herein prescribed for actions to recover judgments for taxes, and similar actions may be instituted whenever coupons are tendered in satisfaction of any judgment obtained by the Commonwealth under the provisions of this Act.

"10. The clerk of the court in which any such judgment is rendered in behalf of the Commonwealth shall, as soon as it is rendered, transmit a certified abstract thereof to the auditor of public accounts, who shall record the same in a book to be kept for that purpose.

"11. Immediately after the passage of this Act the county and city treasurers, and all other officers authorized by law to collect or receive money for taxes due the Commonwealth, including the license taxes, shall report to the Commonwealth's attorneys of their respective counties and cities, and also to the auditor of public accounts, the names of all persons assessed or liable therein for taxes due the Commonwealth who have heretofore tendered (otherwise than for identification and verification) coupons for such taxes, and which taxes remain unpaid, the amount of the taxes due, on what account, and when they become payable, and a description, as far as possible, of the coupons tendered, and when tendered; and they shall thereafter make like reports whenever and as soon as any such tender may be made. As soon as the auditor of public accounts shall receive such reports he shall credit the proper officer with the taxes named therein for which coupons were tendered.

"12. The attorneys for the Commonwealth and the attorney-general, when it is his duty under this Act to represent the Commonwealth in any case in the Circuit Court in the City of Richmond, upon such report being made to them, or whenever they are otherwise informed of any such tender having been made, shall forthwith institute and prosecute such proceedings as are hereinbefore required.

"13. In any case instituted under the provis-

ions of this Act, in which there is a judgment for the Commonwealth, a fee of ten dollars shall be allowed the attorney for the Commonwealth, or the attorney-general, as the case may be, which fee and fees of the clerk and other officers for services rendered in the case, as well as such other costs as are allowed by law in other cases in which the Commonwealth is a party, shall be taxed in the costs against the defendant. The Commonwealth shall not be liable for any fees or costs in any proceedings under this Act.

"14. If any officer fail to perform any duty required of him by this Act he shall be fined not less than one hundred dollars nor more than five hundred dollars.

"15. This Act shall be in force from its passage."

On this bill the following order was made:

"Circuit Court of the United States for the Eastern District of Virginia.

"James P. Cooper, H. R. Beeton, F. J. Burt, N. J. Chinnery, W. M. Chinnery. F. P. Leon, and W. G. Woolston,
against
"Morton Marye, Auditor, R. A. Ayers, Attorney-General, the Treasurers of Counties, Cities and Towns in Virginia, and the Commonwealth Attorneys of Counties, Cities and Towns in said State, whose names complainants have leave to insert as they may be discovered.

"Upon reading the bill of the complainants, it is ordered that Morton Marye, Auditor, R. A. Ayers, Attorney-General, each and every treasurer of a county, city, or town in the State of Virginia, and each and every commonwealth attorney for a county, city, or town in said State, be restrained from bringing or commencing any suit against any person who has tendered the State of Virginia's tax-receivable coupons in payment of taxes due to said State, as provided for and directed by the Act of the Legislature of Virginia, approved May 12, 1887, described in the bill, and of which a copy is attached thereto, and that each and all of said parties, their agents and attorneys, be restrained from doing any act to put said statute into force and effect until the further order of the court.

"And it is ordered that the motion for an injunction in this case be set down for hearing at the Circuit Court of the United States at Richmond, Virginia, on the first Monday in October next; *Provided*, That the Attorney-General of the State of Virginia, or either of the defendants, may move the court for an earlier hearing thereof after ten days' written notice to the solicitor of the complainants; and *provided further*, That a copy of this bill and of this order be served on the Attorney-General of the State of Virginia within ten days after the filing thereof.

"June 6, 1887."

A copy of this order, together with a copy of the bill, was served on the petitioner Ayers, the Attorney-General of Virginia, on June 7, 1887.

On October 8, 1887, the following proceedings took place, viz.:

"And now, at this date, to wit: at a Circuit Court of the United States for the Eastern District of Virginia, held at Richmond, in said district, this 8th day of October A. D. 1887.

"J. P. Cooper and Others
against
Morton Marye, Auditor, etc., and Others. } In Equity.

"This cause came on this day to be heard upon the motion of the complainants for a preliminary injunction and was argued by counsel; upon consideration whereof it is adjudged, ordered, and decreed, for reasons stated in writing and made part of the record, that the injunction be issued as prayed in the bill and remain in force until the further order of the court.

"Hugh L. Bond,
"Circuit Judge.

"Thereupon the complainants, by counsel, called the attention of the court to the fact that the defendant, R. A. Ayers, Attorney-General of the State of Virginia, was guilty of contempt by his disobedience of restraining order issued in this cause on 6th day of June, 1887, and the said R. A. Ayers, being called upon to answer in this behalf, filed in open court his answer in writing, which answer is in the words following, to wit:

"Answer of Defendant R. A. Ayers.

"The answer of R. A. Ayers, Attorney-General of the State of Virginia, to a rule awarded against him by this honorable court.

"To the Honorable Judge of the Circuit Court of the United States for the Eastern District of Virginia:

"By an order entered in the chancery cause of *James P. Cooper et als.* against *Morton Marye and others*, summoning him to show cause why he should not be fined and imprisoned for disobeying the injunction heretofore awarded in said suit, restraining him and others from instituting the suits required by an Act of the General Assembly of Virginia, entitled 'An Act to Provide for the Recovery by Motion of Taxes and Certain Debts Due the Commonwealth, for the Payment of Which Papers Purporting to be Genuine Coupons of the Commonwealth Have Been Tendered,' approved May 12, 1887, by instituting a suit against the Baltimore and Ohio Railroad Co., respondent, answering, says that he admits that he instituted the suit against the Baltimore and Ohio Railroad Company to recover taxes due by it to the State of Virginia after he had been served with the injunction order in this case; that he instituted the said suit because he was thereunto required by the Act of the General Assembly of Virginia aforesaid, and because he believed this court had no jurisdiction whatever to award the injunction violated. Respondent disclaims any intention to treat the court with disrespect, and states that he has been actuated alone with the desire to have the law properly administered.

"R. A AYERS,
"Atty-Gen. of Virginia.

"Subscribed and sworn to before me this 8th day of October, 1887.

"M. F. PLEASANTS, Clerk."

And thereupon the order was made adjudging the petitioner guilty of contempt by his disobedience of said order, and requiring him forthwith to dismiss the suit of *Commonwealth* v.

Baltimore & Ohio R. R. Co., instituted by him in the Circuit Court of the City of Richmond, fining him $500 for his contempt, and directing that he stand committed in the custody of the marshal of the court until the same be paid, and to purge himself of his contempt by dismissing said suit last mentioned.

In the same case, the proceedings resulting in the commitment and imprisonment of the petitioner John Scott, are as follows:

On August 23, 1887, on affidavit, showing that John Scott, attorney for the Commonwealth for Fauquier County, Virginia, had been served with a copy of the restraining order of June 6, 1887, and that in violation thereof he had brought certain suits against parties in said county, for the recovery of taxes alleged to be due by them to the State of Virginia for the year 1886, for which they had previously tendered tax-receivable coupons, said actions being brought under the Act of the General Assembly of May 12, 1887, a rule was entered upon the said Scott to show cause, on September 23, 1887, why he should not be attached for contempt. On that day the said Scott answered the rule, justifying his action on the ground that the order which he had disobeyed was void for want of jurisdiction in the circuit court to make it. On September 24, 1887, in pursuance of leave given, the complainants filed an amendment to their bill, making Scott, as attorney for the Commonwealth for said County of Fauquier, a formal party defendant, and alleging that a judgment had been rendered against the defendant in each of the suits brought by the said Scott under the said Act, a list of which, with the amounts of the several judgments, was set out.

Thereupon, on October 8, 1887, the following order was made: "The court, therefore, doth adjudge, order, and decree that, for his contempt of this court, said John Scott do pay a fine of $10, and dismiss the cases which he has brought in the Circuit Court of Fauquier County, Virginia, in violation of the restraining order heretofore made in the cause of *Cooper* v. *Marye*, on the 6th day of June, 1887; and, further, that he enter satisfaction of the judgments heretofore obtained by him against the defendants in said causes, and that he stand committed to the custody of the marshal of this court until this order is obeyed, and the fine hereby imposed upon him is paid. And it is further ordered that the said John Scott do pay the costs of these proceedings."

Similar proceedings were had in respect to J. B. McCabe, the Commonwealth's attorney for Loudoun County, Virginia, the other petitioner. On July 11, 1887, an order was entered granting a rule against him to show cause why he should not be attached for an alleged contempt of the court in disobeying the restraining order made in the cause on June 6, 1887. Upon proof by affidavit that the said McCabe, as such attorney, had commenced proceedings under the Act of May 12, 1887, to recover taxes alleged to be due to the State of Virginia from certain parties therein named, who had previously tendered tax receivable coupons in payment thereof, he answered the rule, denying the validity of the order which he had violated; and thereupon, on October 8, 1887, the matter coming on to be heard, it was ordered and adjudged by the court "that the said J. B. McCabe is guilty of contempt in his disobedience of said order, and that he do forthwith dismiss all suits under the Act of May 12, 1887, now pending in the Circuit Court of Loudoun County. And the court doth further order and adjudge that the said J. B. McCabe, for his said contempt, be fined $100; that he be taken into the custody of the marshal of this court, and by him held until the said fine be paid, and he purge himself of the said contempt by dismissing the suits brought or prosecuted in violation of the restraining order of this court; and that he pay the costs of these proceedings."

Messrs. C. V. Meredith, W. W. Gordon, **J. Randolph Tucker** and **Roscoe Conkling,** for petitioners:

The restraining order or injunction was to proceedings in a state court, and is beyond the jurisdiction of the court, under the provisions of the Act of Congress.

R. S. § 720; *Missouri, K. & T. R. R. Co.* v. *Scott*, 4 Woods, 386; *Fisk* v. *Union Pac. R. R. Co.* 10 Blatchf. 518; *Diggs* v. *Wolcott*, 8 U. S. 4 Cranch, 179 (2: 587); *Peck* v. *Jenness*, 48 U. S. 7 How. 625 (12: 846); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Watson* v. *Jones*, 80 U. S. 13 Wall. 679 (20: 666); *French* v. *Hay*, 89 U. S. 22 Wall. 250 (22: 857); *Haines* v. *Carpenter*, 91 U. S. 254 (23: 345); *Dial* v. *Reynolds*, 96 U. S. 340 (24: 644); *Dietzsch* v. *Huidekoper*, 103 U. S. 494 (26: 497.)

The Act of 1789, section 16, continued in Revised Statutes, section 723, provides: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

Baker v. *Biddle*, 1 Baldw. 405.

Complainants had no equity by their original bill or any of the amended bills.

Carter v. *Greenhow*, 114 U. S. 317 (29: 202); *Marye* v. *Parsons*, 114 U. S. 325 (29: 205); *Hagood* v. *Southern*, 117 U. S. 52 (29: 805).

If the complainants have equity, they have none to restrain an attorney who brings a suit.

Poore v. *Clark*, 2 Atk. 515; *Cockburn* v. *Thompson*, 16 Ves. Jr. 325; *Wilkins* v. *Fry*, 1 Meriv. 262; *Kerr* v. *Watts*, 19 U. S. 6 Wheat. 550 (5: 323); *Caldwell* v. *Taggart*, 29 U. S. 4 Pet. 190 (7: 828); *Mechanics Bank* v. *Seton*, 26 U. S. 1 Pet. 299 (7: 152); *Story* v. *Livingston*, 38 U. S. 13 Pet. 359 (10: 200); *McArthur* v. *Scott*, 113 U. S. 340 (28: 1015); *Williams* v. *Bankhead*, 86 U. S. 19 Wall. 563 (22: 184).

It cannot be held to be unconstitutional for a State to provide for suits by itself, in its own courts, against citizens who have not paid their taxes, and a trial by jury to test the claim.

Murray v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 272 (15: 372).

This is an injunction against the State.

Virginia Cases, 100 U. S. 303-370 (25: 664-668); *U. S.* v. *McLemore*, 45 U. S. 4 How. 286 (11: 977); *Hill* v. *U. S.* 50 U. S. 9 How. 386 (13: 185); *Mississippi* v. *Johnson*, 71 U. S. 4 Wall. 475 (18: 437); *Georgia* v. *Stanton*, 73 U. S. 6 Wall. 50 (18: 721); *Board of Liquidation* v. *McComb*, 92 U. S. 531 (23: 623); *Cunningham* v. *Macon & B. R. R. Co.* 109 U. S. 446 (27: 992); *Louisiana* v. *Jumel*, 107 U. S. 711 (27: 448); *Antoni* v. *Greenhow*, Id. 769 (27: 468); *Hagood* v. *Southern*, *supra.*

If the court, on any ground previously maintained, was without jurisdiction or transcended its jurisdiction, this court will discharge.

Ex parte Parks, 93 U. S. 23 (23: 788); *Ex parte Wilson*, 114 U. S. 417 (29: 89); *Ex parte Curtis*, 106 U. S. 371 (27: 232); *Ex parte Carll*, Id. 521 (27: 288); *Ex parte Bigelow*, 113 U. S. 328 (28: 1005); *Ex parte Fisk*, Id. 713 (28: 1117); *Ex parte Yarbrough*, 110 U. S. 651 (28: 274); *Ex parte Virginia*, 100 U. S. 343 (25: 676); *Ex parte Siebold*, Id. 371 (25: 717); *Ex parte Harding*, 120 U. S. 782 (30: 824); *Ex parte Bain*, 121 U. S. 1 (30: 849.)

The petitioner is only required to show that the lower court had no power to enter the order complained of.

Ex parte Fisk, 113 U. S. 713 (28: 1117); *Ex parte Virginia*, 100 U. S. 339, 343 (25: 676, 677); *Ex parte Rowland*, 104 U. S. 604 (26: 861).

The statute is not unconstitutional.

Antoni v. *Greenhow, supra; Poindexter* v. *Greenhow*, 114 U. S. 274 (29: 187); *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 196 (4: 218); *Grenada County* v. *Brogden*, 112 U. S. 261 (28: 704); *U. S.* v. *Dickson*, 40 U. S. 15 Pet. 141, 165 (10: 689, 698).

Expert testimony is never allowed to prove the genuineness of coupons.

Rowt v. *Kile*, 1 Leigh, 216, 223; *Strother* v. *Lucas*, 31 U. S. 6 Pet. 763 (8: 573).

The right to have one's controversies determined by existing rules of evidence is not a vested right.

Cooley, Const. Lim. 367; *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 350, 351, 369 (6: 653, 659); Black's Con. Proh. § 202; *Moore* v. *U. S.* 91 U. S. 270 (23: 346).

This is a suit against the State.

Osborn v. *U. S. Bank*, 22 U. S. 9 Wheat. 738 (6: 204); *Davis* v. *Gray*, 83 U. S. 16 Wall. 203–220 (21: 447, 453); *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 (13: 383); *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *State Bank of Ohio* v. *Knoop*, 57 U. S. 16 How. 369 (14: 977); *Kendall* v. *U. S.* 37 U. S. 12 Pet. 613 (9: 1216); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 (10: 559); *U. S.* v. *Seaman*, 58 U. S. 17 How. 230 (15: 227); *U. S.* v. *Guthrie*, 58 U. S. 17 How. 304 (15: 106); *Mississippi* v. *Johnson*, 71 U. S. 4 Wall. 498 (18: 440); *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 352 (19:64); *Litchfield* v. *Register*, 76 U. S. 9 Wall. 575 (19: 681); *Secretary* v. *McGarrahan*, 76 U. S. 9 Wall. 298 (19: 579); *Louisiana* v. *Jumel* and *Poindexter* v. *Greenhow, supra.*

The bill is without equity.

Marye v. *Parsons*, 114 U. S. 327 (29: 205), and *Hagood* v. *Southern, supra.*

An injunction will not lie against different persons for separate infringements or violations of one and the same right.

2 High, Inj. 1549; *Dilly* v. *Doig*, 2 Ves. Jr. 486; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 155.

A court of equity will not enjoin proceedings in an action at law in behalf of one not a party to the suit which it is sought to enjoin.

2 High, Inj. § 1550; *New York* v. *Connecticut*, 4 U. S. 4 Dall. 1 (1: 715); *State* v. *McGlynn*, 20 Cal. 233, 274.

Messrs. **Wm. L. Royall** and **D. H. Chamberlain**, for respondent:

Section 720, United States Revised Statutes, does not apply to a case in which the United States Court enjoins parties from commencing suits in a state court. The suit must have been actually commenced in the state court in order to bring section 720 into operation.

Fisk v. *Union Pac. R. R.* 10 Blatchf. 520; *Louisiana State Lottery Co.* v. *Fitzpatrick*, 3 Woods, 255; *Live Stock D. & B. Asso.* v. *Crescent City L. S. L. & S. H. Co.* 1 Abb. U. S. 388; *Moore* v. *Holliday*, 4 Dill. 54; *Cropper* v. *Coburn*, 2 Curt. 468.

When a state court is enforcing a statute repugnant to the Constitution of the United States it is without any jurisdiction whatever, and therefore it cannot be said that there are any proceedings in the state court.

Ex parte Royall, 117 U. S. 248 (29: 870); *Ex parte Siebold*, 100 U. S. 371, 376 (25: 717, 719); *Ex parte Yarbrough*, 110 U. S. 651, 654 (28: 274); *Norton* v. *Shelby County*, 118 U. S. 425 (30: 178); *Cadle* v. *Tracy*, 11 Blatchf. 102; *Dietzsch* v. *Huidekoper*, 103 U. S. 497 (26: 498); *Ex parte Fisk*, 113 U. S. 713 (28: 1117); *Ex parte Bain*, 121 U. S. 1 (30: 849).

The federal courts will enjoin state officers from executing a state law repugnant to the Constitution of the United States.

Dodge v. *Woolsey*, 59 U. S. 18 How. 331 (15: 401); *Wilmington & W. R. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 264 (20: 568); *Tomlinson* v. *Branch*, 82 U. S. 15 Wall. 460 (21: 189); *Charleston* v. *Branch*, Id. 470 (21: 193); *Branch* v. *Charleston*, 92 U. S. 677 (23: 750); *Humphrey* v. *Pegues*, 83 U. S. 16 Wall. 244 (21: 326); *Home of the Friendless* v. *Rouse*, 75 U. S. 8 Wall. 430 (19: 495); *Washington University* v. *Rouse*, Id. 439 (19: 498); *McGehee* v. *Mathis*, 71 U. S. 4 Wall. 143 (18: 314); *Antoni* v. *Greenhow*, 107 U. S. 769 (27: 468); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 738 (6: 204); *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 (21: 447); *Board of Liquidation* v. *McComb*, 92 U. S. 531 (23:623); *U. S.* v. *Lee*, 106 U. S. 196 (27: 171); *Hagood* v. *Southern*, 117 U. S. 52 (29: 805); *Louisiana* v. *Jumel*, 107 U. S. 711 (27: 448); *Poindexter* v. *Greenhow*, 114 U. S. 270 (29: 185); *Rolston* v. *Missouri Fund Comrs.* 120 U. S. 390 (30: 721); *Hawes* v. *Oakland*, 104 U. S. 450 (26: 827); *Huntington* v. *Palmer*, 104 U. S. 482 (26: 833); *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153 (25: 903); *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691 (27: 584); *Moore* v. *Holliday*, 4 Dill. 52; *Watson* v. *Bondurant*, 2 Woods, 166; *Haines* v. *Carpenter*, 91 U. S. 254 (23: 345); *Diggs* v. *Wolcott*, 8 U. S. 4 Cranch, 179 (2:587).

The complainants show themselves to have such an interest in the subject matter of the suit as to give them a standing in the court below.

Marye v. *Parsons*, 114 U. S. 327 (29: 205); *Hagood* v. *Southern, supra.*

The Act of May 12, 1887, is unconstitutional.

Poindexter v. *Greenhow, supra; Cornwall* v. *Commonwealth*, 11 Va. L. J. No. 2, 90.

In *Newton* v. *Commonwealth* and *Burruss* v. *Same*, 11 Va. L. J. p. 93, the same court decided that the Act of January 26, 1886, was constitutional in its requirement of the production of the bond from which coupons tendered for taxes were cut, and that when the plaintiff failed to produce such bond he must fail in his suit.

This is not a suit against the State.

Osborn v. *U. S. Bank*, 22 U. S. 9 Wheat. 738 (6: 204); *Poindexter* v. *Greenhow, supra.*

Mr. Justice **Matthews** delivered the opinion of the court:

It is established by the decisions of this court, that while "the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court," yet, when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void; and the order punishing for the contempt is equally void;" and that, "when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner." *Ex parte Fisk*, 113 U. S. 713, 718 [28:1117, 1119].

In *Ex parte Rowland*, 104 U. S. 604 [26:861], the commissioners of a county in Alabama were, on a writ of *habeas corpus*, discharged by this court from imprisonment to which they had been adjudged in consequence of an alleged contempt of the Circuit Court of the United States for the Middle District of Alabama, in refusing to obey the command of a peremptory
496 writ of *mandamus* issued by that court requiring them to levy certain taxes. This court said, page 612 [864]: "If the command of the peremptory writ of *mandamus* was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court. *Ex parte Lange*, 85 U. S. 18 Wall. 163 [21:872]; *Ex parte Parks*, 93 U. S. 18 [23:787]; *Ex parte Siebold*, 100 U. S. 371 [25:717]; *Ex parte Virginia*, 100 U. S. 339 [25:676]."

In *Ex parte Bain*, 121 U S. 1 [30: 849], it was held that a prisoner who had been tried, convicted, and sentenced to imprisonment, by a Circuit Court of the United States, the indictment having been amended by the district attorney, by leave of the court, after it had been returned by the grand jury, was entitled to his discharge under a writ of *habeas corpus* issued by this court, on the ground that the proceeding was void. The court said, page 13 [853]: "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case, for want of an indictment."

The question in the present case, therefore, is whether the order of the circuit court of June 6, 1887, forbidding the petitioners from bringing suits under the Act of May 12, 1887, in the name and on behalf of the State of Virginia, as its attorneys, for the recovery of taxes, in payment of which the taxpayers had previously tendered tax receivable coupons, is an order which that court had power by law to make. The question really is whether the circuit court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill are by a final decree perpetually to enjoin the defendants from taking any steps in execution of the Act of May 12, 1887. If the court had power, upon 497
the case made in the record, to entertain the suit for that purpose, it had equal power, as a provisional remedy, to grant the restraining order, the violation of which constitutes the contempt adjudged against the petitioners.

The principal contention on the part of the petitioners is that the suit, nominally against them, is, in fact, and in law, a suit against the State of Virginia, whose officers they are, jurisdiction to entertain which is denied by the 11th Amendment to the Constitution, which declares that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." On the other hand, it is contended by counsel for the complainants in that cause, who have argued against the discharge of the petitioners, that the suit is not within that prohibition.

It must be regarded as the settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties on the record." *Poindexter* v. *Greenhow*, 114 U. S. 270, 287 [29: 185, 191]. This, it is true, is not in harmony with what was said by *Chief Justice* Marshall in *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 738, 857 [6: 204, 232]. In his opinion in that case he said: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State or by aliens." And the point as involved in that case was stated by *Mr. Justice* Swayne, delivering the opinion of the court in *Davis* v. *Gray*, 83 U. S. 16 Wall. 203, 220 [21: 447, 453], as follows: "In deciding who are parties to the suit the 498
court will not look beyond the record. Making a state officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." But what was said by *Chief Justice* Marshall in *Osborn* v. *Bank of U. S. supra*, must he taken in connection with its immediate context, wherein he adds, page 858 [232]: "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the de-

fendants,—whether they are to be considered as having a real interest, or as being only nominal parties." This conveys the intimation, that where the defendants, who are sued as officers of the State, have not a real, but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject matter.

This, indeed, seems to be the interpretation put upon this language by *Chief Justice* Marshall himself in the opinion of the court delivered by him in the case of *Governor of Georgia* v. *Madrazo*, 26 U. S. 1 Pet. 110, 128, 124 [7: 73, 79]. After quoting the paragraphs from the opinion in the case of *Osborn* v. *Bank of U. S.* above extracted, the Chief Justice mentioned the case of *Georgia* v. *Brailsford*, 2 U. S. 2 Dall. 402 [1: 433], where the action was not in the name of the State, but was brought by the Governor in its behalf, and added: "If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this." He further said: "The claim upon the Governor is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant, as the appeal bond was executed by a different Governor from him who filed the information. In such a case, where the Chief Magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant." It was therefore held, in that case, that the State was in fact, though not in form, a party defendant to the suit, and that, consequently, the circuit court had no jurisdiction to pronounce the decree appealed from. See also *Ex parte Madrazo*, 32 U. S. 7 Pet. 627 [8: 808]. This view was reiterated by this court in *Kentucky* v. *Dennison*, 65 U. S. 24 How. 66, 98 [16, 717, 726], where it was said to be settled "that where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant." Accordingly in *Cunningham* v. *Macon & B. R. R. Co.* 109 U. S. 446 [27: 992], it was decided that in those cases where it is clearly seen upon the record that a State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. The inference is that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction.

The very question was presented in the cases of *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U. S. 76 [27: 656]. In each of those cases there was upon the face of the record nominally a controversy between two States, which, according to the terms of the Constitution, was subject to the judicial power of the United States. So far as could be determined by reference to the parties named in the record, the suits were within the jurisdiction of this court; but, on an examination of the cases as stated in the pleadings, it appeared that the State, which was plaintiff, was suing, not for its own use and interest, but for the use and on behalf of certain individual citizens thereof who had transferred their claims to the State for the purposes of suit. It was accordingly unanimously held by this court, that it would look behind and through the nominal parties on the record, to ascertain who were the real parties to the suit. The Chief Justice, speaking for the court in that case, made a review of the circumstances which led to the adoption of the 11th Amendment, and, in concluding his opinion, said: "The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the States to be sued; and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each case is dismissed."

The converse of that case is to be found in *Hagood* v. *Southern*, 117 U. S. 52 [29: 805]. There, the State of South Carolina, which was the party in interest, was not nominally a defendant. The nominal defendants were the Treasurer of the State of South Carolina, its Comptroller General, and the treasurers of its various counties and their successors in office. The object of the bills was to obtain on behalf of the complainants, by judicial process, the redemption by the State of certain scrip of which they were holders, according to the terms of a statute in pursuance of which it was issued, by the levy, collection, and appropriation of a special tax pledged to that purpose, as they claimed, by an irrepealable law constituting a contract protected from violation by the Constitution of the United States. The decrees of the circuit court granting the relief were reversed, and the cause remanded with instructions to dismiss the bills, on the ground that the suits, though nominally against the officers of the State, were really against the State itself. In its opinion this court said, page 67 [810]: "These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with with that consent it could not be brought be-

fore the court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States."

The conclusions in the case of *Hagood* v. *Southern* were justified by what had previously been decided by this court in the cases of *Louisiana* v. *Jumel* and *Elliott* v. *Wiltz*, 107 U. S. 711 [27:448]. Those cases had for their object: one, by injunction, to restrain the officers of the State from executing the provisions of the Act of the General Assembly alleged to be in violation of the contract rights of the plaintiffs; and the other, by *mandamus*, to require the appropriation of money from the treasury of the State in accordance with the contract. This relief, it was decided, was not within the competency of the judicial power. The Chief Justice said, on that point, page 727 [453]: "The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it 492 related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full; and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has, by its act of submission, allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the court, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State."

It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record.

The substantial averments of the bill are (1) that the complainants were the owners of $100,000 worth of tax receivable coupons of Virginia, for which they had paid over $30,000; (2) that they have sold $50,000 of that amount for $15,000 or more to taxpayers of Virginia, who have tendered the same to the proper state officials in payment of their taxes, but that said officers have refused to receive the same; (3) that if the officers of the State are permitted to enforce the Act of May 12, 1887, the complainants will be unable to sell the remaining $50,000 of their coupons to the taxpayers of that State at any price, and thus their entire property in the same will be destroyed; (4) that the Act of May 12, 1887, is unconstitutional and void, because it impairs the obligation of 493 the contract of the State of Virginia by which it agreed to receive coupons cut from its bonds in payment of debts, demands, and taxes due to it.

The particulars in which this contract is alleged to be violated by the provisions of that Act are: first, that, in disregard of tenders of tax-receivable coupons made by taxpayers in payment of taxes, the Act of the General Assembly peremptorily requires actions at law to be brought in the name of the State of Virginia against all such taxpayers as are delinquent; second, because in the trial of such actions it is required that the defendant shall not only prove the fact of tender, but the genuineness of the coupons tendered; third, that as part of that proof he is required to produce the bond itself from which such coupon is said to have been cut; and, fourth, that he is not permitted to introduce expert testimony to prove the genuineness of the coupons tendered. The prayer of the bill is that the Attorney-General of the State of Virginia, and the Commonwealth's attorneys for the counties, be restrained by injunction from commencing and prosecuting any suits under the Act of May 12, 1887, for the recovery of taxes against parties alleged to be delinquent, but who in fact have tendered tax-receivable coupons in payment of taxes due.

It is to be noted that there is no direct averment in the original of amended bills that the coupons alleged to have been tendered in payment of taxes by those taxpayers against whom the defendants threatened to bring suits under the Act of May 12, 1887, were purchased from the complainants, although it incidentally appears otherwise upon the record that some of them may have been. The injunction, however, prayed for is to prevent the bringing of any suits under that Act against taxpayers who have tendered coupons, whether the coupons were purchased from the complainants or not.

It is also to be observed that the only personal act on the part of the petitioners sought to be restrained by the original order of June 6, 1887, in pursuance of the prayer of the bill, is the bringing of any suit under the Act of May 12, 1887, against any person who had tendered tax-receivable coupons in payment of taxes due to the State of Virginia. Any such suit must, 494 by the statute, be brought in the name of the State, and for its use.

It is immaterial, in our opinion, to consider the matters which are alleged in respect to the course and conduct of such a suit after its institution, by reason of the provisions contained in other Acts of the General Assembly of the State restricting the mode of proof of the gen-

uineness of the coupons tendered. What is required by the Act of May 12, 1887, is that "If the defendant relies on a tender of coupons as payment of the taxes claimed, he shall plead the same specifically and in writing, and file with the plea the coupons averred therein to have been tendered; and the clerk shall carefully preserve them. Upon such plea filed the burden of proving the tender and the genuineness of the coupons shall be on the defendant. If the tender and the genuineness of the coupons be established, judgment shall be for the defendant on the plea of tender. In such case the clerk shall write the word 'proved,' and thereunder his name in his official character, across the face of the coupons, and transmit them, together with a certificate of the court that they have been proven in the case, to the auditor of public accounts, who shall deliver the coupons to the second auditor, receiving therefor the check of the second auditor upon the treasurer, which check he shall pay into the treasury to the credit of the proper tax account."

If a suit may be rightfully brought at all by the State to recover a judgment for taxes, in such a case, certainly there is nothing in these provisions that violates any legal or contract right of the party sued. If he defends the action on the ground of a lawful tender of payment, he must, of course, plead the tender, and may rightfully be required to bring into court the tender alleged to have been made. Under the issue upon this plea, the burden is upon the defendant of proving the truth of its allegations. What shall be the amount and kind of proof necessary to establish the defense involves questions of law which can only be raised and decided in the course of the trial. Their determination is for the court where the trial is to be had. If, in pursuance of other Acts of the General Assembly, the contract rights of the defendant, as a taxpayer having tendered tax-receivable coupons, are denied to
495 him in that trial, by reason of requirements in regard to the nature and quantity of proof as to the genuineness of the coupons, the errors of law thus committed can only be remedied, according to the common course of judicial proceedings, by a writ of error, which, as it would present a federal question, might ultimately be sued out in this court. But it is not to be assumed in advance, either that such questions will arise or that, if they arise, they will be erroneously decided. The question, therefore, is narrowed to the single inquiry of the equitable right of the complainants to enjoin the petitioners against bringing any such suits at all.

It seems to be supposed in argument, that the right of taxpayers in Virginia, who have tendered tax receivable coupons in payment of their taxes to the proper collecting officer, to be forever thereafter free from suit by the State to recover judgment for such taxes, rests upon the proposition that such a tender is in law a payment of the taxes, so as to extinguish all claim for them on the part of the State. This proposition, indeed, is said to be justified by the authority of certain language in the opinion of this court in the case of *Poindexter* v. *Greenhow*, 114 U. S. 270 [29: 185]. In that case the effect of a tender in payment of taxes upon the subsequent act of the collector in seizing the personal property of the taxpayer was considered and decided; but there is nothing in the opinion which countenances the idea that such a tender was a payment of the taxes, so as to extinguish all subsequent claim of the State therefor. Its effect was precisely defined in the following statement, page 299 [195]: "His tender, as we have already seen, was equivalent to payment, *so far as concerns the legality of all subsequent steps by the collector to enforce payment by distraint of his property.*" There is nothing in the opinion to indicate that the party making the tender was relieved from the operation of the rule of law, making it necessary to keep the tender good, or that a subsequent action at law for the recovery of the taxes would be unlawful—reserving, of course, in such a case, the admitted right of the defendant to plead the fact of his tender and bring it into court, in pursuance of the usual practice in such cases, as a defense.

496

It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the circuit court, reduced to the mere bringing of an action in the name of and for the State against taxpayers, who, although they may have tendered tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such taxpayers.

Much more difficult is it to conceive that it constitutes a grievance of which the complainants in the principal suit have any legal right to complain. No suits against the complainants themselves are apprehended; and their pecuniary interest in the actions threatened against taxpayers who have made tenders of tax-receivable coupons purchased from them, with their guaranty against loss in consequence thereof, is collateral and remote. The bringing of such actions is no breach of any contract subsisting between the complainants and the State of Virginia. All rights under the contract contained in the coupons they parted with when they transferred them to taxpayers. If the complainants have agreed in that transfer that they shall be received by the State in payment of taxes, that is a contract between the complainants and the taxpayer, their assignee, to which the State is not a party. It is one the complainants have voluntarily entered into, and for which the State cannot be held responsible.

In that aspect, the case does not differ in principle from *Marye* v. *Parsons*, 114 U. S. 325 [29: 205]. The consequential losses in the diminution of the market value of the coupons which they still hold, and the liability of the complainants to make good their warranty to taxpayers to whom they have transferred the others, are not direct and legal consequences of any breach of the contract made with the State of Virginia by which the coupons are made receivable in payment of taxes. As such damage could not be recovered in a direct action upon the contract, if the State were suable at law, so neither can it be made the foundation of any preventive relief by injunction.

These considerations, however, are adverted to in this connection, not so much for the purpose of showing that the substance of the bill 497
presents a case the subject-matter of which is not within the jurisdiction of the court as to

show that it does not allege any grounds of equitable relief against the individual defendants for any personal wrong committed or threatened by them. It does not charge against them in their individual character anything done or threatened which constitutes, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they are parties.

The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the State of Virginia. The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney-General, according to the precedents in such cases. *New Jersey* v. *New York*, 30 U. S. 5 Pet. 284, 288, 290 [8: 127, 128, 129]; *Kentucky* v. *Dennison*, 65 U. S. 24 How. 66, 96, 97 [16: 717, 725]; Rule 5 of 1884, 108 U. S. 574 [See Bk. 20: 901]. If a decree could have been rendered enjoining the State from bringing suits against its taxpayers, it would have operated upon the State only through the officers who by law were required to represent it in bringing such suits, viz.: the present defendants, its Attorney-General, and the Commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

The nature of the case as supposed is identical with that of the case as actually presented in the bill, with the single exception that the State is not named as a defendant. How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?

It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the States from executing the provisions of state statutes, void by reason of repugnancy to the Constitution of the United States; that there are many precedents in which that jurisdiction has been exercised under the sanction of this court; and that the present case is covered by their authority.

The principal authority relied upon to maintain this proposition is the judgment of this court in the case of *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 738 [6:204]. As strengthening the argument based upon that decision, our attention is called by counsel to a feature of the case which it is said does not clearly appear from the official report by Mr. Wheaton. The original record of the case shows that the bill, after setting out the substance of the Act of the Legislature of Ohio complained of, alleged that Osborn, the Auditor of the State, and the officer upon whom the execution of the statute of the State was enjoined, "daily gives it out in speeches that he will execute and enforce the provisions of the said Act of Ohio against your orators." And it is part of the prayer of the bill "to stay and enjoin said Ralph Osborn, auditor as aforesaid, and all others which it may concern in anywise, from proceeding against your orators under and in virtue of the Act of Ohio aforesaid, or any section, part, or provision thereof." It also appears that it was part of the decree of the circuit court, from which the appeal was prosecuted, "that the defendants and each of them be perpetually enjoined from proceeding to collect any tax, which has accrued or may hereafter accrue, from the complainants under the Act of the General Assembly of Ohio in the bill and proceedings mentioned." But the Act of the Legislature of Ohio, declared to be unconstitutional and void in that case, had for its sole purpose the levy and collection of an annual tax of $50,000 upon each office of discount and deposit of the Bank of the United States within that State, to be collected, in case of refusal to pay, by the Auditor of State by a levy upon the money, bank notes, or other goods and chattels, the property of the bank, to seize which it was made lawful, under the warrant of the auditor, for the person to whom it was directed, to enter the bank for the purpose of finding and seizing property to satisfy the same. The wrong complained of and sought to be prevented by the injunction prayed for was this threatened seizure of the property of the bank. An actual seizure thereof, in violation of the injunction, was treated as a contempt of the court, for which the parties were attached, and the final decree of the circuit court restored the property taken to the possession of the complainant. In disposing of the case in this court, the opinion of *Chief Justice* Marshall, page 871 [235], concludes as follows: "We think then that there is no error in the decree of the Circuit Court for the District of Ohio, so far as it directs restitution of the specific sum of $98,000, which was taken out of the bank unlawfully and was in the possession of the defendant Samuel Sullivan when the injunction was awarded in September, 1820, to restrain him from paying it away, or in any manner using it, and so far as it directs the payment of the remaining sum of $2,000 by the defendants Ralph Osborn and John L. Harper; but that the same is erroneous so far as respects the interest on the coin, part of the said $98,000, it being the opinion of this court that while the parties were restrained by the authority of the circuit court from using it they ought not to be charged with interest. The decree of the Circuit Court for the District of Ohio is affirmed as to the said sums of $98,000 and $2,000, and reversed as to the residue."

The mandate from this court was in accordance with the terms of this judgment.

There is nothing, therefore, in the judgment in that cause as finally defined which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the Act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout that case, in the argument at the

500 Bar and in the opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally, vainly seeking to defend themselves under the authority of a void Act of the General Assembly of Ohio. One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since. But the very ground on which it was adjudged not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, because the authority under which they professed to act was void.

In pursuance of the principles adjudged in the case of *Osborn* v. *Bank of U. S. supra*, it has been repeatedly and uniformly held by this court that an injunction will lie to restrain the collection of taxes sought to be collected by seizures of property imposed in the name of the State, but contrary to the Constitution of the United States, the defendants being officers of the State threatening the distraint complained of. The grounds of this jurisdiction were stated in *Allen* v. *Baltimore & O. R. R. Co.* 114 U. S. 311 [29: 200]. The vital principal in all such cases is that the defendants, though professing to act as officers of the State, are threatening a violation of the person or property rights of the complainant, for which they are personally and individually liable. This principle was plainly stated in the opinion of the court in *Poindexter* v. *Greenhow*, 114 U. S. 270 [29: 185], as follows, page 282 [190]: "The case then of the plaintiff below is reduced to this: He had paid the tax demanded of him by a lawful tender. The defendant had no au-
501 thority of law thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully with force and arms seized, taken, and detained the personal property of another." It was also stated, page 288 [192]: "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent and a warrant for his act. This the defendant in the present case undertook to do." The legislation under which the defendant justified being declared to be null and void as contrary to the Constitution of the United States, therefore, left him defenseless, subject to answer to the consequences of his personal act in the seizure and detention of the plaintiff's property, and responsible for the damages occasioned thereby.

This principle is illustrated and enforced by the case of *U. S.* v. *Lee*, 106 U. S. 196 [27:171]. In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a State or of the United States, where the objection has been interposed that the State was the real defendant, and has been overruled. The action has been 502 sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character.

The present case stands upon a footing altogether different. Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the Acts of its General Assembly referred to in the bill of complaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the 11th Amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought. In *Hagood* v. *Southern*, 117 U. S. 52 [29: 805], it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officer and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where "The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State," the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it: that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and

doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State. Such is the precise character of the suit in the circuit court against the petitioners in which the order was made, the violation of which constitutes the contempt for which they have been committed to the imprisonment from which they seek delivery by these writs.

It may be asked what is the true ground of distinction, so far as the protection of the Constitution of the United States is invoked, between the contract rights of the complainant in such a suit, and other rights of person and of property? In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the Acts of the State of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it. In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a State subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a State; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the 11th Amendment, which secures to the State an immunity from suit. Wherever the question arises in a litigation between individuals, which does not involve a suit against a State, the contract will be judicially recognized as of binding force, notwithstanding any subsequent law of the State impairing its obligation. But this right is incidental to the judicial proceeding, in the course of which the question concerning it arises. It is not a positive and substantive right of an absolute character, secured by the Constitution of the United States against every possible infraction, or for which redress is given as against strangers to the contract itself, for the injurious consequences of acts done or omitted by them. Accordingly, it was held in *Carter* v. *Greenhow*, 114 U. S. 317 [29:202], that no direct action for the denial of the right secured by a contract, other than upon the contract itself would lie under any provisions of the Statutes of the United States authorizing actions to redress the deprivation, under color of state law, of any right, privilege, or immunity secured by the Constitution of the United States. In that case it was said, page 322 [204]: "How, and in what sense, are these rights secured to him by the Constitution of the United States? The answer is, by the provision of article I, section 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the States of laws such as are described. If any such are, nevertheless, passed by the Legislature of a State, they are unconstitutional and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution." But where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution.

It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisana* v. *New Orleans*, 102 U. S. 203 [26:132]. That obligation, by virtue of the provision of article I, section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas*, 61 U. S. 20 How. 527 [15:991]; *Memphis & C. R. R. Co.* v. *Tennessee*, 101 U. S. 337 [25:960]. The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or

aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted not literally and too narrowly, but fairly, and with
506 such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.

But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or *mandamus*, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases we repeat what was said by this court in *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 [23: 623, 628]: "A State, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." An example and illustration of this class will be found in *Seibert* v. *Lewis*, 122 U. S. 284 [30: 1161].
507 Nor need it be apprehended that the construction of the 11th Amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a State are guilty of acting in violation of them under color of its authority. The Government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them, without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority; and the extent and limits of that authority the Government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

In contradistinction to these classes of cases, for the reasons given, we adjudge the suit of *Cooper* v. *Marye*, in which the injunctions were granted against the present petitioners, to be in substance and in law a suit against the State of Virginia. It is, therefore, within the prohibition of the 11th Amendment to the Constitution. By the terms of that provision, it is a case to which the judicial power of the United States does not extend. The circuit court was without jurisdiction to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt were 508
equally void, and their imprisonment is without authority of law.

It is ordered, therefore, that the petitioners be discharged.

Mr. Justice **Field**, concurring:

I concur in the judgment discharging from arrest and imprisonment the Attorney-General of Virginia, and other officers of the State, who were adjudged by the circuit court to be guilty of contempt in refusing to obey the order of that court in the case of *Cooper* v. *Marye*, and were fined, and committed until the fine should be paid, and they should purge themselves of their contempt by doing the acts commanded. I also concur in the main position stated in the opinion of the court, upon which the discharge of the petitioners is ordered; namely, that the case of *Cooper* v. *Marye* was in law and fact a suit by subjects of a foreign State against the State of Virginia. To a suit of that character the judicial power of the United States cannot, by the Eleventh Amendment of the Constitution, be extended. The object of that suit was to enjoin the Attorney-General and the Commonwealth's attorneys of the several counties, cities, and towns of Virginia from bringing any suits in the name of the Commonwealth to enforce the collection of taxes, for the payment of which coupons originally attached to her bonds had been tendered. To enjoin the officers of the Commonwealth, charged with the supervision and management of legal proceedings in her behalf, from bringing suits in her name, is nothing less than to enjoin the Commonwealth, for only by her officers can such suits be instituted and prosecuted. This seems to me an obvious conclusion.

The reason given in the bill in *Cooper* v. *Marye*, for seeking the injunction is, that the State has passed various Acts creating impediments in the way of holders of coupons establishing their genuineness, by which their value will be practically destroyed, and the performance of these obligations be evaded, unless the officers of the State are restrained from prosecuting such suits. The numerous devices to which the State has resorted in order to escape from her obligations under the forms of law may, it is true, seriously embarrass the coupon holder in the assertion of his claims; but that is not a sufficient reason for denying to the State the right to prosecute her demands for taxes in her own courts. If the obstacles to the maintenance of the claims of the coupon holder, presented by the state legislation, are repugnant to the Constitution and laws of the United States, we cannot assume in advance that they will be sustained by the courts of Virginia when the coupons tendered are produced in the suits mentioned, and for that reason deny to her a hearing there upon her own demands. If they should be sustained, a remedy may be found in this tribunal, where decisions in conflict with the Constitution and laws of the United States may be reviewed and corrected.

There are many cases—indeed, they are of frequent occurrence—where officers of the State, acting under legislation in conflict with the Constitution and laws of the United States, may be restrained by the federal courts—as where those officers attempt, by virtue of such legislation, to take private property for public use without offering compensation, or in other ways to deprive one of the use and enjoyment of his property. I do not understand that the opinion of the court is against this doctrine; but, on the contrary, that it is recognized and approved. There is a wide difference between restraining officers of the State from interfering in such cases with the property of the citizen, and restraining them from prosecuting a suit in the name of the State in her own courts to collect an alleged claim. Her courts are at all times as open to her for the prosecution of her demands as they are open to her citizens for the prosecution of their claims.

I, however, make this special concurrence in the opinion of the majority because of language in it expressing approval of the positions taken by the court in *Louisiana* v. *Jumel*, from which I dissented—not agreeing with the majority either in the statement of the object of that case, or in the law applicable to it. 107 U. S. 728 [27:454]. I considered that case as brought to compel the officers of the State to do what she had by her laws and former Constitution consented they might by the judicial tribunals be required to do. I expressed, at the time, against the majority of the court, my conviction of the invalidity and unconstitutionality of the ordinance of repudiation embodied in the new Constitution of Louisiana. At the same time I also expressed in *Antoni* v. *Greenhow* my opinion of the equally invalid legislation of Virginia. 107 U. S. 784 [27:474]. I adhere to my dissenting opinions in those cases, and in concurring in the judgment in this case I do not in any respect depart from or qualify what I there said.

Mr. Justice **Harlan,** dissenting:

As I adhere to the views expressed by me in *Louisiana* v. *Jumel*, 107 U. S. 746 [27:460]; *Antoni* v. *Greenhow*, Id. 841 [27:480] and *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 458 [27:996]; and as I concurred in the judgments in *Poindexter* v. *Greenhow*, 114 U. S. 273 [29:186] and *Allen* v. *Baltimore & O. R. Co.* Id. 311 [29:200] I feel obliged to dissent from the opinion and judgment in these cases.

In *Cooper* v. *Marye* the jurisdiction of the circuit court cannot be questioned, so far as it depends upon the citizenship of the parties; for the plaintiffs are subjects or citizens of Great Britain, and the defendants are citizens of Virginia.

Whether the plaintiffs merely as holders of Virginia coupons, and not taxpayers in the Commonwealth, have any legal ground of complaint, by reason of the refusal of her officers to accept, when tendered, like coupons which the plaintiffs sold or transferred to taxpayers to be used in meeting their taxes; whether the statutes under which those officers proceeded, or intend to proceed, are repugnant to the Constitution of the United States, and, therefore, void; whether the preliminary injunction in question should or should not have been refused upon the ground that such taxpayers have a complete and adequate remedy at law; whether the necessity of avoiding conflicts between the courts of the United States and the officers of a State, acting in obedience to her statutes, was not ample reason for refusing to grant such injunction; or whether an officer ought to be enjoined from merely bringing a suit in behalf of the public—the suit itself not necessarily, or before judgment therein, involving an invasion of the property rights of the defendant therein—are all matters which the circuit court, sitting in equity, was competent to determine upon the final hearing in *Cooper* v. *Marye*, etc. Those questions are not open for consideration here except upon the appeal from the final decree in that case; consequently, I am not at liberty now to express an opinion as to any of them.

The only inquiry now to be made is whether *Cooper* v. *Marye* is a suit against Virginia within the meaning of the 11th Amendment to the Constitution of the United States. If it be, I agree that the prisoners must be discharged; for the judicial power of the United States does not extend to suits against a State by citizens of another State, or by subjects of foreign countries.

But I am of opinion that it is not a suit of that character. I stand upon what was adjudged in *Orborn* v. *U. S. Bank*, 22 U. S. 9 Wheat. 857 [6:232]; *Chief Justice* Marshall, speaking for the court in that case, said: "It may, we think, be laid down as a rule *which admits of no exception*, that in all cases where jurisdiction depends on the party, it is the party *named on the record*. Consequently, the 11th Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizen of another State, or by aliens. The State not being a party on the record, and the court having juris-

diction over those who are parties on the record, the true question is not one of jurisdiction, but whether, *in the exercise* of its jurisdiction, the court *ought* to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

These principles have been recognized in several decisions of this court, notably in *U. S.* v. *Lee* and *Kaufman* v. *Lee*, 106 U. S. 196, 218, 215 [27:171, 179, 180]. That was an action to recover a body of land in Alexandria County, Virginia, two hundred acres of which constituted Arlington Cemetery, previously established by the United States as a military station and as a national cemetery for the soldiers and sailors of the Union. When the action was brought that cemetery was in the actual possession of the United States, by the defendants, *as their officers*. Those officers certainly had no personal interest in the result of the suit. They simply represented the United States, who were the real parties in interest. As the United States were not parties to the record, and because they could not be made parties, the court proceeded to a determination of the case between the parties before it. The result was a judgment, determining that Lee had a legal right to the possession of Arlington cemetery, as against the officers of the United States having it under their control. The authority and duty of the court to proceed in the case, notwithstanding the United States were not before the court, was rested mainly upon the decision in *Osborn* v. *Bank of U. S.* from which was quoted, with emphatic approval, the following language: "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that as the real party cannot be brought before the court, a suit cannot be sustained against the agent of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit." And in order that no one might suppose that *Osborn* v. *Bank of U. S.* had been modified or overruled by subsequent decisions, the court in the *Lee Case*, after referring to several decisions, said: "These decisions have never been overruled. On the contrary, as late as the case of *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 [21:447], the case of *Osborn* v. *Bank of U. S.* is cited with approval, as establishing these, among other propositions: 'Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.' Though not prepared to say now that the court can proceed against the officer 'in all respects' as if the State were a party, this may be taken as intimating, in a general way, the views of the court at the time."

In *Poindexter* v. *Greenhow*, 114 U. S. 270 [29:185] we sustained a suit by a private individual against a treasurer, charged with the duty of collecting taxes, to recover certain personal property which the defendant had seized for the nonpayment of taxes due Virginia from the plaintiff in that suit. In seizing the property the officer disregarded the tender, previously made, of the State's coupons. It was earnestly contended that as the officer only did what the State by her statutes had commanded him to do, and had himself no personal interest in the matter, the suit against him was, in legal effect, one against the State; that a suit to recover property seized for the nonpayment of taxes, in conformity with the Statutes of Virginia, had the same result as a direct suit against the State to compel her performance of her contract with the coupon holder, or to enjoin her officer from carrying those statutes into effect. But this view was overruled, mainly upon the authority of *Osborn* v. *Bank of U. S.*, from which the court quoted, with approval, the same passages as are to be found in the opinion in *Lee's Case*, and in reference thereto observed: "This language, it may be observed, was quoted with approval in *U. S.* v. *Lee*. The principal which it enunciates constitutes the very foundation upon which the decision in that case rested." In *Poindexter's Case* we said that the immunity from suit secured to the States by the Constitution "does not exempt the State from the operation of the constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit, of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, *the jurisdiction is not thereby ousted, but must be exercised*, with whatever legal consequences to the rights of the litigants may be the result of the determination."

Upon identically the same grounds rests our decision in *Allen* v. *Baltimore & O. R. R. Co.* 114 U. S. 311 [27: 200] in which we maintained the right of that company to an injunction to

prevent the collection of taxes by distraint upon its property after a tender of the States tax receivable coupons in payment of such taxes. That suit was against the Auditor of Public Accounts and the Treasurer of Virginia. They certainly had no personal interest in the collection of the taxes, but were only obeying the statutes of the State which they assumed to be constitutional and binding upon them. But the effect of that suit was to say to the State of Virginia that she should not collect her revenue in the mode proposed by the statute, and thereby violate rights secured by the Constitution of the United States. In vain was it urged by the officers of the State that Virginia was the real party in interest; that, as the State could only act by her officers, to enjoin them was to enjoin the State; and that consequently the suit was one against the State within the meaning of the 11th Amendment. This court overruled that contention, holding in substance that, the State of Virginia not being named as a party, and it being impossible to make her a party, her officers could be prevented from touching the property of the railroad under a statute void under the Constitution of the United States.

The result, then, of former decisions is: That a suit against officers of the United States to recover property not legally in their possession is not a suit against the United States; and that neither a suit against officers of the State to recover property illegally taken by them in obedience to the statutes of the State, nor a suit brought against state officers to enjoin them from taking, under the command of the State, the property of a taxpayer who has tendered coupons for taxes due to her, were suits against the State within the meaning of the 11th Amendment of the Constitution. And now it is adjudged, in the cases before us, that a suit merely against state officers to enjoin them from bringing actions against taxpayers who have previously tendered tax-receivable coupons is a suit against the State. There is, I grant, a difference between the cases heretofore decided and the case of *Cooper* v. *Marye;* but the difference is not such as to involve the jurisdiction of the circuit court, but rather—to use the language of *Chief Justice* Marshall, "the exercise of its jurisdiction."

The Commonwealth of Virginia has no more authority to enact statutes impairing the obligation of her contracts than statutes impairing the obligation of contracts exclusively between individuals. *New Jersey* v. *Wilson*, 11 U. S. 7 Cranch, 164, 166 [3: 303]; *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514, 560 [7: 939, 955]; *Green* v. *Biddle*, 21 U. S. 8 Wheat. 1, 84 [5: 547, 568]; *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190, 207 [13: 383, 390]; *Wolff* v. *New Orleans*, 103 U. S. 358, 367 [26: 395, 399]; *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650, 673 [29: 516, 524]. A statute which is void, as impairing the obligation of the State's contract, affords no justification to anyone, and confers no authority. If an officer proposes to enforce such a statute against a party, the obligation of whose contract is sought to be impaired, the latter, in my judgment, may proceed, by suit, against such officer, and thereby obtain protection in his rights of contract, as against the proposed action of that officer. A contrary view enables the State to use her immunity from suit to effect what the Constitution of the United States forbids her from doing; namely, to enact statutes impairing the obligation of her contract. If an officer of the State can take shelter behind such immunity while he proceeds with the execution of a void enactment to the injury of the citizen's rights of contract, it would look as if that provision which declares that the Constitution of the United States shall be the supreme law of the land, anything in the constitution or laws of a State to the contrary notwithstanding, had lost most, if not all, of its value in respect to contracts which a State makes with individuals.

I repeat, that the difference between a suit against officers of the State, enjoining them from seizing the property of the citizen, in obedience to a void statute of the State, and a suit enjoining such officers from bringing under the order of the State, and in her name, an action which, it is alleged, will result in injury to the rights of the complainant, is not a difference that affects the jurisdiction of the court, but only its exercise of jurisdiction. If the former is not a suit against the State, the latter should not be deemed of that class.

JOSEPH NATAL ET AL., *Plffs. in Err.*,
v.
STATE OF LOUISIANA.

(See S. C. Reporter's ed. 516–518.)

Supersedeas—violations of.

1. The *supersedeas*, provided for in section 1007 of the Revised Statutes, stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs. It operates on the judgment or decree, not on the questions involved considered apart from the particular suit in which they were decided.

2. New suits, not brought to give effect to the judgment in the case, but to enjoin the plaintiffs in error from further violation of the ordinance which was the foundation of the prosecution now here for review, are not violations of the *supersedeas* in this case.

[No. 1271.]

Submitted Dec. 2, 1887. Decided Dec. 5, 1887.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion for a rule on the Mayor of the City of New Orleans, and on the lessee of the public markets of that city, to show cause why they should not be punished for a contempt of the *supersedeas* in this case. *Denied.*

The present proceedings result from the action of J. V. Guillotte, Mayor of the City of New Orleans, at the instance of Henry Larquié, lessee of the public markets of said city, in instituting suit against Joseph Hug, Timothé Rouche, August Spraul, and Joseph Natal, plaintiffs in error in the above entitled cases, for causes identical in every particular with the previous suits, now before this court by writs of error to the Supreme Court of the State of Louisiana, and this, after all the requirements were fulfilled, by the said plaintiffs in error furnishing bond, as *supersedeas*, in accordance with the Statutes of the United States in such case made and provided. Under color of such subsequent suits, one John Kenny, under pay of the said Larquié, and acting as a

special policeman by appointment of the said mayor, had the said plaintiffs in error arrested and imprisoned, and a firm of attorneys, Blane & Butler by name, acting as counsel for the said Larquié, drew up petitions, which were signed by the said mayor, by which injunctions were obtained from the Civil District Court for the Parish of Orleans, and the places of business of said plaintiffs in error were forcibly closed by the Sheriff of the said Parish of Orleans.

The further facts are stated by the court.

Messrs. **West Steever** and **J. Hale Sypher,** for petitioners:

In a suit brought to this court from a state court, which involves the constitutionalty of ordinances made by a municipal corporation in the state, this court will, when necessary, put its own independent construction upon the ordinances.

Yick Wo v. *Hopkins*, 118 U. S. 356 (30: 220).

The jurisdiction of the supreme court to issue a *supersedeas* attaches from the time the party in whose favor the writ is granted complies with the conditions prescribed to make the writ of error operate as a *supersedeas* and stay of execution.

Slaughter House Cases, 77 U. S. 10 Wall. 278 (19: 915).

If a state court issues final process, it is competent for the supreme court to issue a *supersedeas* as an exercise of appellate power to correct the error.

Slaughter House Cases, supra; Green v. *Van Buskirk*, 70 U. S. 3 Wall. 448 (18: 245).

Where, after the allowance of an appeal, the required *supersedeas* bond was duly approved and the cause entered here, the court below had no longer any control over the decree, and its subsequent order vacating that allowance is void.

Keyser v. *Farr*, 105 U. S. 265 (26: 1025).

Attachment for contempt issues at the discretion of the judges of a court of record; and may be awarded by them upon a bare suggestion, or on their own knowledge.

1 Bac. Abr. 180; *Voss* v. *Luke*, 1 Cranch, C. C. 331 and citations; *U. S.* v. *Watkins*, 4 Cranch, C. C. 272.

Each superior court is the judge of its own power to punish contemnors, and the facts constituting the contempt need not even be set out in the record.

Ex parte Fernandez, 10 C. B. N. S. 3; *Ex parte Summers*, 5 Ired. L. 149; *U. S.* v. *Hudson*, 11 U. S. 7 Cranch, 32 (3: 259); *First Cong. Church* v. *Muscatine*, 2 Clarke (Iowa), 69; *State* v. *Morrill*, 16 Ark. 384; *Johns* v. *Davis*, 2 Rob. (Va.) 729; *King* v. *Almon*, Wilmot, 243.

One who pleads his own cause, through his attorney at law, must be regarded as any other citizen, and may be so punished.

Satterlee v. *De Comeau*, 7 Robt. (N. Y.), 666 *State* v. *Grailhe*, 1 La. Ann. 183.

Even if the order is improper, parties may be punished for disobedience or resistance.

Re Cohen, 5 Cal. 494; *Sullivan* v. *Judah*, 4 Paige, 444; *Moat* v. *Holbein*, 2 Edw. Ch. 188; *People* v. *Bergen*, 53 N. Y. 404; *Partington* v: *Booth*, 3 Meriv. 149; *Franklin* v. *Smith*, 49 Ga. 112.

(No one appeared in opposition.)

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The plaintiffs in error were proceeded against in the name of the State of Louisiana before the recorder of the first Recorder's Court of the City of New Orleans, for an alleged violation of an ordinance of that city. The judgment of the recorder's court does not appear in the printed record, but the case was taken by appeal to the Supreme Court of the State; and in the opinion of that court it is stated that the appeal was by the defendants "from judgments rendered against them for the payment of a fine, and in default of payment sentencing them to imprisonment for the violation of Ordinance No. 4798, A. S., which forbids the keeping of private markets within six squares of a public market within the limits of the City of New Orleans." The order of the supreme court was "That the judgment appealed from be affirmed, with costs."

To reverse this judgment of the supreme court the present writ of error was sued out, and a *supersedeas* obtained, in accordance with the provisions of section 1007, Revised Statutes, May 12, 1887. The complaint now is that with this *supersedeas* in force, the mayor of the city and the lessee of the public markets have caused suits to be begun in the Civil District Court of the Parish of New Orleans to enjoin the plaintiffs in error, and each of them, "from opening, maintainining, or carrying on a private market * * * anywhere * * * in the City of New Orleans within six squares of a public market," and "that the grounds on which said injunction are based are the same law and city ordinance, the same defendants, and the same location of mercantile business, as that involved in said writ of error, being the same persons and same course of action in said injunctions, and based on the same law and city ordinance, identical in every particular with the cases involved in said writ of error."

It is not alleged that any attempt has been made to carry the judgment which is here for review into execution. The whole gravamen of the charge made in support of this motion is, that the mayor and lessee of the markets have commenced another suit in another court upon another cause of action growing out of violations of the same ordinance. The *supersedeas* provided for in section 1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs. It operates on the judgment or decree, not on the questions involved considered apart from the particular suit in which they were decided. The new suits now complained of are not brought to give effect to the judgment in this case, but to enjoin the plaintiffs in error from further violations of the ordinance which was the foundation of the prosecution now here for review. This judgment is in no way connected with or made the basis of the injunction in the civil district court. Both suits may involve the consideration of the validity of the same ordinance, but the last is in no sense process for the execution of the judgment in the first. It follows that, upon the showing made by the plaintiffs in error themselves, there is no ground for proceeding here against the mayor

or the lessee of the market, and that the rule ought not to issue.

We understand that the motions in 1272, 1273, and 1274 involve precisely the same question, and *they are consequently also denied.*

RICHARD B. CHAPMAN, *Plff. in Err.*,

v.

GEORGE CRANE, Admr. of EDWARD K. GOODNOW, Deceased.

THOMAS H. STRYKER, Exr. of JOHN STRYKER, Deceased, *Plff. in Err.*

v.

SAME.

(S. C. "*Chapman* v. *Goodnow's Admr.*" Reporter's ed. 540-549.)

Federal question—decree, when a bar—state decision.

1. Where one pays the taxes on lands of which he is not the owner, and the real owner, when sued by the county for such taxes, sets up such payment as a defense, the question, whether he thereby made the previous act of payment his own and thus became obligated to the person making the payment to repay to him what he had paid, is not a federal question.

2. A decree is a bar to a subsequent suit for the same cause of action, but not to a suit for a different cause of action arising afterward.

3. If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court properly takes of the case, within the scope of the pleadings, the judgment is not open to review here.

[Nos. 214, 48.]

Argued Nov. 1, 1887. Decided Dec. 5, 1887.

IN ERROR to the Supreme Court of the State of Iowa. *Affirmed.*

The facts are fully stated by the court.

Messrs. **C. H. Gatch,** and *Wm. Connor*, for plaintiffs in error:

The record presents two federal questions:

1. Whether or not the plaintiffs in error were entitled to immunity from the demand of the defendant in error, under the decision and judgment of this court in the case of *Iowa Homestead Co.* v. *DesMoines Nav. & R. R. Co.* 84 U. S. 17 Wall. 153 (21: 622).

2. The plaintiff in error claimed immunity from the demand of the defendant in error, by force and virtue of the decision of this court in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 (18: 689), and *Burr* v. *DesMoines Nav. & R. R. Co.* 68 U. S. 1 Wall. 99 (17: 561).

Whether or not defendants in error were estopped by the judgment of the court in the case of *Iowa Homestead Co.* v. *DesMoines Nav. & R. R. Co.* was a federal question.

Mackay v. *Dillon*, 45 U. S. 4 How. 421 (11: 1038); *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586 (12: 829).

The judgment under which immunity is claimed is still the judgment, unreversed and in full force, of this court.

Crowell v. *Randell*, 35 U. S. 10 Pet. 368 (9: 458); *Miller* v. *Nicholls*, 17 U. S. 4 Wheat. 311 (4: 578); *Hickie* v. *Starke*, 26 U. S. 1 Pet. 98 (7: 69); *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7: 412); *Williams* v. *Norris*, 25 U. S. 12 Wheat. 117 (6: 571); *Williams* v. *Bruffy*, 102 U. S. 248 (26: 135); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 (28: 1084); *Brown* v. *Colorado*, 106 U. S. 97 (27: 133); *McManus* v. *O'Sullivan*, 91 U. S. 578 (23: 390); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590, 636 (22; 429, 444); *Chouteau* v. *Gibson*, 111 U. S. 200 (28; 400); *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 (29: 118).

The decision of this court, in the case of *Wolcott* v. *DesMoines Nav. & R. R. Co. supra*, was a final determination of the question of title and the Iowa decision, holding it not to have been, presents a federal question.

Williams v. *Baker*, 84 U. S. 17 Wall. 144 (21: 561); *Iowa Homestead Co.* v. *DesMoines Nav. & R. R. Co., supra; Litchfield* v. *Webster County*, 101 U. S. 777 (25: 927); *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Embry* v. *Palmer*, 107 U. S. 20 (27: 352); *Crescent City Live Stock etc. Co.* v. *Butchers Union, etc. Co.* 120 U. S. 143 (30: 615); *Factors & T. Ins. Co.* v. *Murphy*, 111 U. S. 738 (28: 582).

Mr. **George Crane,** for defendant in error:

The record in the *Homestead Suit* showed affirmatively that the DesMoines Navigation & Railroad Company was a citizen of the same State with the plaintiff in that suit; that said company was an indispensable party to the suit brought, and hence that the federal courts had no jurisdiction to make a valid determination of any issues involved therein.

Shainwald v. *Lewis*, 108 U. S. 158 (27: 691); *Cameron* v. *M'Roberts*, 16 U. S. 3 Wheat. 591 (4: 467); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 385 (28: 464); *Ober* v. *Gallagher*, 93 U. S. 201 (23: 829).

In suits brought from the Supreme Court of Iowa this court can examine the opinions of that one, for the purpose of ascertaining what has been decided therein.

Jacks v. *Helena*, 115 U. S. 288 (29: 392); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S. 123 (28: 678).

In disposing of the defense of former adjudication no question of federal cognizance was decided.

Linton v. *Stanton*, 58 U. S. 12 How. 426 (13: 1051); *Adams County* v. *Burlington & M. R. R. Co. supra.*

At the time this court rendered its decision in the *Homestead Suit* there was no cause of action.

Freem. Judg. 368; *Hurst* v. *Means*, 2 Sneed (Tenn.) 549.

The question involves no question of federal cognizance.

New York L. Ins. Co. v. *Hendren*, 92 U. S. 286 (23: 709); *Kennebec & P. R. R. Co.* v. *Portland & K. R. R. Co.* 81 U. S. 14 Wall. 25 (20: 851); *Gibson* v. *Chouteau*, 75 U. S. 8 Wall. 314 (19: 317); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 633 (22: 443).

The claim for the taxes being a cause of ac-

tion arising within this State, the Limitation Statute of New York ceased to apply to it in 1870.

Goodnow v. *Stryker*, 62 Iowa, 224; *Higgins* v. *Mendenhall*, 42 Iowa, 675.

When a cause of action accrues under the statutes of a State, or when the Statute of Limitation begins to run, are necessarily questions for the determination of the state and not the federal courts.

Lytle v. *Arkansas*, 63 U. S. 22 How. 203 (16: 309); *Marqueze* v. *Bloom*, 83 U. S. 16 Wall. 351 (21: 280); *New York L. Ins. Co.* v. *Hendren*, 92 U. S. 286 (23: 709).

Messrs. **C. H. Gatch** and *Wm. Connor*, for plaintiffs in error, in reply:

In *Skillern* v. *May*, 10 U. S. 6 Cranch, 267 (3:220), it was held too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate.

McCormick v. *Sullivant*, 23 U. S. 10 Wheat. 192 (6: 300).

In *Kennedy* v. *Georgia State Bank*, 49 U. S. 8 How. 586 (12: 1209), it was held that if the jurisdiction of a circuit court is not shown in the proceedings in the case, its judgment is erroneous and liable to be reversed, but is not an absolute nullity.

Washington Bridge Co. v. *Stewart*, 44 U. S. 3 How. 413 (11: 658); *DeSobry* v. *Nicholson*, 70 U. S. 3 Wall. 420 (18: 263).

This court will consider and determine questions of state or common law, for purposes which involve questions giving it jurisdiction.

Martin v. *Hunter*, 14 U. S. 1 Wheat. 304 (4: 97); *Smith* v. *Maryland*, 10 U. S. 6 Cranch, 286 (3: 225).

Mr. Chief Justice **Waite** delivered the opinion of the court:

These are writs of error for the review of two judgments of the Supreme Court of Iowa, one against Richard B. Chapman, and the other against John Stryker, in suits brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, in his lifetime, to recover money paid by the homestead company for taxes levied by the county of Webster on Des Moines River lands belonging to Chapman and Stryker respectively, for the years 1864 to 1871, both inclusive. For a statement of the general facts on which the right of recovery depends reference is made to the case of *Stryker* v. *Crane*, *ante*, 194. The homestead company assigned its claims against these owners after the decree in the suit of *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.* 84 U. S. 17 Wall. 153 [21: 622], was rendered.

The suits were begun August 5, 1876, and in each case a demurrer was filed to the original petition January 19, 1877. On the 12th of February, 1879, the County of Webster appeared in each of the suits and filed a petition therein setting forth "That the taxes mentioned in said petition (that of Goodnow) were duly and legally assessed and levied by said county upon the lands therein mentioned, at the times, for the years and amounts, and in the manner and form alleged and set forth in said petition, and that the said taxes at the times of the said several assessments became and were and still are a valid and binding lien upon said lands in favor of said county;" that Chapman and Stryker were the owners in fee of the several tracts by them respectively claimed at the times of the levies, "and in duty bound to pay said taxes to said county;" that the said taxes had never been paid, and the "whole thereof is still due to said county from the said defendant." Each of these petitions concluded with a prayer for judgment against the defendant for the amount of the taxes, and the enforcement of a lien on the lands for the payment thereof.

On the 5th of April, 1879, Goodnow filed an amendment to his original petition in each of the cases, in which he alleged that when the homestead company paid the taxes to the county "It was agreed and understood that if the said county should receive or collect the said taxes of and from the said defendant, the said county would repay the taxes so collected to" the company; and "that said county would sue defendant in its own name for the taxes mentioned in said petition, and in case it should collect the same, would pay them to" the company. And further, he alleged "That if said defendant refuses to pay said taxes to said county and claims that said taxes have been paid to said county through or by means of the plaintiff's assignor (the homestead company) having given or delivered the same to the county, then the defendant is bound to repay the same to plaintiff."

The defendant in each case answered the original and amended petition of Goodnow by denying every allegation therein—setting up the Statute of Limitations and charging that the homstead company "paid said taxes to said county voluntarily and without the request, knowledge, or consent of the defendant, and with full knowledge of the facts and circumstances upon which the defendant's title to said lands was founded."

To the petition of the county the defendant in each case filed an answer, and, in addition to the defenses set up to the petition of Goodnow, claimed that the county was not a party to the suit and not entitled to relief. He also further said "that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead Company as soon as the same became due, and said defendant is no longer liable therefor."

Afterwards, on the third of June, 1881, each of the defendants filed in his own case an amended answer, setting up the decree in the case of *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.* as a bar to the action, and also insisting that the "question of title and ownership of the lands * * * was distinctly decided and determined" in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* 72 U. S. 5 Wall. 681 [18: 689].

The Circuit Court of Webster County, in which the suit was originally begun, gave judgment for the defendants; but on appeal to the Supreme Court of the State that judgment was reversed on the grounds stated in an opinion, which is as follows:

"I. The defendant pleaded as one of its additional defenses that the plaintiff's right of recovery is barred by a prior adjudication, to wit: an adjudication in the case of *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.* 84 U. S. 17 Wall. 153 [21: 622]. To this plea the plaintiff replies, in substance, that if it should be

conceded that the court made an adjudication in that case denying a right of recovery for the taxes in question in this case, yet this action is not barred, because a right of recovery has arisen since that time. The fact relied upon as giving such right of recovery is that the defendant now claims, as he did not then, the benefit of the payments made by the homestead company. After this action was instituted, a petition was filed in the case by Webster County, averring, among other things, that the taxes in question have never been paid by anyone, and that the same are now due to the county from the defendant. To this petition the defendant answered, averring 'that all of said taxes mentioned in said petition were duly paid by the Iowa Homestead Company, * * * and said defendant is no longer liable therefor.' The question presented is as to whether, if the payments in the first instance were officious, as we may assume was held, and the defendant for that reason was not liable, the subsequent adoption of the payments for the purpose of escaping liability to the county should be regarded as an adoption of the payment as between the defendant and plaintiff.

"If the plaintiff's assignor had made the payments in the name of the defendant as his assumed agent, any act of the defendant indicating an intention to claim the benefit of the payments would constitute a ratification of the acts by which the payments were made. But the defendant contends that the case is different where a person pays another person's debt, not under a claim of action for such person, but under the mistaken supposition that the debt is due from himself. The defendant's position is that in such case there is no act of assumed agency to ratify. It must be conceded, we think, that in one sense this is so. The plaintiff's assignor did not hold himself out as the defendant's agent; nevertheless, when the defendant claims the benefit of the payments, he elects to treat the acts of payment as done for himself. Having elected to so treat the acts, he ought not to complain if the court treats them in the same way. Natural justice certainly requires that if the defendant has the benefit of payments as discharging his liability to the county, he should reimburse the plaintiff, whose assignor made the payments. If we were to take any other view, it appears to us that we should attach more importance to the form than the substance of things. We do not overlook the fact that, under ordinary circumstances, every taxpayer has the right, as between himself and third persons, to pay his own taxes in his own way, and to pay them to the county to which they are due, and not be compelled to run after a self-substituted creditor and make payment to him. Where, therefore, such payment is made by a third person, the taxpayer has a right to ignore the payment if he chooses to do so. But if he chooses not to ignore, but to claim the benefit of it, we see no reason why we may not regard him as treating the act of payment as done for him; and, if we do so regard him, there is no difficulty in finding an implied promise to reimburse the payer or his assignee.

"We ought, perhaps, to say in this connection, that the doctrine has been announced that there can be no ratification of an act not done avowedly for the principal. Story, Ag. § 251; *Fellows* v. *Comrs.* 36 Barb. 655. But the case before us is peculiar. The act done was such that it necessarily inured to the defendant's sole benefit. Besides, the circumstances under which the act was done should not be overlooked. The defendant neglected the payment of the taxes, which was a duty of public concern. He allowed the plaintiff's assignor, under an honest claim of title to the land, to discharge this duty for several years in succession. Now, while the plaintiff is not allowed, by reason of the prior adjudication, to set up these facts as alone sufficient to create a liability on the part of the defendant, they may be considered, we think, in connection with the fact that the defendant has since claimed the benefit of the payments as sufficient to render such claim of benefit a ratification, if it otherwise would not be." *Goodnow* v. *Stryker*, 61 Iowa, 261.

The cause was then remanded to the circuit court, where a judgment was rendered, in accordance with the opinion of the supreme court, against the defendant for the amount of the taxes paid, without interest; but on a second appeal to the supreme court this judgment was modified so as to make it include interest, and a new judgment was entered in that court accordingly. Upon that judgment the writ of error in the case of Stryker was sued out.

In the case of Chapman a judgment was also rendered by the circuit court in favor of the defendant; but on appeal to the supreme court that judgment was reversed, on the same ground stated in the opinion in the case of Stryker, and a final judgment was entered in that court for the amount of the taxes paid and interest. *Goodnow* v. *Chapman*, 64 Iowa, 602. For the review of that judgment the writ of error was sued out in the case of Chapman.

In each of the cases the supreme court has certified that upon the hearing the defendant claimed immunity from the entire demand on account of the prior adjudication between him and the assignor of Goodnow in the case of *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.*, which was denied, and also on account of the judgment in the case of *Wolcott* v. *Des Moines Nav. & R. R. Co.* which was also denied.

These rulings are assigned for error here.

As to the effect of the judgment in *Wolcott* v. *Des Moines Nav. & R. R. Co.* on the rights of the parties to this suit, it is only necessary to refer to what was said on that subject in the other case of *Stryker* v. *Crane, ante*, 194, which has just been decided. The cases are identical so far as this question is concerned, and there was no error in the ruling of the supreme court thereon.

As to the decree in the case of *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.* the court held in effect that it was a bar to a recovery on the cause of action as it stood originally and at the time of the decree, but that since then a new cause of action had arisen, because both Chapman and Stryker had adopted the payments made by the Homestead company as payments made on their account, and from this the law implied a promise to repay what had been paid for their use. The theory of the court seems to have been that Chapman and Stryker, as owners of the land, were bound in

law to the county for the payment of the taxes notwithstanding what had been done by the homestead company. When, therefore, the county sued them for the taxes and they set up the payment by the company as a defense, they made the acts of the company their own, and thus became obligated to repay what had been paid for them.

Whether this was the true legal effect of what was done is not a federal question. All we have to consider is whether it was the real ground of decision, and not used to give color only to a refusal to allow the bar of the decree. It cannot be doubted that if Chapman and Stryker had, after the rendition of the decree, got from the homestead company permission to use its payments as a defense to the actions brought against them for the taxes, and in consideration thereof had promised to repay what had been advanced for that purpose, a new cause of action would have arisen, to which the decree would not have been a bar. That is in substance what the supreme court held was done. The county sued Chapman and Stryker for the taxes which had been levied on their lands, assuming that the payments made by the homestead company did not discharge them from their liability as the true owners. To this suit Goodnow, as the assignee of the homestead company, was a party, and in his pleadings he insisted that if they refused to pay the county because his assignor had already made the payment, then they would be bound to him for the amount advanced by the company for that purpose. Such being his claim on the record, Chapman and Stryker, each in his own suit, set up as a defense "that all of said taxes * * * were duly paid by said Iowa Homestead Company as soon as the same became due, and said defendant was no longer liable therefor." This the court held to be equivalent to an election by Chapman and Stryker to treat the payments by the company as payments by themselves, and to imply a promise of reimbursement for the advances made. Whether this conclusion was correct or not depends on the tax laws of the State and the principles of general law applicable to such facts, and not on the Constitution or laws or authority of the United States. What was done was not affected by the decree because it was done afterwards. It was in the opinion of the court a new promise, as the money of the homestead company was in effect used by the defendants themselves to meet their own liabilities. The fact that the company gave the money to the county for the taxes could not of itself be made a ground of action against the defendants; because the court in the other case, to which they and the company were parties, had decided otherwise, and there had been at the time no election by them to treat this act of the company as done for them. It was only when this election was made that the liability arose, and as that was after the decree, the new liability was not affected by what had been adjudicated before. The court did not refuse to give faith and credit to the decree, but it acted upon a new cause of action with which the decree had no legal connection. That decree is a bar to the cause of action upon which it was based, but not to a different cause of action arising afterwards.

Neither can we consider whether the court below erred in allowing the county to come in as a party to the suit, and in giving judgment upon the new cause of action which arose after the original suit was begun. The question presented by the new pleadings was a real question in the case, as adjudged by the court; and the manner of getting it in is no more the subject of review here than the decision upon it afterwards.

We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here. *Chouteau* v. *Gibson*, 111 U. S. 200 [28:400]; *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S. 123, 127 [28:678,680]. Such, in our opinion, were these cases, so far as the question arising out of the prior adjudication in *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.* is concerned. The federal question involved in that decree lay behind the alleged new promise; and as the new promise was sustained and a judgment given against the defendants on that account, the effect of the decree did not necessarily enter into the determination of the cause.

Inasmuch, therefore, as there is no federal question presented by this branch of the cases, and there was no error in the decision of that involved in the other, the judgment of the Supreme Court of Iowa in each of the cases is affirmed.

MILTON F. LAMASTER, *Plff. in Err.*,

v.

JOHN W. KEELER.

(See S. C. Reporter's ed. 376-391.)

Nebraska law—sale on execution—confirmation of sale.

1. The Act of Nebraska, of Feb. 23, 1875, did not, on Dec. 2, 1875 govern proceedings for the stay of judgment in the Federal Courts of the Nebraska District, nor determine the liability of the sureties on the bond or undertaking given for such stay; and the act of the clerk, extending the judgment against the sureties in this case was without authority and void.

2. The sale under the execution, of the property of one of the sureties in this case, and the deed of the marshal to the purchaser at such sale, therefore, conferred no title.

3. The confirmation of the sale, by the order of the court, did not cure the invalidity of the execution upon which it was made; a confirmation of a sale may cure mere irregularities not affecting its fairness, but not an infirmity growing out of the nullity of the judgment under which it was had.

[No. 76.]

Argued Nov. 18, 1887. *Decided Dec. 5, 1887.*

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Reversed.*

Statement by *Mr. Justice* **Field:**

This case comes before us from the Circuit Court for the District of Nebraska. It is an action of ejectment to recover a parcel of land in the City of Lincoln, State of Nebraska. The plaintiff below, the defendant in error here, traces title to the premises from a purchaser at a sale under an execution issued upon a judgment, extended by the clerk of the court so as to include certain sureties, and among them the defendant below. The contention of the defendant is that the extension of the judgment so as to include him was unauthorized and void, and that the execution and sale thereunder of his property was, therefore, without any force or validity.

The facts of the case, so far as it is necessary to state them for the disposition of the contention of the defendant below, are briefly these: on the 12th of November, 1875, Charles W. Seymour and William Wardell, as plaintiffs, recovered a judgment in the Circuit Court of the United States for the District of Nebraska, against one William P. Young, as defendant, for $6,500 and costs. The defendant in that case, Young, being desirous of staying execution upon this judgment, obtained a bond, as the undertaking is termed, signed by five parties, of whom Lamaster, the plaintiff in error, was one, in which, after reciting the judgment recovered, they acknowledged themselves "security for the defendant for the payment of the judgment, interest and costs, from the time of rendering said judgment, until paid, to be paid nine months from the rendering the same." Attached to this instrument was an affidavit of justification of all the parties signing it, except Lamaster. Originally, his name was signed to the affidavit, but he had it cut off before the instrument was presented to the clerk. It is unnecessary to state the circumstances under which this was done or the effect of it (if any it had) upon his liability, as the case will be determined on other points.

The bond, so called, was approved by the clerk of the court, on the second of December, 1875, and filed; and thereupon he made in one of the books of record of the court, called "Judgment Index of the Court," the following entry: "Defendants, Lamaster, M. F., *et al.*, surety; Plaintiffs, Seymour and Wardell, appearance. Docket 6, No. 138; date of judgment, Nov. 12th, 1875; amount of judgment, $6,500."

This entry was made by the clerk, under the impression that the Statute of Nebraska of February 23, 1875, entitled "An Act to Provide for Stay of Executions and Orders of Sale," was the law governing the stay of executions upon judgments in the Circuit Court of the United States. The third section of the statute provides for a stay of execution for a period of nine months, upon judgments for the recovery of money only, with certain exceptions not material in this case, on condition that the defendant shall, "within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest and cost from the time of rendering judgment until paid."

The other sections which bear upon the questions involved are the following:

Sec. 4. "Officers approving stay bonds shall require the affidavits of the signers of such bonds, that they own real estate not exempt from execution and aside from incumbrances, to the value of twice the amount of the judgment."

Sec. 6. "The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties; and the clerk shall enter and index the same in the proper judgment docket as in the case of other judgments."

Sec. 9. "At the expiration of the stay, the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein." See Neb. Laws, 1875, p. 49.

Upon the assumed sufficiency of the bond of the sureties, and of the above entry in the judgment index under the Statute of Nebraska, the clerk, on the 14th of April, 1881, issued an *alias* execution to the marshal of the district, commanding him as follows:

"That of the goods and chattels, and for want thereof, then of the lands and tenements of Wm. P. Young, debtor, and John I. Irwin, Jane Y. Irwin, W. T. Donovan, Milton F. Lamaster, and Nathan F. Moffit, sureties, in your district, you cause to be made the sum of $4,744.31, being the balance due April 2, A.D. 1881, on the judgment of the Circuit Court of the United States, for the District of Nebraska, at the November Term thereof, in the year 1875, by which Charles W. Seymour and William W. Wardell recovered against the said William P. Young, with interest thereon from the second day of April, A. D. 1881, until paid, together with the further sum of ——, costs of increase on said judgment, and also the costs that may accrue on this writ. And have you the said moneys before the clerk of the said circuit court, at the City of Omaha, in said district, within sixty days, to be paid to the persons entitled to receive the same."

Under this execution, the premises in controversy, being a lot in the City of Lincoln, was, on the 17th of May, 1881, sold to one Thomas Ewing for the sum of $5,600. A motion to set aside the sale having been denied, and the sale confirmed, the marshal's deed of the premises was made to the purchaser, and he conveyed them to the plaintiff.

The petition, the designation given to the first pleading, in the system of procedure in civil cases in force in Nebraska, sets forth the title of the plaintiff under the execution and sale mentioned, the detention of the premises by the defendant, and the receipt by him of the rents and profits to the amount of $3,000, and prays judgment for the possession of the premises and for the rents and profits. The defendant pleaded that the conveyance from Ewing, the purchaser at the execution sale, to the plaintiff, was colorable and collusive, for the purpose of enabling the latter to commence

and maintain an action for the recovery of the property, in the Circuit Court of the United States. And in answer to the petition the defendant denied the validity of the bond, the extension of the judgment against him, and the proceedings thereunder; and also set up the pendency in the state court of a suit for the determination of his title to the premises.

Two trials of the case were had, which is permissible in actions of ejectment under the laws of Nebraska. On the first, the verdict of the jury was for the defendant; on the second, they found that the conveyance by the purchaser at the marshal's sale to Ewing, the plaintiff herein, was "merely colorable and collusive, and was made for the purpose of creating a case cognizable in the federal court, and the plaintiff was not the real party in interest; but that the action was being prosecuted for the use and benefit of Ewing, and that Keeler is only a nominal and colorable party."

This verdict being set aside by the court, a third trial was had, which resulted in a general verdict for the plaintiff, under the instructions of the court. The question raised on the trial and decided by the court, upon the instruction refused and those given, related to the validity of the proceedings taken by the clerk upon the bond of the sureties, to authorize execution against their property, and the sale of the premises.

The defendant requested the court to instruct the jury that the Statute of Nebraska respecting the stay of executions and orders of sale, approved February 23, 1875, "was not operative to authorize the execution against Lamaster's property;" but the court refused the instruction and charged the jury as follows: "That the filing of defendant's bond with the clerk of the court, and its approval by him, and his approval of the sureties thereto, including the defendant, the record of the same, the entry of memoranda thereof in the judgment index, called in the statute 'extending the judgment,' justified the issue by the clerk of the court of an execution upon the judgment of Seymour and Wardell against Young and others, directed to the marshal, commanding him to make the balance due upon the judgment out of the property of the principal and sureties, including that of the defendant Lamaster, and the sale by the marshal of the defendant's property under and by virtue of the execution, was authorized by law." And again, "that when the bond was taken by the clerk, as shown in evidence, and when the proceedings were taken thereon leading to the sale by the marshal of the property in question, the Statute of this State, passed on the 23d of February, 1875, and entitled 'An Act to Provide for Stay of Executions and Orders of Sale,' was in force in the court, and was a law therein, the same as in the district courts of the State."

And the court further instructed the jury to find a general verdict for the plaintiff.

To the refusal of the court to give the instruction requested, and to the instructions given, the defendant at the time excepted.

The jury found a verdict for the plaintiff; and to review the judgment entered thereon the defendant has brought the case here on a writ of error.

On the 30th of December, 1876, and not before, the Circuit Court of the United States for the District of Nebraska made the following order:

"Ordered, that the laws of the State of Nebraska, now in force, regulating the issuing of executions and of the proceedings to be had thereon and thereunder, be, and the same are hereby, adopted as the rule of procedure to enforce the collection of judgments in the United States Circuit and District Court for said State."

Messrs. **John F. Dillon, Geo. W. Doane** and *W. C. Goudy*, for plaintiff in error:

The court below erred in not dismissing this case upon the return of said special findings and verdict.

Williams v. *Nottawa*, 104 U. S. 209 (26: 719); *Hayden* v. *Manning*, 106 U. S. 586 (27: 306); *Bernards* v. *Stebbins*, 109 U. S. 341 (27: 956); *Farmingtan* v. *Pillsbury*, 114 U. S. 138 (29: 114).

The court erred in admitting the testimony objected to.

Wayman v. *Southard*, 23 U. S. 10 Wheat. 1 (6: 253); *Bank of U. S.* v. *Halstead*, 23 U. S. 10 Wheat. 51 (6: 264); *Ross* v. *Duval*, 38 U. S. 13 Pet. 45 (10: 51); *Beers* v. *Haughton*, 34 U. S. 9 Pet. 329 (9: 145); *Amis* v. *Smith*, 41 U. S. 16 Pet. 303 (10: 973).

If there was no valid judgment upon which to base the execution, the sale thereunder was a nullity, and the court had no jurisdiction to make any order which should be binding on Lamaster.

Downs v. *Fuller*, 2 Met. 135; *Caldwell* v. *Walters*, 18 Pa. 79; *Higgins* v. *Peltzer*, 49 Mo. 152, *Ditto* v. *Geoghegan*, 1 Met. (Ky.) 169; *Wilson* v. *Arnold*, 5 Mich. 98; *Gregory* v. *Tabar*, 19 Cal. 397; *Townsend* v. *Tallant*, 33 Cal. 45; *Shriver* v. *Lynn*, 43 U. S. 2 How. 43 (11: 172); *Gantly* v. *Ewing*, 44 U. S. 3 How. 707 (11: 794); *Shelton* v. *Tiffin*, 47 U. S. 6 How. 163 (12: 387); *Milwaukee & M. R. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 (17: 886).

The court erred in refusing to give to the jury the instructions requested by the plaintiff in error.

Dair v. *U. S.* 83 U. S. 16 Wall. 1 (21: 491); *State* v. *Pepper*, 31 Ind. 82; *Wild Cat Branch* v. *Ball*, 45 Ind. 218; *State* v. *Peck*, 53 Me. 284; *Fletcher* v. *Austin*, 11 Vt. 447; *Pawling* v. *U. S.* 8 U. S. 4 Cranch, 219 (2: 601); *People* v. *Bostwick*, 32 N. Y. 445.

The court erred in giving to the jury the instructions requested by the defendant in error.

Wayman v. *Southard*, *Bank of U. S.* v. *Halstead*, and *Amis* v. *Smith*, *supra*.

There was no valid judgment against Lamaster.

Nudd v. *Burrows*, 91 U. S. 426 (23: 286); *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291 (23: 898).

The Circuit Court of Nebraska had no power to adopt the State Statute of 1875, authorizing a stay of execution for nine months upon the execution of a bond; and there was no power in the clerk to approve of such a bond, or extend any judgment against the sureties signing it.

Wayman v. *Southard*, and *Bank of U. S.* v. *Halstead*, *supra*; *Kearoy* v. *Farmers & M. Bank*,

41 U. S. 16 Pet. 89 (10: 897); *McCracken* v. *Hayward*, 43 U. S. 2 How. 608 (11: 897); *Davenport* v. *U. S.* 76 U. S. 9 Wall. 409 (19: 704); *Duncan* v. *Darst*, 42 U. S. 1 How. 301 (11: 139); *Boyle* v. *Zacharie*, 31 U. S. 6 Pet. 648 (8: 532); *Beers* v. *Haughton*, 34 U. S. 9 Pet. 329 (9: 145); *Homer* v. *Brown*, 57 U. S. 16 How. 354 (14: 970).

The decision of the Circuit Court of Nebraska, denying the motion of Lamaster to set aside the sale, does not prevent him from litigating the questions arising upon that motion.

Freeman, Judg. §§ 255, 325, and cases cited; *Boggs* v. *Clark*, 37 Cal. 236.

There are no presumptions in favor of the jurisdiction of the United States Courts; but the facts upon which it rests must appear in some form in the record.

Ex parte Smith, 94 U. S. 455 (24: 165); *Shriver* v. *Lynn*, 43 U. S. 2 How. 43 (11: 172); *Williamson* v. *Berry*, 49 U. S. 8 How. 541 (12: 1189); *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 328 (7: 164); *Hickey* v. *Stewart*, 44 U. S. 3 How. 750 (11:814); *Kilbourn* v. *Thompson*, 103 U. S. 197 (26: 389); *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565).

Mr. **J. M. Woolworth**, for defendants in error:

Section 914, R. S. U. S., adopted, as part of the jurisprudence of the Federal Court in Nebraska, the statute of that State by virtue of which the proceedings here complained of were had.

Wayman v. *Southard*, 23 U. S. 10 Wheat. 1 (6: 253); *Bank of U. S.* v. *Halstead*, 23 U. S. 10 Wheat. 51 (6: 264); *Beers* v. *Haughton*, 34 U. S. 9 Pet. 329 (9: 145); *Ross* v. *Duval*, 38 U. S. 13 Pet. 45 (10: 51); *Williams* v. *Benedict*, 49 U. S. 8 How. 107 (12: 1007); *Bank of Tennessee* v. *Horn*, 58 U. S. 17 How. 157 (15: 70); *Georgia* v. *Atlantic & G. R. R. Co.* 3 Woods, 434; *Smith* v. *Cockrill*, 73 U. S. 6 Wall. 756 (18: 973); *Moncure* v. *Zunts*, 78 U. S. 11 Wall. 416 (20: 181); *U. S.* v. *Knight*, 3 Sumn. 373; *Hiriart* v. *Ballon*, 34 U. S. 9 Pet. 156 (9: 85); *Smith* v. *Gaines*, 93 U. S. 341 (23: 901); *Amis* v. *Smith*, 41 U. S. 16 Pet. 303 (10: 973); *Beall* v. *New Mexico*, 83 U. S. 16 Wall. 535 (21: 292); *Moore* v. *Huntington*, 84 U. S. 17 Wall. 417 (21: 642).

The question discussed is not an open one between these parties.

Day v. *Thompson*, 11 Neb. 123; *McKeighan* v. *Hopkins*, 14 Neb. 361; *Neligh* v. *Keene*, 16 Neb. 407; *Orchard* v. *Hughes*, 68 U. S. 1 Wall. 73, 76 (17: 560, 561); *Blossom* v. *Milwaukee & C. R. R. Co.* Id. 655 (17: 673); *Butterfield* v. *Usher*, 91 U. S. 246 (23: 318); *Findley* v. *Bowers*, 9 Neb. 72; *Gilbert* v. *Brown*, 9 Neb. 90; *Berkley* v. *Lamb*, 8 Neb. 392; *Schribar* v. *Platt*, 19 Neb. 625; *Milwaukee & M. R. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 (17: 886).

When a court, even of inferior jurisdiction, exercising statutory powers, is called upon to determine whether it has jurisdiction, its decision on that subject is conclusive.

Mather v. *Hood*, 8 Johns. 50, 51; *Griswold* v. *Stewart*, 4 Cow. 458; *Dyckman* v. *Mayor of N. Y.* 5 N. Y. 435, 440; *Sheldon* v. *Wright*, Id. 497.

It was not error for the court to refuse to reduce its charge to the jury to writing.

Nudd v. *Burrows*, 91 U. S. 426 (23: 286); *Vicksburg & M. R. R. Co.* v. *Putnam*, 118 U. S. 545 (30: 257); *Martindale* v. *Waas*, 11 Fed. Rep. 551; *S. C.* 3 McCrary, 637.

The circuit court had jurisdiction of the case.

Cohens v. *Virginia*, 19 U. S. 6 Wheat. 264, 379 (5: 257, 285); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 738, 824 (6: 203, 224); *New Orleans, M. & T. R. R. Co.* v. *Mississippi*, 102 U. S. 135, 140 (26: 96, 98); *Kansas Pac. R. Co.* v. *Atchison, T. & S. F. R. R. Co.* 112 U. S. 414, 416 (28:794, 795); *Starin* v. *Mayor of N. Y.* 115 U. S. 248 (29:388); *Nashville* v. *Cooper*, 73 U. S. 6 Wall. 247 (18: 851).

Mr. Justice **Field** delivered the opinion of the court:

The contention of the plaintiff below, the defendant in error here, that the Act of Nebraska of February 23, 1875, governed proceedings for the stay of money judgments in the Federal Courts of the Nebraska District equally as for the stay of such judgments in the courts of that State, and in like manner determined the liability of sureties upon bonds given for such stay, is founded upon the language of section 914 of the Revised Statutes, which is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This section is a re-enactment of section 5 of the Act of June 1, 1872, "to further the administration of justice" (17 Stat. at L. chap. 255), and was intended to assimilate the pleadings and the procedure in common-law cases in the federal courts to the pleadings and procedure used in such cases in the courts of record of the State within which the federal courts are held. Much inconvenience had been previously felt by the profession from the dissimilarity in pleadings, forms, and modes of procedure of the federal courts from those in the courts of the State, consequent upon the general adherence of the former to the common-law forms of actions, pleadings, and modes of procedure; whilst the distinctions in such forms of action and the system of pleading and the modes of procedure peculiar to them had been in many States abrogated by statute. The new codes of procedure did not require an accurate knowledge of the intricacies of common-law pleading; and to obviate the embarrassment following the use of different systems in the two courts the section mentioned of the Act of 1872 was adopted. As said by this court in the case of *Nudd* v. *Burrows*, 91 U. S. 426, 441 [23: 286, 290] its purpose "was to bring about uniformity in the law of procedure in the federal and state courts of the same locality. It had its orgin in the code enactments of many of the States. While in the federal tribunals the common-law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local Code prevailed. This involved the necessity, on the part of the Bar, of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of

the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes."

The general language of the section, in the absence of qualifying provisions, would comprehend all proceedings in a cause from its commencement to its conclusion, embracing enforcement of the judgment therein. The court which has jurisdiction of a cause has jurisdiction over the various proceedings which may be taken therein, from its initiation to the satisfaction of the judgment rendered. Any practice, pleading, form, or mode of proceeding which may be applicable in any stage of a cause in a state court would therefore, under the section in question, in the absence of other clauses, be also applicable in a like stage of a similar cause in a federal court. The section would embrace proceedings after judgment equally within those preceding its rendition.

The first Process Act of Congress, passed September 29, 1789, 1 Stat. at L. 93, provided "That until further provision shall be made * * * the forms of writs and executions, except their style, and *modes of process* * * * in the circuit and district courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same."

The second Process Act, passed May 8, 1792, 1 Stat. at L. 275, provided "That the forms of writs, executions and other process, except their style and the *forms and modes of proceeding* in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the Act, entitled 'An Act to Regulate Processes in the Courts of the United States,'" the first process Act mentioned above.

In *Wayman* v. *Southard*, 23 U. S. 10 Wheat. 1 [6: 253] these statutes were considered and construed by this court. And in giving a meaning to the language "forms and modes of proceeding in suits," the court, speaking by *Chief Justice* Marshall, said that it "Embraces the whole progress of the suit, and every transaction in it, from its commencement to its termination, which has been already shown not to take place until the judgment shall be satisfied. It may then and ought to be understood as prescribing the conduct of the officer in the execution of process, that being a part of the proceedings in the suit." Id. 32 [260].

There would, therefore, be good reason for the contention of the plaintiff below, that the general words of section 914 of the Revised Statutes, "forms and modes of proceeding," apply to proceedings for the enforcement of judgments, as well as to proceedings before the judgments were rendered, but for the provisions of section 916, which is section 6 of the same Act of June 1, 1872, from which section 914 was taken. Section 916 is as follows:

"The party recovering a judgment in any common-law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This section shows that in pursuing the remedies for the enforcement of a judgment in a common-law cause, recovered in a federal court, the "forms and modes of proceeding" provided for the enforcement of a like judgment in a state court are not to be followed, unless they were prescribed by a law of the State, at the time the provisions of the section took effect; or, if subsequently prescribed by such law, until they have been adopted by a general rule of the court. In providing for remedies upon judgments, the section not only excludes the application of the provisions of section 914 to such remedies, but also indicates the extent to which remedies upon judgments furnished by state laws may be used in the federal courts. Congress, which alone can determine the remedies which may be pursued for the enforcement of judgments in the federal courts, as well as the procedure to be adopted in the progress of a suit, has declared its will with respect to both. The procedure in civil causes, other than those in equity and admiralty, from their commencement to final judgment, must conform, as near as may be, to the procedure *existing at the time* in like causes in the courts of record of the State in which the federal courts are held. It must, therefore, follow subsequent changes in the procedure in like causes in the state courts. But to enforce judgments in common-law causes, only such remedies can be pursued "as *are now provided* in like causes by the laws of the State"—that is, when the Act of Congress on the subject, the above section, was passed or re-enacted—or, if provided by subsequent laws of the State, such as have been adopted by the federal courts.

It matters not that the remedies designated in section 916 are stated to be, to reach by execution or otherwise the property of the judgment debtor; and that proceedings under the Stay Law of Nebraska are only to secure, where a stay is obtained, the personal liability of the sureties for the amount of the judgment—in the absence of a designation of any other remedies, the section is a declaration that, until adopted by a rule of the court, no other remedies prescribed by state laws shall be permitted in the federal courts. The extent to which the authority of the federal courts may go, in the enforcement of judgments, by resort to remedies provided by state laws in similar cases, is thus defined and limited.

Section 916, as mentioned, is taken from the Act of Congress of June 1, 1872, and is re-enacted in the Revised Statutes, which took effect as of December 1, 1873. The Act of Nebraska of February 23, 1875, had not been adopted by any rule of the federal court when the judgment of *Seymour* v. *Young* was rendered in the Circuit Court of the United States, November 12, 1875, or when that judgment was extended by the clerk of that court, December 2, 1875, so as to embrace the sureties on the bond given to stay execution. That Act was not adopted as a rule of procedure of that court until December 30, 1876.

It follows from this construction of the two sections 914 and 916 that the Act of Nebraska

did not govern proceedings for the stay of execution upon that judgment, or determine the liability of the sureties on the bond or undertaking given for such stay; and that the act of the clerk extending that judgment against the sureties was without authority and void. The sale, under the execution of the property of Lamaster, one of the sureties, and the deed of the marshal to the purchaser at such sale, therefore, conferred no title.

The confirmation of the sale by the order of the court did not cure the invalidity of the execution upon which it was made. The extension of the judgment against Young, so as to embrace the sureties, being a void proceeding, no subsequent action upon the sale could give it validity. A confirmation of a sale may cure mere irregularities not affecting its fairness, but not an infirmity growing out of the nullity of the judgment under which it was had.

The judgment below must therefore be reversed, and the cause remanded for a new trial; and it is so ordered.

JAMES B. WHITE, *Plff. in Err.*,
v.
GEORGE M. BARBER.

SAME, *Appt.*,
v.
SAME.

(See S. C. Reporter's ed. 392–425).

General exception — charge to jury — money, when not recoverable — illegal contract.

1. A general exception to the whole of a charge to the jury cannot be regarded, as it is a violation of Rule 4 of this court.

2. A charge to the jury, which presented fairly to them a statement of the testimony on both sides and which fairly submitted to them the question whether the contracts in question in this action were contracts to buy or sell at a future day, or were absolute sales, and which instructed them that if they should find that the dealings of the defendant for the plaintiff were options to buy or sell at a future day, their verdict should be for the plaintiff, but if they should find such dealings were contracts for absolute delivery of the grain, their verdict should be for the defendant, *held*, in this case, not to have been erroneous.

3. Moneys irrevocably set apart, by both the plaintiff and his agent, the defendant, for the payment of damages upon contracts for the purchase of wheat, and paid over by such agent in satisfaction of such damages, under the rules of the board of trade, cannot, under the circumstances of this case, be recovered back by the plaintiff.

4. A party who has paid out his money for the accomplishment of a purpose made an offense by the law, and upon a contract which was illegal, criminal and void, cannot recover it back, in a court whose duty it is to give effect to the law which the party admits he intended to violate.

[Nos. 72, 73.]

Argued Nov. 17, 1887. Decided Dec. 5, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. (No. 72.) *Affirmed.*

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. (No. 73.) *Affirmed.*

Statement of the case by *Mr. Justice* **Blatchford:**

The first one of these cases is an action at law brought on the 10th of May, 1883, by James B. White against George M. Barber, in the Superior Court of Cook County, Illinois. The declaration demanded the sum of $15,000 and declared on the common counts. The defendant pleaded *non assumpsit*. In June, 1883, the cause was removed by the defendant into the Circuit Court of the United States for the Northern District of Illinois. At the trial, in February, 1884, there was a verdict for the defendant, followed by a judgment for him, to review which the plaintiff has brought a writ of error. There was a bill of exceptions, the whole of which is in substance as follows:

The plaintiff introduced the following evidence: James B. White, the plaintiff, "testified, that now, and during the time in question, he resided at Fort Wayne, Indiana, engaged in the business of dealing in general merchandise; that, in 1879 and prior thereto, one A. S. Maltman, of Chicago, acted as his agent in purchasing and forwarding merchandise of various kinds; that, about September, 1879, desiring to do some trading on the board of trade, Chicago, I asked Maltman to recommend some good responsible broker on the board of trade, through whom I could do business; that Maltman recommended the defendant, who then, and during the time in question, was a broker residing in Chicago and doing business on the board of trade; that thereupon I commenced trading on the board, sending my orders at first to Maltman, who communicated them to the defendant; that about December, 1879, I came to Chicago, made the acquaintance of defendant, and thereafter did business directly with him; that I continued to do business with defendant during the years 1879, 1880, 1881, and 1882, buying and selling on the board, through the defendant as broker, corn, wheat, oats, pork, and other commodities; and that, about April 19th, 1882, I had a settlement with defendant, in which all previous dealings were adjusted; that up to this time the transactions which I had made through defendant on the board amounted to $105,000, in 1879; $1,718,000 in 1880; $640,000, in 1881, and $672,000, in 1882; that, in November or December, 1879, and at other times prior to the settlement in April, 1882, I had conversations with the defendant in which I told defendant that I was a merchant in Fort Wayne, and did not want it known that I was engaged in speculating on the board of trade in Chicago, as it might affect my credit, and that the account could be kept in the name of A. S. Maltman; that I considered it a hazardous business, but was willing to gamble provided I could have a fair show; that I wanted my deals placed with responsible parties, so that I could get my money when I made it; that I didn't want any of the property, but meant simply to do a gambling business; that defendant told me (plaintiff) that he knew what I wanted; that Maltman had explained my situation and business; that he would deal only with responsible parties, and the deals should be settled so as to get the profits or losses; that defendant told me (plaintiff) that not one bushel in a million that was bought and sold on the board was legitimate business; that a few of the large houses did some legitimate business, but most

of it was simply trading in differences; that he (defendant) did nothing but business of the latter kind; that he dealt mostly for himself; that he did a good deal of 'scalping,' deals made and closed the same day, on the turn of the market; that he did not let his deals run over night; that, up to April, 1882, I (plaintiff) never delivered or received any of the property so sold or bought, nor was anything ever said by defendant to me about receiving or delivering the property or making arrangements to do so; that, from time to time, defendant rendered statements to me (plaintiff) showing the deals made, the price per bushel, or, in case of pork, the price per 100 lbs., at which the commodity was bought and sold, the difference in dollars and cents, the commissions charged, and the total debit or credit passed to my account; that all the deals made, were, in form, contracts for future delivery, in which the seller had the option of delivering at any time during some future month; that, up to April, 1882, all trades made by defendant for me (plaintiff) had been settled or closed by counter trades prior to the month in which delivery could be made; up to April 19, 1882, no commodities had been delivered to or received on these trades, nor had any suggestion or requirement on the part of Mr. Barber to deliver been made; that defendant never reported to me the names of the parties with whom trades were made on my account, and that I never knew or inquired who such parties were; that, after the settlement in April, I commenced selling wheat for July delivery, and, by the last of May, had sold, through defendant, 100,000 bushels for that delivery, which are the trades in question in this case; that there was a corner in July wheat, and the price was forced up ten or twelve cents; that, on the last of July, I came to Chicago, had an interview with defendant in the morning, in which he (defendant) proposed to make a tender of No. 2 red winter wheat, the kind sold being No. 2 spring wheat; that No. 2 red winter is intrinsically more valuable than No. 2 spring, but that, on the last of July, the former stood at 98 cents per bushel and the latter at $1.35 to $1.37; that I (plaintiff) knew of the tender and I did not object; that I met defendant later in the day, and was informed by him that he had borrowed warehouse receipts for ten thousand bushels No. 2 red winter wheat, and had made a tender of the same to the several parties to whom he had sold the wheat, and that such tender was in every case declined, and that said tender was made under the following rules of the board of trade, viz.: 'On contracts for grain for future delivery the tender of the higher grade of the same kind of grain as the one contracted for shall be deemed sufficient, provided the higher grade of grain tendered shall not be of a color or quality that will depreciate the value of the other, if mixed.'

"Prior to December, 1879, I bought through defendant, 100,000 bushels of corn for December delivery. I came to Chicago and defendant told me the deal had gone against me $4,500, and he said I had to close it that day. The loss was that amount, and I paid it that day. No corn was delivered on either side. In January, 1880, I sold, through Barber, 20,000 bushels of wheat. My profit was $400. I did not take the profit, but sold more, and the deal went against me $2,000, and I paid it up. I then commenced buying, and made $600 on March wheat bought in January. I commenced selling wheat in March, 1880, and made a good deal of money for a few months; recovered losses in April and commenced selling May wheat. The May options took a sudden start up, and I lost $8,000, and I paid it. It was expressly stated by me to Barber that I wanted no property. He knew that. He said, 'Certainly, I know that,' and that the deals should be settled on the margins—on the profits. Up to April, 1882, nothing had been delivered by me or received by me, nor had there been any suggestion or requirement on defendant's part to deliver made; on the other hand, it was never expected to handle the property, but merely to trade in the different deals. Up to the close of the July deal, 1882, no demand had been made on me by Barber for the delivery of wheat or corn, or any other commodity.

"That I received the following statement of account from defendant about the day of its date (which was read in evidence):

'CHICAGO, *Oct. 30th '82*

A. S. Maltman (J. B. W.) in acc't with G. M. Barber,

		Cr.
'1882.		
'July 1.	By balance	12,000 00
" 3.	" draft	8,000 00
'Sept. 11.	" profit as per statement rend.	931 25
" 12.	" " " "	2,018 75
" 27.	" " " "	818 75
'Octo. 26.	" " " "	900 00

	'DEBIT.	
'July 31.	To loss as per statement rend.	2,668 75
'Aug. 11.	" " " "	100 00
'Sept. 12.	" draft	3,000 00
'Octo. 27.	" loss as per statement rend	400 00
" 30.	" draft	987 50
	To balance	11,412 50
		$18,568 75

		$18,568 75
'Octo. 30.	By balance, being diff. between price	$11,412 50

'I have 100 M July spring wh't sold for you and the settling price of same as fixed by board of trade (1.35), including coms., &c.'

"That the item of $12,000 balance in said account consisted of money advanced and paid to the defendant; that the item of 'July 3, by draft $3,000,' consisted of $3,000 money paid the defendant by means of a draft. Plaintiff testified further that on April 2, 1883, I served the following notice upon the defendant, by delivering to him a copy thereof; the defendant

read the notice, admitted he had the money in his hands, but declined to pay it over.

"The notice was offered in evidence, and is as follows:

'To G. M. Barber, Esq.:

'In a statement made by you, dated October 30, 1882, of deals made on my account on the board of trade, Chicago, you acknowledged a balance in your hands of $11,412.50 in my favor, being, so the statement says, the difference between price you sold 100 M July wheat for me and the selling price of same as fixed by the board of trade, $1.35, including your commission of ⅛ cent; now you are hereby notified that I claim all contracts for sale of said wheat to be illegal and void, and forbid you to pay over any part of said money or balance to anyone, and I further demand the immediate payment thereof to myself.

'Dated Chicago, April 2nd, 1883.

JAMES B. WHITE.'

"On cross examination plaintiff testified that, during all the time he traded through defendant, Maltman continued to some extent to act as his agent in the business with defendant; that he received some profits debited to him in the statement offered in evidence; that defendant complied with his orders, so far as he knows; that he didn't think defendant had anything to do with the corner in wheat; that he (plaintiff) had nothing to do with the appointment of a committee by the board to fix a selling price for July wheat; that he knew what was going on, and talked with A. M. Wright and other members of the board of trade about the deal, but did not enter into any agreement or arrangement with the other brokers similarly situated to the defendant in regard to legal proceedings to prevent the consummation of the corner; did not employ counsel on behalf of defendant, or authorize any steps to be taken in his name; that he (plaintiff) was an outsider and was not recognized in that matter; that he did not agree to pay attorney's fees, but expected he would have to do so, and did after the litigation was over; that he knew a bill was filed; that the matter was contested and decided by the supreme court in favor of the cornerers. The litigation was after a committee appointed by the board had fixed the selling price at $1.35.

"In the progress of the case the plaintiff testified further, among other things: I left it for Mr. Barber to put the contract in form when I wished him to buy or sell. I understood that he would go on the board of trade and either buy or sell, and I understood that he did go on the board of trade and buy and sell according to my orders. There was no disobedience of my orders, so far as I know. I have no complaint to make on the score of nonobservance of my orders. I knew that while we thought the corner in July wheat was about to culminate, buying wheat at Milwaukee or elsewhere to fill orders was talked about—a great many talked of it—but it was considered that parties who attempted that got beaten, because they simply dropped the grade on them. It is possible I may have talked with Maltman about the possibility of buying wheat in Milwaukee to fill my orders, but I never dreamed of it. I said some were doing it; some did do it. It was generally talked that some people had done it, and as to the propriety of doing it; it was only three cents, I think, to bring it from Milwaukee here, and twelve, fifteen, or twenty cents, somewhere along there, lower a bushel, and they could fill their contracts here with it and not lose so much as they would in the extortion of the corner. I might have said, 'Well, it could be done,' 'I wish I could do it,' or something of that kind. I knew Barber being a member of the board of trade and making contracts on the board for me, would be obliged to observe the rules of the board. I understood there was a rule that one must keep his margin good. I told him to buy, and told him to sell, and told him to sell out, and when to cover and when to close trades, and he observed my orders. If there was any corner it was not my fault, as I was selling, and it was not from Barber's fault, so far as I know. After he made the tender of red winter wheat on the 31st of July, 1882, I approved of what he did. I went to see Mr. A. M. Wright, who was one of the parties proposing to file a bill to question the propriety or binding force of a finding of a committee of the board of trade fixing the settling price for July wheat. I saw published a communication in the paper, an interview with the reporter, in regard to this corner, or at least he published a communication and I went to see him and consulted with him about it. The complaint was that the price of July wheat was put too high on the 31st of July. Barber had spoken about the contracts being under the board of trade rules. After the culmination of the corner I got a copy of the rules—printed copy. He showed me the rules under which the committee was appointed. I think the rule is on page 51 of Rules of 1882, sec. 3. Mr Wright believed it was a legal tender; so did I. I believed that 'red' would be a good tender. I went to see counsel; it was John E. Burke. He was a lawyer who had charge of what he called contested cases. There were some thirty-two members of the board in contested cases, and Mr. Barber joined in with them. I footed the lawyer's bill; that was all I did. I told Mr. Burke that I was one of the fellows that got bled in this affair, and I did not want to stand it if he could help it. He was seemingly as much out of humor about it as I was, as far as the situation was concerned—the unfairness of it. When it came to pay for the expense of those legal proceedings, the bills were presented to Mr. Barber and Mr. Maltman, and I told them to pay them, and I would pay them back; and I did. I went with Mr. Wright to Mr. Burke. Mr. Barber was away from home at the time. I told Mr. Burke the situation I was in, and he said, 'Well, when your broker comes here have him come up and see me.' It was understood that Mr. Barber was my broker or commission merchant, and, when he returned, he went and joined in with the others, to contest this thing. I knew how the matter progressed after that. It was contested in the courts in some formal way, to get into the supreme court. There was a *pro forma* decision in the court here, and the case was taken to the supreme court and was there determined in favor of the cornerers. That was after the committee of the board of trade appointed under these rules had been appointed. The case went to the supreme court.

We simply had to have patience to wait until they determined it. They determined it about a year ago last January—that is, in January, 1883—before I had served notice on him. In most cases where I bought or sold I closed before the end of the month in some way—either sold out or covered it. If I bought wheat of a man for the month of July he had the whole month of July in which to tender to me. During the whole of the month of July I had an option at what time I would deliver. The buyer has to close his trade the first of the month; and the seller has to the last of the month, or, if he pleases, he can close between times.

"George M. Barber, defendant, who, being first duly sworn, testified as follows: That, after the notice was served upon him, by plaintiff, in April, 1883, he paid over to the various parties to whom he had owed the wheat in question, the sum of $11,412.50, less the amount of his commissions, which were $250; and, on cross examination, that he made such payment because charges had been preferred against him, and he had to pay or be suspended from the board.

"Plaintiff here rested his case, and the defendant, to maintain the issues on his part, introduced the following:

"George M. Barber, defendant, who, being recalled, testified that he was a commission merchant and member of the board of trade; that he was employed by Maltman to trade for plaintiff on the board of trade—to make trades there; that, in executing the orders of plaintiff, he dealt with other members of the board; that he did not seek commission business, but dealt mostly on his own account; that once, when White was hanging on to a deal which had gone against him, witness told him that witness never hung on to a deal, but, in his own trades, generally calculated when he went home at night to have an equal amount bought and sold, so that he would not be affected by the fluctuations of the market, but did not say to Mr. White that White's business would be conducted in that way. Witness had to be governed by White's orders, which were to do so and so; did not recollect plaintiff saying that he wanted to gamble on the board; that the manner of making trades on the board is as follows: If the order was to sell, he would go on the board and offer to sell so much wheat at such a price, and some other broker would accept the offer, or some other broker might offer to buy, and he (defendant) would accept the offer, and thereupon both parties made a memorandum of the trade on a card, without comparison; that such memorandum was usually as follows, (referring to a card,) this being one of the trades in question: '10 M, July, H. G. Gaylord, 1.25¼, J. B. W.; 'that this was the only writing made in the hurry of business on the board; that '10 M' meant 10,000 bushels; 'July' meant for delivery in July, at the seller's option; that No. 2 spring wheat was understood; that 'H. G. Gaylord' was the name of the broker to whom the sale was made; that '1.25¼' denoted the price, and the initials 'J. B. W.' indicated that the sale was on account of plaintiff; that their trades were afterwards, on the same day, entered on the books of the espective parties, and their clerks went round and compared and checked them off; that this was the case with the sales of 100,000 bushels for delivery at seller's option during July, 1882, (the deals under consideration); that he had no different agreement with any of the persons with whom he dealt for plaintiff; that the grain was to be delivered or received; that 'puts' and 'calls,' or mere options to buy or sell, were not recognized on the board; that it is customary where a commodity is sold to and bought of the same broker, upon different orders, for the brokers to settle their trades by paying the difference, as the case may be. (And a rule of the board of trade allowing such transfers was read in evidence.) That he never told plaintiff that trading on the board was illegitimate, but may have told him many other of the trades were settled up, or offset, without delivery. The volume of transactions was too large to make delivery practicable in all cases. As to the conversation between witness and White, November 30, 1879, witness stated he believed it was the first time he met White, for whom there were then to mature contracts to buy 100,000 bushels corn, and witness told White that the chances were strong that the corn would be delivered, and he must either furnish the money to pay for it or order him to sell it, so that he would have a place to put it, when delivered, or make arrangements to transfer it; that, in the contracts for Mr. White, witness had received and delivered property; had received as high as 60,000 bushels in a day; that, at the request of plaintiff, he did not settle the deals for July, but made default as to the 100,000 bushels. Mr. Maltman, for Mr. White, gave me the draft of $5,000, June 12, 1882. I was required to give my word that I would not buy in the wheat unless by his orders, but would allow him to default, and Maltman told me that White said he would settle—let the committee fix the price and he would settle that way, if possible, if he did not decide to buy in the wheat. White sent witness a telegram from Fort Wayne, Aug. 5, 1882, as follows: 'Don't cancel the July trades. My attorneys here believe the tender we made is good and can be enforced. J. B. White. (Telegram read in evidence.) There were about thirty other brokers who made default; that a committee was appointed in accordance with the rules of the board, who fixed the settling price at $1.35; that thereupon the brokers filed bills in court, to enjoin the board from suspending them for not settling at the price fixed by the committee; that he returned to the city about September 10th, 1882, after being absent a month or more, and was informed by Maltman that the plaintiff had made arrangements for him to join in the injunction proceedings; that the next day he went to the office of J. E. Burke, the attorney for the defaulting brokers, and signed and swore to a bill for the purpose above stated; that said bill was filed; that afterwards the supreme court rendered a decision adverse to the prayer of the bill, and the bill was dismissed; that plaintiff was informed of the result, and paid the attorney's fees and damages in the case; that plaintiff did not suggest the making of any further contest; that at the time plaintiff made the demand upon him, April 2, 1883, the money in question was under his control, except $6,700, which had been de-

posited in the bank as margins, on account of some of the deals; that he frequently received and delivered grain; had received as high as 60,000 bushels in a day; that he could not recall any trade in which he bought for Mr. White where he received any commodity, but had no doubt at all in all his tradings he did receive a good deal, but could not recall any particular instance. There was a certainty that delivery would be made, unless, after the trades were made, I made offsets. I always do get more or less; do not expect it will all be delivered. I expect I can offset trades with a good part of it. When the 100,000 bushels in question were sold, witness expected it would be delivered; that he would buy here in the market, the largest grain market in the world.

"Thomas W. Burns, being duly sworn, testified for the defendant, that, in 1882, he was a member of the firm of Ulrich, Busch & Co. and a broker on the board of trade; that on May 17, 1882, he bought of defendant, for his firm '5, July, wheat, at 1.24⅛,' No. 2 spring wheat, (5,000 bushels); that the contract was made in the regular way; that there was no secret understanding or agreement that it was not to be executed, or that it was to be settled; that the wheat was to be delivered at any time in July, at the seller's option.

Abel H. Bliss, being duly sworn, testified for defendant, that he was a member of the board of trade, and was doing business as a commission merchant in 1882; that in May he bought 10,000 bushels July wheat, (No. 2 spring, deliverable at seller's option at any time during July) of defendant, which he never received; the wheat was to be delivered in July, at the seller's option; that there was no agreement that the wheat was not to be delivered, or that it was to be settled; that he certainly expected to get the wheat.

"It was admitted that the other brokers to whom defendant had sold the wheat in question would testify in a similar way, as to the trades with them, respectively.

"Alexander S. Maltman, being sworn, testified for defendant, that he was of the firm of A. S. Maltman & Co., and was engaged in the commission business in Chicago; that he acted as agent for plaintiff, in his transactions with defendant; that he never told defendant that the transactions were to be of a gambling or fictitious character; that his instructions from plaintiff were for the most part contained in telegrams and letters, and these he gave or showed to defendant; that the transactions were quite continuous; that, in July, 1882, he had several conversations with plaintiff as to Barber defaulting; that, when the price was up in the thirties, plaintiff was unwilling to advance more margins unless defendant would agree to default, and that he procured such an agreement from the defendant at the request of plaintiff; that, after default had been made, plaintiff said he was willing to leave it with the committee to be appointed by the board; that he went with plaintiff to the office of Burke, the attorney; that plaintiff went there to get out an injunction to prevent the board of trade from suspending defendant; that he paid out for the plaintiff on account of the said suit $283.50, which plaintiff had repaid him.

"George F. Morcom, who, being duly sworn, testified for defendant, that he was of the firm of A. S. Maltman & Co.; that he heard plaintiff say that the tender of No. 2 red winter wheat was good, that, according to their own rules, they were bound to accept it; that plaintiff said that he desired Mr. Barber to default on the deals and let the matter go to a committee and let them fix the price, and said that he would see that Mr. Barber was protected.

"Deville C. Bannister, being duly sworn, testified for defendant, that, during the time in question, he was bookkeeper for defendant; that plaintiff, at the time the injunctions were being obtained, went to Mr. Burke's office to see about the matter, and said he wished he would take the matter into his own hands; that Mr. Barber did not pay over the money until it was necessary to do so in order to save himself from being suspended from the board.

"The bill in chancery above referred to, being a bill filed in the Superior Court of Cook County, by George M. Barber, in the interest of or for the benefit of the plaintiff, on the 11th of September, 1882, making the Board of Trade of the City of Chicago party defendant, was, together with a copy of the injunction issued in pursuance of the writ, read in evidence. It set forth certain sections of the charter of the board of trade, and referred to a copy of the rules of said board in force January 1, 1882, making such copy a part of the bill as an exhibit, and referred also to sales of number 2 spring wheat, made by defendant for delivery in July, 1882, and alleged that there was an unlawful combination to prevent the complainant and others situated like him from fulfilling their contracts, etc., and set forth a certain rule of the board of trade providing, among other things, for the appointment of a committee to determine disputes as to the price of property, in case of supposed excessive claims for damages being made under contracts, on default, etc., and showed that application for the appointment of such committee was made with reference to the defaults made upon contracts for delivery of No. 2 spring wheat in July, 1882, and showed that the committee determined the price for settlement at $1.35 per bushel; and the decision of the committee was drawn in question by the bill upon various grounds, not drawing in question the validity of the contracts, but questioning whether the board of trade had power to compel members to abide the decision of such committee, and also questioning the regularity of the appointment of the committee, and charging that, in the conduct of the hearing had before the committee, and in the finding of the committee, the spirit of the rules of the board of trade was violated by putting it in the power of persons who had been concerned in cornering the market to get excessive damages, etc. The bill pointed out certain rules of the board of trade under which, in case a member failed to comply promptly with the terms of any business contract or obligation, or failed to satisfy, adjust, and settle the contract, or failed to comply with or fulfill any award of the committee of arbitration, or committee of appeals, made in conformity with the rules, regulations, and by-laws of the association, he should, upon admission or proof of the delinquency before the board of directors, be subject to be suspended from all privileges of the asso-

ciation, etc.; and an injunction to prevent suspension or expulsion, and especially to restrain and enjoin the board from accepting, treating, or recognizing the decision of the committee aforesaid as in force, or as having any effect, was prayed for by the bill. Such injunction was ordered, and was issued September 11, 1882, and was served on the board. There was also introduced a certified transcript of the order of said superior court, made on the 11th of October, 1882, dissolving the injunction, and assessing damages on account of the issuing of the same, but showing that by stipulation the cause was to abide the final result of the case of *Wright* v. *Board of Trade of Chicago*, in the appellate court or in the supreme court, and that, in cases of the reversal of the decree in that case, then the decree in the Barber case should be set aside on his motion, and the injunction in his favor was continued. This decree was to be regarded as final in case the decree in the Wright case should be affirmed, except that, in such case, the injunction was to be dissolved, on defendant's motion. The transcript further showed that, on the 16th of April, 1883, the said superior court, in the said chancery suit of Barber, vacated the order to continue the injunction, and the bill thereupon stood dismissed under the previous order of the court, this being because the supreme court had, in the case of Wright, affirmed the decree of the superior court dismissing his bill. It appeared that, after the decision of the Wright case, inquiry was made of the plaintiff as to whether he wished anything further done in reference to the prosecution of the chancery suit in the name of Barber, and he replied: 'Further appearance not necessary.'

"It further appearing, from the testimony, that the plaintiff paid the damages which were assessed against Barber on account of the issuing of the injunction, the testimony of the witness Barber tended to show that, at the time of the delivery by defendant to the plaintiff of the statement aforesaid, dated October 30th, 1882, the balance of $11,412.50 therein mentioned, that amount being the difference between the price at which the one hundred thousand bushels of wheat were sold for July delivery, and $1.35 per bushel, the settling price so fixed by the committee—that is, the difference over and above the commissions of ⅛ of a cent per bushel charged by the defendant—was to remain with the defendant, to await the action of the court upon the aforesaid bill in equity, seeking to impeach the decision of the committee fixing the settling price, and that, after that matter had been litigated in the courts, through the suit so brought in favor of Wright, which was made a test case, complaints were made before the board of directors of the board of trade, against the defendant, on account of default on his part in performing or settling the contracts for the sale of the said one hundred thousand bushels of wheat, notice of one or more of which complaints were given by defendant to plaintiff; and the defendant appeared before the directors to make defense, but did not succeed in making any defense, and, being about to be suspended unless he settled, did thereupon settle by paying according to the decision of the committee declaring $1.35 per bushel to be the settling price, so that the moneys paid out by defendant, together with his commission, exhausted the said sum of $11,412.50; and this was prior to the commencement of this suit, but after the notice of April 2, 1883, above set forth; the testimony tended to show that this money was left in defendant's hands by Mr. White, when the aforesaid statement of account stating said balance, etc., was given by defendant to the plaintiff, and was so left for the protection of the defendant, as to the contracts, with reference to the litigation arising as to whether the decision of the committee should be allowed to be binding in regard to the settling price."

On the foregoing evidence, the plaintiff claimed to recover the before named sum of $11,412.50, as money placed by him in the hands of the defendant for the purpose of dealing in gambling contracts at the Chicago Board of Trade, and which contracts, it was asserted, were made illegal by a Statute of Illinois.

The court charged the jury, among other things, as follows: "The question of fact for you to determine under the proof is whether these dealings made by the plaintiff on the Board of Trade, through the defendant, as his broker, were gambling contracts, within the meaning of the law. The Statute of the State of Illinois upon the subject I will now read you. Section 130, chap. 38" (Rev. Stat. of Illinois, by Hurd, ed. of 1883, p. 394; ed. of 1885, p. 405), "reads as follows: 'Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' The plaintiff contends that the contracts in question, made by the defendant for him and in his behalf, were gambling contracts, within the meaning of this law. The question then arises, What kind of contracts are prohibited by this statute? You will notice the language is, 'Whoever contracts to have or give to himself or another the option to sell or buy, at a future time'—an option to sell or buy at a future time. The courts have construed to some extent the meaning of this statute, and I will read from a case decided by the supreme court of this State the construction which is there given upon it: 'The evidence in this record is by no means conclusive that the contracts for grain, made by defendants for plaintiff, were unlawful. They were made in the regular course of business, and, for anything that appears in this record, they could have been enforced in the courts. It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* contracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was to deliver the grain at all events; but it was the seller's privilege or option to deliver it at any time

before the closing of business on the last day of the month. Time contracts, made in good faith, for the future delivery of grain or any other commodity, are not prohibited by the common law nor any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had; consequently, the rights of the parties are not affected by it. What the law prohibits, and what is deemed detrimental to the public interests, is speculations in differences in market values, called, perhaps, in the peculiar language of the dealers, 'puts' and 'calls,' which simply means a privilege to deliver or receive the grain, or not, at the seller's or buyer's option. It is against such fictitious gambling transactions, we apprehend, the penalties of the law are leveled.'" The above extract is taken from the opinion of the Supreme Court of Illinois in *Wolcott* v. *Heath*, 78 Ill. 433. The circuit court then proceeded in its charge as follows: "Now, the question is, in the light of the testimony in this case, whether the contracts in question in this case were contracts to buy or sell at a future day, or whether they were simply absolute sales, in which the seller had the entire month, the month specified, in which to perform his contract. This court has found it necessary, on several occasions, to construe this statute, and has held, with the case which I have just read, that the statute is leveled against what are called 'puts and calls', that is, the right or the privilege which a party may have to buy or sell of you at a future day, not an absolute agreement now to sell, but where one man pays another $5 or $10 for the privilege of delivering to him 1,000, 5,000 or 10,000 bushels of grain at a future time, or pays him a similar amount for the privilege of buying or accepting from him grain at a future time—a contract which cannot be enforced in terms, because it is wholly at the option of the party holding the option whether he will call for the grain or not. This is what is termed a gambling contract, or a put or call, or an option to buy or sell at a future time, within the meaning of the Illinois Statute."

The bill of exceptions further says: "And the court further explained to the jury that the 'option to buy or sell,' prohibited by § 130, ch. 38, of the Revised Statutes, means a privilege which the buyer or seller may or may not exercise at his option, and that a contract by which the seller absolutely agrees to deliver a certain commodity to the buyer within a specified time, when the only option is as to the delivery within a certain time, such as within the whole of some month named, is not a gambling contract, within the meaning of this statute."

There were other instructions to the jury, the entire charge covering nearly seven printed pages of the record. The bill of exceptions states that the plaintiff excepted to all of the instructions given, and especially to those hereinbefore set forth.

The second case above named is a suit in equity, brought on July 24, 1883, in the Circuit Court of Cook County, Illinois, by the Bank of British North America, a corporation of Great Britain, against James B. White and George M. Barber. The bill alleges that the bank has on deposit, in its office at Chicago, Illinois, $6,700, standing to the credit of Barber, the same having been deposited by him as security for certain trades or deals in wheat with members of the Board of Trade of Chicago, the money having been turned over to the plaintiff by the Merchants' Bank of Canada, to whose business at Chicago the plaintiff succeeded; that White claims that said money belongs to him, and claims that Barber, in depositing it, acted merely as the agent of him, White; that, on April 2, 1883, White made a demand upon the plaintiff for the money, and forbade it to pay the money, or any part thereof, to any person except upon the order of him, White; that White had commenced an action against the plaintiff to recover the money; and that Barber had demanded of the plaintiff that it should pay the money to him. The bill prays that the defendants may interplead and settle the controversy, and that the plaintiff may be allowed to pay the money into court. Both of the defendants appeared in the suit. White put in an answer setting up that the $6,700 was part of a larger sum of money placed by him in the hands of Barber to be used by Barber as margins in gambling contracts which Barber was to make for him on the Board of Trade in Chicago; that Barber, in pursuance of such employment, and in April, May and June, 1882, made certain gambling contracts with members of the board of trade, which contracts were ostensibly for the sale of certain quantities of wheat by Barber to such members, to be delivered at any time in July, 1882, at the option of the pretended purchaser, but such pretended contracts were a mere form and cover, and the real intention of all the parties was to settle them by a payment of the difference between the price for which the wheat was sold and the market price of the same when delivery thereof should be called; that Barber took $6,700 of the money of White, so placed in his hands, and deposited the same with the Merchants' Bank of Canada, as security for certain of such pretended contracts, being the same $6,700 turned over to the plaintiff by the Merchants' Bank; and that, while the money was still in the possession of the plaintiff, and on April 2, 1883, White notified both the plaintiff and Barber not to pay the same to anyone but White.

Barber also answered the bill, and in his answer made the following allegations: He was not the agent of White in depositing the $6,700. As a commission merchant at Chicago, he made certain sales and purchases of grain and pork, for future delivery, at the instance and request of White, being, as between himself and those with whom he made the contracts, responsible for the performance of them on his part. A large number of such transactions occurred in May, June, July, August, September, and October, 1882. Barber was doing business on the Board of Trade of Chicago, of which he was a member, and White was living at Fort Wayne, in Indiana. The contracts were made with reference to the rules and regulations of the board of trade, and to the usages of business on that board; and, by those rules, the persons with whom Barber made such contract were authorized to demand

margins and deposits, as security for the performance of the contracts by Barber, and in various instances such demands were made, and it became necessary for Barber to make deposits for margins or security with reference to the contracts. Those rules provided that, on time contracts, purchasers should have the right to require of sellers, as security, 10 per cent margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above that price; also, that sellers should have the right to require as security from buyers, 10 per cent margins on the contract price of the property sold, and, in addition, any difference that might exist or occur between the estimated value of said property and the price of sale. The rules also provided that securities or margins should be deposited either with the treasurer of the board of trade, or with some bank authorized to receive the deposits. The rules also prescribed the form of certificate to be used by the bank, which form was adopted by the Merchants Bank of Canada and by the plaintiff. In accordance with those rules, the certificates showing the deposits were issued in duplicate in each case, one being marked "original" and the other "duplicate" and both being marked "not negotiable or transferable." The certificates were not made with express reference to any particular contract, and the deposits were subject to be treated as security for the fulfillment of any contracts made between the parties to the respective certificates, during the time the deposit remained unpaid. During May, 1882, Barber, at the instance and request of White, made contracts for the sale and delivery by Barber, to divers persons, members of such board of trade, of large quantities of No. 2 spring wheat, for delivery at seller's option during July, 1882, at certain prices specified in the various contracts, ranging from $1.22\frac{1}{2}$ per bushel to $1.25\frac{1}{2}$ per bushel, which wheat was to be delivered in lots of 5,000 bushels. White did not put Barber in funds to buy wheat for delivery according to the contracts. While Barber remained liable upon the contracts he was, from time to time, called upon to deposit margins on account of the contracts, to secure their performance, and did, in accordance with the rules of the board of trade, and in compliance with his duties under the contracts make deposits of money and procure certificates therefor from the Merchants Bank of Canada. The answer then gives the particulars of twelve different certificates for such deposits on various contracts, amounting in the aggregate to $6,700. The contracts for the delivery during July, 1882, of No. 2 spring wheat were not performed by White. The moneys deposited as margins were furnished by Barber in large part from his own means, for the purpose of keeping the contracts open, as was desired by White. Barber also, in order to avoid loss by White and to protect the interest of White, made, before the close of July, 1882, a tender of No. 2 red winter wheat under the contracts, which wheat was of greater intrinsic value, as Barber believed, than No. 2 spring wheat; but the tender was rejected by the purchasers, on the ground that the wheat tendered was not of the kind and grade contracted to be delivered, nor such as, under the rules of the board of trade, was necessary to be delivered. The parties with whom the contracts had been made, and who had the right to call for delivery, made large claims for damages against Barber, and insisted that the tender was irregular and insufficient; and White desired Barber to object to the payment of such claims, and to reduce the same, if he could. With this object in view, Barber, at the instance of White, filed a bill in chancery, in the Superior Court of Cook County, on September 11, 1882, against the board of trade, seeking by the bill to impeach the regularity and fairness of an award or decision of a committee which had been appointed, under the rules of the board of trade, to determine the settlement price under contracts such as those which were so made by Barber, and which committee had determined that such settlement price should be $1.35 per bushel. The bill also sought to restrain the board of trade from enforcing such award or disciplining Barber on account of noncompliance therewith. An injunction was temporarily granted on the bill. The award made Barber liable to pay, as damages, to the parties with whom he had made the contracts, the difference between the contract price and the settlement price of $1.35 per bushel. The Superior Court of Cook County adjudged, in the suit, that Barber was not entitled to any relief on account of any of the matters stated in the bill, and the injunction was dissolved on April 16, 1883. The bill was drawn up by counsel employed by White, White knowing that if the injunction should be dissolved Barber would be required to settle on the basis of the award of the committee. With reference to that basis White drew from Barber, on October 30, 1882, $987.50, as an excess of money, including profits, due to him from Barber after reserving enough to pay damages at that rate. Prior to the bringing of the suit in chancery, it was the right of the parties with whom Barber had entered into the contracts, to have the moneys which had been deposited as margins or security under the contracts paid over to them on the order of the president of the board of trade, they holding, respectively, duplicates of the certificates; and Barber, on making default as to the delivery, became amenable to discipline under the rules of the board of trade, for not complying with the terms of the contracts. One of those rules provided that, when any member of the association failed to comply promptly with the terms of any business contract or obligation, and failed to equitably and satisfactorily adjust and settle the same, he should, upon admission or proof of such delinquency before the board of directors, be by them suspended from all privileges of the association until all his outstanding obligations to members of the board of trade should be adjusted and settled. The parties who were entitled to delivery of the wheat under the contracts for delivery in July, 1882, were, by those rules, entitled to settlement with Barber at the average market price of the commodity on July 31, 1882, the day of the maturity of the contracts; and the damage or loss due to such purchasers by reason of the required settlement became thereupon immediately due and payable by Barber to such purchasers; but the payment was delayed because

of difference of opinion as to the amount of damages, and in order to enable White to obtain, if possible, a reduction of them; and this was the object of the suit in chancery against the board of trade. It was also, under those rules, the right of such purchasers, after a failure for three business days succeeding the maturity of the contracts, to cause to be submitted to a select committee of three members of the board any dispute between Barber and such purchasers, with reference to any deposit of moneys applicable to the contracts; and the decision of a majority of the committee, reported to the president of the board, would have determined in what manner and to whom the deposit should be paid; and thereupon the president would have been authorized, by the rules, to make an order for the payment of the deposit in accordance with the decision of the committee, which order would have been a sufficient warrant to the bank by which the certificates were issued, to pay the money in accordance with the order; but action before the board, as against Barber, was postponed because of the injunction, and the certificates of deposit for margin and security, so issued, having reference to such wheat contracts, were held over in view of the injunction. After its dissolution, the payment of the margins or security moneys represented by the certificates was subject to be enforced under the rules of the board of trade, and Barber was in danger of being suspended from the privileges of the board because of the nonsettlement of the contracts.

White had due notice of all the foregoing facts, but failed to protect Barber or to give him any guaranty for his protection. The liability to suspension from membership of the board of trade was one of great consequence to Barber in a monetary point of view, as well as with reference to his standing and reputation as a merchant, for such suspension would have operated as practically a forfeiture of his membership, so long as the contracts remained unsettled. The fee for membership was fixed by the rules of the board at $10,000; and any permanent suspension of Barber from the membership of the board would have caused a loss to him of even more than $10,000, because it would have interfered with his livelihood and business. He could not, consistently with his rights or duties as a member of the board, defer an adjustment or settlement of the contracts any longer than was necessary to determine what he would, under the rules of the board, be required to do in respect to such settlement. In order to accommodate White as far as possible, Barber delayed making settlement until after complaint was made against him before the board in pursuance of its rules; and he allowed the complaint to proceed to a hearing, at which he attempted to make defense as to one of the contracts, setting up, among other matters, such tender of No. 2 red winter wheat; but the board ruled against him and was about to direct his suspension from membership unless he made settlement. Thereupon, on the 24th of April, 1883, he settled such of the contracts as were then outstanding, making such settlement in accordance with the rules of the board; and, on his making it, the deposits for margins and security, pertaining to the contracts, were liberated, and, on the return to the bank of the original margin certificates, so issued by the Merchants Bank of Canada, the certificates being indorsed to the bank, it gave to Barber credit for the moneys on his account as a depositor in the bank. White caused Barber to make the contracts and to become bound for their performance, and made it necessary for Barber to put up margins and security, and thus placed it out of the power of Barber to control such margins and security in any other way than according to the rules of the board of trade, and also so involved Barber, in causing him to become amenable to discipline by or suspension from the board of trade, that White could not legally or equitably revoke the authority of Barber to make settlement of the contracts or pay over the moneys when it became necessary to settle the contracts. The contracts were legal, and the provisions of the rules of the board of trade, applicable thereto, were binding upon Barber, and were necessary and proper to be considered with reference to his duties and rights, as between himself and the other contracting parties, and as between himself and White. Barber avers that it was his right to pay damages or differences on default under the contracts, when such damages became due according to the rules of the board of trade; that such right inured to him by direct authority from White, when the contracts were made at the instance of White and the moneys were paid or advanced to Barber; and that thereafter there was no time when White had any right or authority to revoke the power to pay over the moneys, when in the course of trade, or in accordance with the rules of the board of trade, it became necessary to pay them over, in making settlement of the contracts on which White defaulted, and which it became necessary for Barber to adjust, because he had become a party thereto at the instance of White; that the contracts in question were but a small part of the dealings which were had by White through Barber, as his commission merchant, with various members of the board of trade; that, in many of those dealings, which were carried on contemporaneously with the dealings in question, there was profit to White, and White received from Barber, on account thereof, large sums of money representing such profits; and that it would be inequitable for White to claim that he should be relieved at the expense of Barber from the effects of the contracts for the delivery of No. 2 spring wheat in July, 1882, which remained open at the close of that month because of the nonfulfillment thereof on the part of White, while White had received profits from other contracts of a similar character, made for him by Barber, which White chose to have settled and closed, when the same resulted in profits which were to be paid to White by Barber.

Replications were put in to these two answers and, in January, 1884, the suit was removed by Barber into the Circuit Court of the United States for the Northern District of Illinois. Afterwards, it was stipulated that the money might remain in the hands of the bank until the final disposition of the cause, subject to like

order by the court as if the money were paid into the registry of the court, and an order was made dismissing the bank from the litigation, as well in the suit at law commenced against it by White, as in the interpleader suit.

By a further stipulation, made in May, 1884, the testimony taken in the suit at law before mentioned, of White against Barber, to recover the $11,412.50, at the trial which took place in February, 1884, was used and introduced by the party taking the same, as his testimony on the trial of the suit in equity. Such testimony consisted of the detailed examination of the witnesses examined on the trial of the suit at law, and of documentary testimony, the substance of which examinations and documentary testimony is given in the bill of exceptions in the suit at law, and is hereinbefore recited. To this were added, in the suit in equity, the further depositions of White and Barber, taken therein in May, 1884. In these supplementary depositions, each party goes over with greater particularity the matters previously testified to by him, as set forth in the bill of exceptions; but nothing is substantially added throwing light upon the merits of the dispute. By the same stipulation, there was put in, as part of the testimony on behalf of Barber, a copy of the proceedings and judgment in the suit at law above mentioned, brought by White against Barber, to recover the $11,412.50.

In May, 1884, a final decree was made in the suit in equity, adjudging that Barber was entitled to the $6,700, and ordering that it be paid to him. From that decree White has appealed to this court.

Mr. **L. M. Ninde,** for plaintiff in error and appellant:

The first and principal question is whether the charge of the court that "puts" and "calls" only were prohibited by the State, and that the contracts in question were valid and not prohibited by the statute, stated the law correctly.

Statutes Ill. § 130, chap. 38; *Irwin* v. *Williar*, 110 U. S. 499 (28:225); *Tenney* v. *Foote*, 95 Ill. 99; *S. C.* 4 Bradw. 594; *Pickering* v. *Case*, 79 Ill. 328; *Pearce* v. *Foote*, 113 Ill. 228; *Coffman* v. *Young*, Chic. Leg. N. July 17, 1886; *Beveridge* v. *Hewitt*, 8 Bradw. 467; *Lyon* v. *Culbertson*, 83 Ill. 33; *Gilbert* v. *Cook*, 2 Chic. Leg. N. 208; *Colderwood* v. *McCrea*, 11 Bradw. 543.

The question never seems to have been settled in all its features till the decision in *Pearce* v. *Foote*, *supra*. The Illinois Courts only followed the current of modern decisions on this question.

North v. *Phillips*, 89 Pa. 250; 10 Weekly Notes of Cases, 109, 112; *Barnard* v. *Backhaus*, 52 Wis. 593; *Cobb* v. *Prell*, 15 Fed. Rep. 774; *Grizewood* v. *Blane*, 11 C. B. R. 538; *Brua's Appeal*, 55 Pa. 298; *Kirkpatrick* v. *Bonsall*, 72 Pa. 155; *Stewart* v. *Schall*, 1 Md. (L. ed.) 147, 3 Cent. Rep. 509, 65 Md. 289; *First Nat. Bank* v. *Oskaloosa Packing Co.* 66 Iowa, 41; *Gregory* v. *Wattowa*, 58 Iowa, 711; *Murry* v. *Ocheltree*, 59 Iowa, 435.

White had the right to recover back the money, although it had been advanced to Barber to be invested in gambling contracts.

Love v. *Harvey*, 114 Mass. 80; *Pearce* v. *Foote*, 113 Ill. 237.

Mr. **Thomas Dent,** for defendant in error and appellee:

The contracts were valid.

Greenhood, Public Policy, 234, 237; *Kirkpatrick* v. *Adams*, 20 Fed. Rep. 287; *Lehman* v. *Strassberger*, 2 Woods, 554; *Gregory* v. *Wendell*, 40 Mich. 432; *Williar* v. *Irwin*, 11 Biss. 57; *Irwin* v. *Williar*, 110 U. S. 499, 508 (28:225, 228); *Clarke* v. *Foss*, 7 Biss. 540; *Kent* v. *Miltenberger*, 16 Cent. L. J. 433; *S. C.* 13 Mo. App. 533.

It is no ground for assigning error that the court below omitted to give directions to the jury where they were not requested.

Pennock v. *Dialogue*, 27 U. S. 2 Pet. 16 (7:332); *U. S. Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 342, 354 (19:457, 461); Thompson, Charging Jury, §§ 81, 82; *Holliday* v. *Rheem*, 18 Pa. 465, 470; *Deal* v. *Bogue*, 20 Pa. 228.

A new trial could not change the result; and therefore this court would not reverse the judgment even if it found technical error in the charge.

Walbrun v. *Babbitt*, 83 U. S. 16 Wall. 577 (21: 489); *Decatur Bank* v. *St. Louis Bank*, 88 U. S. 21 Wall. 294 (22: 560); Phillips, Pr. 217; *Shutte* v. *Thompson*, 82 U. S. 15 Wall. 151 (21:123).

The plaintiff had no right to revoke defendant's authority to pay over these moneys.

Warren v. *Hewitt*, 45 Ga. 501; *Wyman* v. *Fiske*, 3 Allen, 238; *Thacker* v. *Hardy*, 4 L. R. Q. B. Div. 685; *S. C.* 18 Am. L. Reg. N. S. 254; Greenhood, Public Policy, 234, 236; *Read* v. *Anderson*, 10 L. R. Q. B. Div. 100; *S. C.* 16 Cent. L. J. 332; *Rosewarne* v. *Billing*, 109 Eng. C. L. 316.

The rules of the board of trade entered into the contracts, as governing the same.

Denton v. *Jackson*, 106 Ill. 433; *Ward* v. *Vosburgh*, 31 Fed. Rep. 12; *Thorne* v. *Prentiss*, 83 Ill. 99; *Nickalls* v. *Merry*, 7 L. R. H. L. Cas. 539; *Patterson* v. *Clark*, 126 Mass. 531; *Yates* v. *Foot*, 12 Johns. 1; *Ruckman* v. *Pitcher*, 1 N. Y. 402; R. S. Ill. 1 Starr & C. 792, chap. 38, § 179; *Jackson* v. *Foote*, 12 Fed. Rep. 37.

As himself the chief party in guilt he should not have been allowed to recover.

Story, Ag. §§ 25, 235; Wharton, Ag. § 250; *Patterson* v. *Clark*, *supra*; *Love* v. *Harvey*, 114 Mass. 80; *Wolcott* v. *Heath*, 78 Ill. 433.

Mr. Justice **Blatchford** delivered the opinion of the court:

The only question involved in the suit at law is as to the correctness of the charge to the jury in the particulars specially excepted to. The proper construction of the Statute of Illinois, § 130, ch. 38 of the Revised Statutes, was determined by the Supreme Court of Illinois, in *Wolcott* v. *Heath*, 78 Ill. 433, in the passage from the opinion in that case quoted by the circuit court in its charge to the jury. According to that construction, the contracts for the sale of No. 2 spring wheat, deliverable in July, 1882, made by Barber, were not void as gambling contracts, if they were *bona fide* contracts for the actual sale of grain, and if the only option the seller had was as to the time of delivery, the obligation assumed by Barber being to deliver the grain at all events, with the option only to deliver it at any time before the close

of business on the last day of July, 1882. That the contracts made by Barber were of that character, and were not such gambling contracts as the statute denounces, must be held to have been found by the jury under the portions of the charge specially excepted to, and under other portions of the charge contained in the record. The plaintiff did not pray for any instructions to be given to the jury, nor did he present to the Court any propositions of law which he maintained the Court should lay before the jury as guides to a proper solution of the questions in controversy. The general exception to the whole of the charge cannot be regarded, as it is a violation of Rule 4 of this Court.

In its charge to the jury the circuit court explained fully to them the theory of White, that the dealings on account of which Barber paid out the moneys in question were, as between White and Barber, gambling or wager contracts and, therefore, illegal. It presented fairly to them a statement of the testimony on both sides of that question, as set forth in the bill of exceptions. It also submitted to them the question whether, in view of the testimony, the contracts in question were contracts to buy or sell at a future day, or whether they were absolute sales, in which the seller had the entire month of July, 1882, in which to perform his contracts; and it instructed them that if they should find that the dealings by the defendant for the plaintiff were options to buy or sell at a future day, their verdict should be for the plaintiff; but that if, on the contrary, they should find that such dealings were contracts by which the grain was to be absolutely delivered during the month of July, 1882, the only option being the time when, during the month, the delivery should be made, their verdict should be for the defendant. This charge was very favorable to the plaintiff, for it necessarily involved an affirmation of the propositions, that the plaintiff had a right to revoke his action in advising the tender of the No. 2 red winter wheat in fulfillment of the contracts, and had a right to revoke his express or implied assent to the appointment of the committee, under the rules of the board of trade, to determine what was a fair settling price for the wheat on the 31st of July, 1882, and had a right to recall his connection with the chancery suit brought by Barber against the board of trade, in which the validity of the contracts was recognized, and had a right to ignore the fact that he had placed Barber in the position in which, at the time of the giving of the notice of April 2, 1883, by White to Barber, Barber was not at liberty to refuse payment of the damages arising out of the nonfulfillment of the contracts, but was in danger of being expelled from the board of trade, if he persisted in such refusal.

The jury must have found, on the testimony, that the contracts made by Barber for the plaintiff at the board of trade were valid contracts, and that Barber was liable on them to either deliver the grain or pay the damages in case he failed to deliver, because the court charged the jury that if the proof satisfied them that, by the contracts, Barber was liable to either deliver the grain or pay the damages, then the contracts were not gambling contracts, and they should find for the defendant.

We find no error in the record in the suit at law, and the judgment is affirmed.

In the suit of equity, the contention on the part of White is, that the contracts and transactions between Barber and himself were wagering contracts, and, therefore, void, and that the $6,700 was subject to the demand of White, if such contracts were void. It is urged on the part of White, that the wheat was sold by Barber for him without any intention on the part of either of them that there should be any delivery thereof, but with the intention that the transactions should be settled by the payment of the differences between the prices at which the wheat was sold and its prices at the times stipulated for its delivery. White testifies that such was his understanding, communicated to Barber before Barber made the contracts of sale. Barber testifies that he has no recollection of anything of the kind. The evidence as to what White did in connection with the transactions is inconsistent with White's version, and it clearly appears that Barber had no such understanding.

The defense set up in the answer of Barber is proved to every substantial intent, and the facts therein set forth constitute a valid bar to the suit of White. The evidence shows that White in advance required that Barber should trade with parties whom he knew to be responsible; that, in each case, he gave special directions to Barber to buy or to sell, as the case might be, and left it to Barber to put the contract in form, these directions being generally given by telegrams from White at Fort Wayne to Barber at Chicago; that it was understood between them that Barber should buy or sell at the Chicago Board of Trade; that Barber, in all cases, obeyed the orders of White; that White controlled the trades which Barber made; that, unless the margin was exhausted, Barber was not to close out White's trades until White directed him to do so; that it was understood that Barber was to observe the rules of the board of trade; that White knew that Barber, as a member of such Board, making such contracts on the board for White, would be obliged to observe those rules; that White directed Barber when to cover and when to close trades, and that Barber observed his orders; that White acted on his own judgment in making the sales of wheat for delivery in July, 1882; that, when the contracts for those sales had matured, White approved of the tender being made of No. 2 red winter wheat; that, subsequently, on August 5, 1882, White telegraphed to Barber from Fort Wayne, directing him not to cancel the July trades, and saying that White's attorneys at Fort Wayne believed that such tender was good and could be enforced; and that, on the 15th of August, 1882, White, in a letter to Barber, stated that his attorney at Fort Wayne had examined the subject of the July deals, in connection with the rules of the board of trade, and had concluded that the delivery which Barber had tendered was good and was "binding on the buyer, and that we can collect the difference in court." It also appears that Barber was unwilling to default on the contracts lest it should injure his reputation on the board of trade, and that he defaulted on them because White insisted that he should do so. White knew of the rule of the board of trade

under which a committee could be appointed to determine what was a fair price for property to be delivered, and was willing to leave it to such committee. After the commitee had fixed the price at $1.35 per bushel, White was advised of this action and determined that legal proceedings should be taken to set aside the award of the committee. It was in pursuance of the wish of White that the chancery suit was brought by Barber against the board of trade, to enjoin all action under such award. In that suit, an injunction was obtained to restrain such action, which injunction remained in force until the determination by the Supreme Court of Illinois of a suit brought by one Wright against the board of trade (15 Chic. Leg. N. 239), it having been stipulated that the suit of Barber against the board of trade should abide the final result of the Wright suit. The latter suit was decided in favor of the board of trade. After all this had occurred White determined to repudiate his obligations to Barber, and, on the second of April, 1883, he served on Barber the written notice, claiming that the contracts for the sale of the wheat were illegal and void, and forbidding Barber to pay over any part of the $11,412.50 to anyone but White, and demanding the immediate payment of it to him. On the 20th of April, 1883, Barber, having been notified of complaints made against him before the Board of Trade, under its rules, which provided for the hearing of complaints and for suspension or expulsion in case of noncompliance with contracts, notified White, in writing, of these facts, and asked White if he could protect him (Barber) in any way. Not receiving such protection, Barber, on the 24th of April, 1883, paid out the moneys necessary to satisfy the damages on the contracts, and thereby relieved himself from being suspended from membership in the board of trade. He had no alternative but to pay the money or lose his business, and also lose a sum of money, in the value of his membership in the board of trade, equal to if not greater than the amount in controversy in this suit. He had acted strictly according to the instructions he had received from White. White had left the money in his hands for the express purpose of paying such damages as the committee of the board of trade should find to be due. Barber retained the money in order to allow White to obtain some benefit if he could from the suit in chancery brought by Barber. By that suit and by the suit of Wright all legal means were exhausted, leaving the rights of the purchasers under the contracts of sale to be enforced according to the rules of the board of trade under which they were made. The payment of the money by Barber in satisfaction of those damages was, under the circumstances, demanded by every principle of law and equity, and no right was left in White to claim the $6,700.

White had no right to forbid the payment of the money by Barber, or to recall it from its destination. The money is to be regarded as having been, for all practical purposes, irrevocably set apart by both White and Barber for the payment of such damages, prior to the giving of the notice by White to Barber on the second of April, 1883. White had caused Barber to make the contracts and to become bound for their performance, and had made it necessary that Barber should put up the margins and security, and had thus placed it out of the power of Barber to control the margins and security in any other way than according to the rules of the board of trade, in subordination to which White as well as Barber had acted throughout. It was obedience to the orders of White which had made Barber subject to suspension or expulsion by the board of trade. The $6,700 had been put up by Barber as margins, under the rules of the board of trade, prior to the giving of the notice of April 2, 1883, and thus had been before that time devoted by White as well as Barber to the purpose of paying the damages under the rules of the board of trade.

For the reasons thus stated, we are of opinion that the claim of White, sought to be enforced in this suit in equity, cannot be allowed.

A claim is made on the part of White, that he can recover this money under the provisions of § 132, ch. 38 of the Revised Statutes of Illinois. (Hurd, Rev. Stat. ed. 1883, p. 394; ed. 1885, p. 405.) That section provides that "Any person who shall at any time * * * by any wager or bet upon any * * * unknown or contingent event whatever, lose to any person so * * * betting, any sum of money * * * amounting in the whole in the sum of $10, and shall pay * * * the same or any part thereof, the person so losing and paying * * * the same, shall be at liberty to sue for and recover the money * * * so lost and paid * * * or any part thereof, * * * by action of debt, * * * from the winner thereof, with costs, in any court of competent jurisdiction." It is a sufficient answer to this claim to say that Barber was not the "winner" of any money from White.

There is a further view applicable to this case, arising out of the decision of this court in *Higgins* v. *McCrea*, 116 U. S. 671 [29: 764]. In that case, Higgins, the broker of McCrea, sued him to recover moneys which Higgins had paid for the purchase, at the Chicago Board of Trade, of pork and lard, on the instruction of McCrea, in May, 1883, deliverable in August, 1883, on such day as the seller might elect. In his answer, McCrea set up that he had engaged with the plaintiff in gambling transactions, and that the contracts which the plaintiff had made were not contracts for the actual delivery of any merchandise, but were pretended purchases and mere options, and that it was the understanding of all the parties to the transactions that no merchandise should be delivered on the contracts, but that the same should be settled upon the differences between the contract prices and the market prices. On this basis, McCrea claimed, by way of counterclaim, to recover judgment against the plaintiff for the sum of nearly $20,000, which he alleged he had paid to the plaintiff to carry on such gambling transactions and to purchase option contracts. The plaintiff denied the version thus given by the defendant of the transactions. The circuit court had instructed the jury that the defendant was entitled to recover upon his counterclaim, and he had a judgment accordingly. This court held that the case of the defendant, as stated by himself in his answer and counterclaim, was, that the money was advanced by him to carry on a gambling

transaction, that with his concurrence the money so advanced was used in such gambling transaction, and that, by the Statute of Illinois, where the contracts were made, they were treated as gambling contracts and were void; that the counterclaim thus stated was supported by the testimony of the defendant, given on the trial; that there was no Statute of Illinois to authorize the recovery of money paid on such contracts; and that no recovery could be had by the defendant. This court said, in its opinion: "We do not see on what ground a party, who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law, and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal, and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate."

The decree of the Circuit Court is affirmed.

LEOPOLD LACOMBE ET AL., Commissioners of MECHANICS & TRADERS BANK, *Appts.*,
v.
EDMUND J. FORSTALL'S SONS, as Agents of BARING BROS. & CO. ET AL.

(See S. C. Reporter's ed. 562–572.)

Sale by pledgee—equity action for value of bonds.

1. Where a pledgeor of bonds indorsed them to the bearer and delivered them to the pledgee, to be by him sold and disposed of at his free will and pleasure, without notice or accountability to the pledgeor, held that this was a consent to a sale of the bonds by the pledgee and a waiver by the pledgeor of any right accruing under a former sale of the bonds—the second sale having been to *bona fide* purchasers for value and fairly made.

2. The pledgeor could not, after waiting some time after the sale, when the bonds had risen to par, maintain an action in equity to recover the value of the bonds, where he had never made any tender for the purpose of redeeming them nor any effort to reclaim them.

[No. 69.]

Argued Nov. 16 and 17, 1887. Decided Dec. 5. 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. *Affirmed.*

The case is fully stated in the opinion.

Messrs. **Crammond Kennedy** and **W. S. Parkerson,** for appellants:

A pledgee cannot sell without notice, because notice was not expressly required by the pledge.

2 Pars. Cont. 120, and cases cited in note; *Stearns* v. *Marsh*, 4 Den. 227; *Stevens* v. *Hurlbut Bank*, 31 Conn. 146; *Conyngham's Appeal*, 57 Pa. 474.

The sale without notice was a nullity.

Middlesex Bank v. *Minot*, 4 Met. 325; *Bryan* v. *Baldwin*, 52 N. Y. 232; *Bryson* v. *Raynor*, 25 Md. 424; *Michoud* v. *Girod*, 45 U. S. 4 How. 503 (11:1076).

The Barings, having received the benefits of the agreement, are estopped from changing their position.

Bigelow Estop. 1st ed. 578, and cases cited.

The sale being a nullity the bonds are still in pledge, and the pledgeors have the right to redeem.

To a bill to redeem and for an accounting, tender is not a prerequisite.

Conyngham's Appeal, 57 Pa. 474 and cases cited.

Tender would have been nugatory.

Stearns v. *Marsh*, 4 Den. 227, cited in *Cortelyou* v. *Lansing*, 2 Cai. Cas. 200; *Story* Bailm. 2d ed. 349; *McLean* v. *Walker*, 10 Johns. 472.

The form of this action does not determine the rule of damages.

Baker v. *Drake*, 53 N. Y. 220; *Cortelyou* v. *Lansing*, 2 Cai. Cas. 200.

The cases of *Fisher* v. *Prince*, 3 Burr. 1363; *Parker* v. *Norton*, 6 T. R. 696, and *Whitten* v. *Fuller*, 2 W. Bl. 902, have long since settled that if the chattel after the conversion increased in value, or be attended with other circumstances, the damages may be enhanced accordingly.

Sedg. Damages, 2d ed. 260 *et seq.*

The price on the day of trial is the true rule of damages.

Shepherd v. *Johnson*, 2 East, 211; *Downes* v. *Black*, 1 Starkie, 318; *McArthur* v. *Seaforth*, 2 Taunt. 258; *Harrison* v. *Harrison*, 1 Car. & P., 412; *West* v. *Wentworth*, 3 Cow. 82; *Clark* v. *Pinney*, 7 Cow. 681; *Wilson* v. *Little*, 2 N. Y., 443; *Romaine* v. *Van Allen*, 26 N. Y. 309; *Markham* v. *Jaudon*, 41 N. Y. 245, modified as to the fixed and unqualified nature of the rule of damages in conversion by *Baker* v. *Drake*, 53 N. Y. 211; *Colt* v. *Owens*, 90 N. Y. 368; *Conyngham's Appeal*, 57 Pa. 474.

Mr. **Joseph H. Choate,** for appellees:

The securities in question were held by the Barings, through their agents, under a valid pledge.

Jacquet v. *His Creditors*, 38 La. Ann. 863.

That notice of the time and place of sale should be given in case of an express authority is not implied in the case of an express authority to sell at private sale.

Milliken v. *Dehon*, 27 N. Y. 364; *Robinson* v. *Hurley*, 11 Iowa, 410; *Louisiana Savings Bank & Safe Deposit Co.* v. *Bussey*, 27 La. Ann. 472.

The damages recoverable by the pledgeor against the pledgee making the irregular sale is limited by the market price at the time of such sale. Damages upon the basis of a future rise in price is not recoverable.

Baker v. *Drake*, 53 N. Y. 211; *Suydam* v. *Jenkins*, 3 Sandf. 614; *Shepherd* v. *Hampton*, 16 U. S. 3 Wheat. 200–204 (4: 369–371); *Ormsby* v. *Vermont Copper Mining Co.* 56 N. Y. 623–625; *Baker* v. *Drake*, 66 N. Y. 518; *Prince* v. *Conner*, 69 N. Y. 608; *Gruman* v. *Smith*, 81 N. Y. 25; *Colt* v. *Owens*, 90 N. Y. 368.

In Louisiana the damages are limited to the price or value at the time of sale, with interest.

Badillo v. *Tio*, 7 La. Ann. 487; *Waterhouse* v. *Bourke*, 14 La. Ann. 358; *Vance* v. *Tourne*, 13 La. 225; *Chamberlain* v. *Worrell*, 38 La. Ann. 847.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the United States for the Eastern District of Louisiana dismissing the bill of the complainants, who are appellants here.

The appellants are commissioners of the Mechanics and Traders Bank, a corporation or-

ganized under the laws of the State of Louisiana, which being in liquidation they were appointed as such by one of the state courts of New Orleans. Before the failure of the bank, which was declared to be insolvent on the 19th day of March, 1879, there had been placed by it in the hands of Edmund J. Forstall's Sons, as agents of Baring Bros. & Co., a very considerable amount of public securities, bonds of the City of New Orleans, and coupons, under an agreement that they should hold them as security for the indebtedness of the bank to Baring Bros. & Co., an English banking house. It is said that these securities, at the time the bill was filed, were of the value of $336,400.

It is alleged in the bill that shortly after the bank was declared to be insolvent: to wit, on or about the 22d day of May, 1879, the said E. J. Forstall's Sons fraudulently pretended to sell said bonds and thereby attempted to deprive the complainants of a large portion of the assets of the bank, which was a great wrong and detriment to the creditors and depositors. The fraud alleged in regard to this pretended sale was, that, offering the bonds without any advertisement, at a private sale, and without notice to complainants, the defendants employed one firm of brokers to sell the securities and instructed another to buy them in on account of said Forstall's Sons, as agents of Baring Bros. & Co., and that they were not sold according to the well known usage in the City of New Orleans in such cases, nor according to the terms of the contract of pledge. They insist that this sale was made contrary to law and equity, and is therefore void as against the bank and its creditors; they protested against said sale; and that thereafter, to wit, about the third of March, 1880, their right to sue for said bonds and any damages arising from said illegal sale was expressly reserved in an agreement and settlement with said Forestall's Sons, as such agents, as well as by judgment rendered by the Fifth District Court, in a suit entitled *State ex rel. Wogan* v. *Mechanics & Traders Bank* [35 La. Ann. 562]. They further say that the bonds, which were sold for a very small amount, less than 50 per cent of their face value, are now worth in the market fully such face value, if not more.

The bill requires an answer from the defendants under oath, and appends six specific interrogatories to be answered. The relief prayed is that the pretended sale of the bonds may be decreed to be null and void, and the complainants to be their owners, and that the defendants, Edmund J. Forstall's Sons, be ordered to return them to complainants; and that in default thereof they be decreed to pay their full value of $336,400, subject to the claim of Baring Bros. & Co. against the bank of about $120,000; and for such other and further relief as the nature of the case may require.

The answer to this bill sets out a copy of the agreement under which Forstall's Sons held the securities as follows:

"NEW ORLEANS, 11th March, 1876.

"Whereas, Messrs. Baring Bros. & Co., of London, have continued in favor of the Mechanics and Traders Bank of New Orleans a credit of forty thousand pounds sterling, in accordance with the terms of the letter of Messrs. Baring Bros. & Co., dated 24th May, 1878, and addressed to the said bank, and confirmed by their cable, of Oct. 27th, 1878, to Edm. J. Forstall & Sons: Now, in order to secure the full and punctual payment of such amount as may be or become due on account of said credit, the Mechanics and Traders Bank does hereby pledge to Messrs. Baring Bros. & Co., and place in the hands of Edm. J. Forstall's Sons, as their representatives, the property described on the list annexed to the present.

"And it is hereby agreed that in the event of the nonpayment of the amount due as above stated, Edm. J. Forstall's Sons are hereby authorized, as agents of Messrs. Baring Bros. & Co. and of the bank, to cause said pledged property to be disposed of for cash, at public or private sale, at the option of said Edm. J. Forstall's Sons, and the proceeds of said sale shall be applied to the payment of the amount due as aforesaid, with interest accrued thereon, and all commissions, costs, and charges attending said sale, the obligation of the bank for any balance that may be left uncovered by the proceeds of said sale remaining in full force.

"H. GALLY, President,
"MOSES HARRIS, Cashier,
"EDM. J. FORSTALL'S SONS, Agents."

The defendants deny any fraud in the sale of the securities, but admit that, finding it necessary on the failure of the bank to sell the bonds held under the foregoing agreement, they put them into the hands of a broker to be sold on the market in the usual way, and instructed another broker to see that they were not sacrificed, authorizing him to say that they would pay one eighth of one per cent more for them to the purchaser than they would sell for. They claim that in this way the securities were returned to them, and that this was done without any fraudulent purpose, but to secure the highest market price for the bonds at the sale. They further deny that they ever made any agreement by which they recognized the right of complainants in the bonds after this sale. They admit that in one or two settlements made in the fifth district court, in the course of the liquidation of the bank, certain reservations were made in regard to the rights of the commissioners to assert further claims on those bonds by litigation; but that they never admitted the existence of any right of recovery against these defendants. They say, however, that whatever right complainants may have had to call these defendants to account for any value in the bonds beyond that for which they were sold, was abandoned and expressly given up by the act of the complainants in indorsing the bonds under an order, obtained on the application of said commissioners, from the said Fifth District Court of the Parish of Orleans, under whose jurisdiction the bank was being liquidated; and that therafter, on or about the 20th day of May, 1880, the complainants did indorse all said bonds to bearer under the certification and seal of office of A. Abat, a notary public, for the purpose of giving authenticity to such action. And complainants did then deliver said bonds so indorsed by them to Forstall's Sons, to be

by them sold and disposed of at their free will and pleasure, without any further notice to complainants or accountability or responsibility of Baring Bros. & Co.

They further say that the said bonds were duly and regularly sold and disposed of to strangers by said Edmund J. Forstall's Sons, in good faith and in accordance with the usual and customary course of such business in New Orleans, at the dates and for the prices stated in Exhibit No. 3, annexed thereto, and that such prices were the full and fair values of said bonds at the time of sale, and the utmost and best prices that could be had or obtained for the same. Accompanying this is a schedule of the sales, with the dates, and the prices which the bonds brought. This amount was considerably less than the debt due by the bank to Baring Bros. & Co.

There is very little contradiction in regard to the facts of the case, as shown by the testimony and the pleadings. As to the question of intentional fraud in the first sale of the bonds, it is repelled by the testimony of the members of the firm of Forstall's Sons, and yet the transaction is one which it might be difficult to sustain in a court of equity. We do not feel, however, called upon, in view of other facts in the case, to decide this question. Nor do we think it necessary to pass upon the effect of what is called in the bill of complaint the right reserved to the complainants to sue the defendants on account of that transaction.

In the course of the administration of the affairs of the bank in the Fifth District Court of Orleans, it became necessary to declare dividends; and Baring Bros. & Co. asserted a claim to a share of such dividends, on acccount of the difference between the amount of their debt and the amount for which the securities had been sold. This difference was about forty-nine thousand dollars. In submitting to the payment of these dividends the defendants and the complainants agreed to a judgment by the Fifth District Court, which contained the following clause:

"It is further ordered, adjudged, and decreed that all the rights of both the opponents and the bank in liquidation touching the value of 180 missing coupons, and any damages resulting from the sale of the bonds of the bank in pledge by said opponents, are expressly reserved."

It is asserted by defendants that by subsequent settlements and proceedings in that court this reservation was abandoned, and that a judgment of the court on that subject is a bar to the present suit. For a reason, presently to be seen, we do not think it necessary to decide this question either. Whatever the reservation of a right to sue may mean, it cannot be construed into an admission of a liability of the defendants, or that a just cause of action existed; and it may be conceded that up to the time of the indorsement of these bonds to bearer, on the 20th of May, 1880, of which there is no denial, they were still in the possession of Forstall's Sons, under such circumstances that if the amount of the debt to Baring Bros. & Co. had been tendered to them, and a demand made of the bonds, the plaintiffs would have been entitled to have them delivered up. No such tender was made. No such demand was made. The bonds at that time were but little, if any, more valuable than they were at the time of the first sale by Forstall's Sons.

We are of opinion that the action of the present complainants, in indorsing these bonds as payable to bearer, and delivering them in that condition to Forstall's Sons, with the knowledge that they had been or were to be sold again by that firm, and for the purpose of enabling them to transfer them with a good title, must be considered a waiver of any right to sue on account of the first sale. This indorsement, and the subsequent sale by Forstall's Sons, were in fact a waiver on both sides of the previous sale, and of any rights accruing under it, as well as a consent by both parties to the second sale.

The sales appear to have been made at different times and to different persons, each of whom became therefore innocent purchasers for value of the bonds which are the subject of controversy. No attempt is made to impeach the fairness of these sales. It is not even charged that the prices obtained were less than the market value of the bonds sold. If the right to sell these bonds for the debt due to Baring Bros. & Co. at that time be conceded, as we think it must be, then no just complaint can be made of the sales or of the proceedings attending them. A full report of those sales, with the amounts received, and a statement of the account as thus adjusted, is set out by the answer as an exhibit.

If the complainants had chosen to stand upon their rights, or the rights of the bank, growing out of the fraud in the first sale, it may be well to consider what course they should have pursued. Treating the first sale as a fraud they might have tendered the amount due on the bonds and brought an action of replevin or sequestration. But there were two reasons why they could not do this. First, they did not have the money to tender to Forstall's Sons for the debt to Baring Bros. & Co.; and second, the bonds were not worth any more in the market than they had been sold for by Forstall's Sons, and the amount credited on the debt to Baring Bros. & Co. They might also have brought an action in the nature of tort for conversion, in which case, if they had succeeded, the value of the bonds would have been the measure of their recovery, after deducting the amount due to Baring Bros. & Co.

It is obvious, as the testimony clearly shows, that the bonds were worth but little more in a fair market at the time this indorsement was made than when they were first sold by Forstall's Sons, and that there was no right of action at law by which any sum could have been recovered worth the litigation. It is, therefore, easy to conceive that when these commissoners of the bank in liquidation asked of the court, in which that liquidation was pending, for power to indorse these bonds and deliver them to Forstall's Sons for sale, they were doing the wisest thing that could be done at that time for the creditors of the bank; for by such sale the bank would get the benefit of all that the pledged securities were worth then in the market, and by any action at law which they could bring they could recover no more.

The complainants in this case seek to avoid all considerations of this kind by bringing a bill in equity. And, ignoring all the transactions

that have taken place about the disposition of the bonds, they ask that the defendants shall be decreed to deliver up these bonds to them, and, if they fail to comply with that order, that they shall be held liable for the present market value, which has increased during the continuance of this controversy, and since their last sale by Forstall's Sons, to the sum of $336,400, being the par value of the various bonds and coupons.

It is clear that complainants, when they brought this action, knew very well that they could not have the relief asked for in the first part of their claim, because by their own indorsement of the bonds they had been transferred under valid sales to numerous persons, who either held them as innocent purchasers for value or had parted with them to others who held them in the same character. Their only efficient prayer of relief, therefore, was for a decree against the defendants for the value of the bonds, which they now insist must be estimated as of the time of the decree.

The first objection to this relief is that it is simply what they could recover, if they could recover at all, in an action at law. It is the damages which, on their theory, are due for an unlawful conversion of the bonds. It is so spoken of by counsel in the argument, and the authorities referred to as furnishing the measure of damages are all in cases of actions at law for what is equivalent to a conversion of property held for another's use. We see no reason why a court of equity should be resorted to for this remedy; nor is there anything in the nature of the transaction, since no actual fraud on the part of Forstall's Sons is proved, why an action at law should not have been the appropriate one to recover these damages. The case is by no means a complex or difficult one. The facts are few and easily proved. The transactions are open and patent to everybody, and an action at law would afford complete and ample remedy for the wrong complained of.

But if we suppose that the nature of the case is one of which a court of equity has jurisdiction, as equity is administered in the circuit courts of the United States, then other considerations seem to forbid the relief prayed for, or any equitable relief whatever.

The first of these considerations is that the complainants, as representing the bank and its creditors, have not only never made any tender for the purpose of redeeming these bonds, but have received their full market value as a credit on the debt to Baring Bros. & Co., to the payment of which they were devoted, as well as permitted the transaction by which these bonds were sold, and the proceeds so appropriated, to stand from May, 1880, when the sale was made, until May, 1882, when the present suit was brought, without any further effort to reclaim the bonds, and without any further protest against that sale, and without payment of any dividend on the sum for which they sold. It is obvious that during the greater part of this time the value of these bonds was rising in the market, and the persons who had purchased them at open sale for a fair consideration were receiving the benefit of this increase in price; but *they* were not responsible in any way to the complainants, who had indorsed those bonds and thus enabled them to purchase them.

The proposition now made by complainants, that, after waiting during all this time, and seeing the bonds rise in value, they could elect to bring suit in equity when their price had risen to par, and they were worth, with the accumulated interest and coupons, nearly three times what they were sold and accounted for, is one which does not commend itself to a court of equity. It may be true that it was the misfortune of the bank that it had no money during this time to tender for the redemption of these bonds; but it is equally true that if they had made such tender, they well knew that they could not get them, because they had passed from the possession of the present defendants.

Nothing hindered them from bringing their action at law at any time. To say that they could delay for any length of time, within the period of prescription, and bring this suit in equity when the securities bore the highest price in the market, would be very unjust, even if they had given no consent and taken no part in the sale of the bonds. But when we consider, in addition, that the sale could not have been made without their consent, that they themselves procured an order of the court authorizing them to consent, and actually placed upon them the indorsement without which they could not have been sold at all, it is idle to say that they were not bound by that sale, and that they now retain a right to go upon the trustees of this pledge to recover of them the increase in the value of the securities between that time and the present.

This attempt to play fast and loose with a supposed right of action, against parties who were mere agents or trustees, and who had no interest in the cause, while through a series of years the value of the matter in contest went up and down in the scale of public market prices, does not commend itself to the conscience of anyone. The truth is, that, conceding the first sale to have been simply void and ineffective, the bonds remaining in the hands of Forstall's Sons, it became their duty to sell those bonds at as early a time as possible, and place the proceeds in the hands of Baring Bros. & Co., in payment of the obligation of the bank to them. That this has been done faithfully, and with the consent and aid of the complainants, is a sufficient answer to all that is alleged in the bill.

The decree of the Circuit Court dismissing the bill is therefore affirmed.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, *Plff. in Err.*,

v.

GEORGE R. MADISON.

(See S. C. Reporter's ed. 524–527.)

Ground of error—abstract questions of law.

1. Where the court, in submitting a case to the jury, directed them to disregard certain testimony as improperly admitted, and the jury could not have been misled, *held*, that the admission of the testimony was no ground of error.

2. Abstract questions of law will not be considered here on a writ of error, unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make such questions material to the issue which was tried.

[No. 66.]

Argued Nov. 11, 1887. Decided Dec. 5, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio. *Affirmed.*

The action was brought by a brakeman to recover damages for personal injuries received while attending to the duties required of him as brakeman, and which he claims to have resulted from the negligence of the Railroad Company.

As appeared from the evidence, Madison, the plaintiff, entered between two cars of a freight train with intent to perform the duties of a brakeman, but caught his foot between the rail of the track and the plank which was there spiked down between the tracks for a roadway crossing, and before he could extricate his foot, the car wheel came upon him and caused the injury.

The case is further stated by the court.

Messrs. **J. E. Ingersoll** and *L. A. Russell*, for plaintiff in error:

Additional precautions and safeguards taken by the company after an injury are not admissible to show its negligence.

Pierce, R. R. 294; *Baird* v. *Daly*, 68 N. Y. 547; *Holbert* v. *St. Louis, K. C. & N. R. Co.* 45 Iowa, 27; *Morse* v. *Minneapolis & St. L. R. Co.* 11 Am. & Eng. R. R. Cas. 170.

The declarations and admissions of the company's servants are admissible only when a part of the *res gestæ*.

Pierce, R. R. 294.

Plaintiff assumed the risk arising from the negligence of the road master or section boss as that of a colaborer or fellow servant.

Randall v. *Baltimore & O. R. R. Co.* 109 U. S. 478 (27: 1003); *Farwell* v. *Boston & W. R. R. Corp.* 4 Met. 49; *R. Co.* v. *Rider*, 62 Tex. 267; *R. Co.* v. *Shackelford*, 42 Ark. 417; *R. Co.* v. *Doyle*, 60 Miss. 977; *Vollins* v. *St. Paul & S. C. R. Co.* 30 Minn. 31; *Robertson* v. *Terra Haute & I. R. R. Co.* 78 Ind. 77; *Howland* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 226; *Slater* v. *Jewett*, 85 N. Y. 61; *Murphy* v. *Boston & A. R. R. Co.* 88 N. Y. 146; *Harvey* v. *N. Y. Cent. & H. R. R. R. Co.* 88 N. Y. 481; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 (28: 787).

In *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755), the court by divided opinion holds, p. 652 (760) that a superintendent of repairs was, so far as that duty was concerned, the representative of the Company and his negligence was its negligence.

But see *Mad River & L. E. R. R. Co.* v. *Barber*, 5 Ohio. St. 541; *Columbus & X. R. R. Co.* v. *Webb*, 12 Ohio St. 475; *Little Miami R. R. Co.* v. *Fitzpatrick*, 42 Ohio St. 318; *Whaalan* v. *Mad River & L. E. R. R. Co.* 8 Ohio St. 251.

Mr. **Edward S. Meyer**, for defendant in error:

There is no bill of exceptions, of which this court can take cognizance.

R. S. U. S. § 914; R. S. of Ohio, §§ 5298, 5301, 5302; *Kerr* v. *State*, 36 Ohio St. 614; *Hill* v. *Bassett*, 27 Ohio St. 597; *Muller* v. *Ehlers*, 91 U. S. 249 (23: 319); *Hunnicutt* v. *Peyton*, 102 U. S. 333 (26: 113).

The evidence claimed to be incompetent was relevant as part of the *res gestæ*, even though it disclosed the immediate repair of the defective roadbed by the roadmaster and section foreman.

Morse v. *Minneapolis & St. L. R. Co.* 30 Minn. 465; *Baird* v. *Daly*, 68 N. Y. 547; *Casey* v. *N. Y. Cent. & H. R. R. R. Co.* 78 N. Y. 518; *Covington & L. R. R. Co.* v. *Ingles*, 15 B. Mon. 637; *Dale* v. *Delaware, L. & W. R. R. Co.* 73 N. Y. 468; *West Chester & P. R. R. Co.* v. *McElvee*, 67 Pa. 311; *Brehm* v. *Great Western R. Co.* 34 Barb. 256.

And even if incompetent and improperly admitted, its admission would not constitute ground for reversal of judgment, there being competent *prima facie* evidence in the case on the same point.

Cooper v. *Coates*, 88 U. S. 21 Wall. 105 (22: 481).

The duty of a railroad company to provide and maintain in proper repair a suitable and reasonably safe roadbed, tracks, and necessary appliances, is one that cannot be delegated to any of its servants so as to relieve the company of responsibility to a servant who is injured.

In the performance of such delegated duty the servant represents the company, and his negligence is the negligence of the company.

Davis v. *Central Vt. R. R. Co.* 55 Vt. 84; *Ford* v. *Fitchburg R. R. Co.* 110 Mass. 240; *Avilla* v. *Nash*, 117 Mass. 318; *Holden* v. *Fitchburg R. R. Co.* 129 Mass. 268; *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Hough* v. *Texas & Pac. R. R. Co.* 100 U. S. 213 (25: 612); *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755).

Even if the injury to the servant is caused in part by the negligence of a fellow servant, and in part by the failure of the defendant company to provide or maintain a suitable roadbed, track, or necessary appliances, the negligence of the fellow servant will not exonerate the company from the consequences of its own default.

Ellis v. *New York, L. E. & W. R. R. Co.* 95 N. Y. 546; *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700 (27: 266); *Elmer* v. *Locke*, 135 Mass. 575; *Northern Pac. R. R. Co.* v. *Herbert*, *supra*.

Messrs. **J. E. Ingersoll** and *L. A. Russell*, for plaintiff in error, in reply:

Our bill of exceptions is sufficient.

U. S. v. *Breitling*, 61 U. S. 20 How. 252 (15: 900); *Dredge* v. *Forsyth*, 67 U. S. 2 Black, 563 (17: 253); *Phelps* v. *Mayer*, 56 U. S. 15 How. 160 (14: 648); *Stanton* v. *Embrey*, 93 U. S. 548 (23: 983); *Hunnicutt* v. *Peyton*, 102 U. S. 333 (26: 113); *Cooper* v. *Coates*, 88 U. S. 21 Wall. 105 (22: 481).

It must appear beyond a doubt that admission of improper evidence neither did prejudice nor could have prejudiced a party against whom the error was made, or the case will be reversed.

Smith v. *Shoemaker*, 84 U. S. 17 Wall. 630 (21: 717); *Deery* v. *Cray*, 72 U. S. 5 Wall. 796 (18: 653); *Moores* v. *Citizens Nat. Bank*, 104 U. S. 625 (26: 870); *Gilmer* v. *Higley*, 110 U. S. 47 (28: 62); *Vicksburg & M. R. R. Co.* v. *O'Brien*, 119 U. S. 99 (30: 299).

What was done by the Railway Company by way of changing the position of the plank at the place of the accident, on the afternoon of the day and some time after the accident, and what was said by the employee then making the repairs, as to the condition of the plank at the time of the accident, were not admissible as parts of the *res gestæ*.

Cleveland, C. & C. R. R. Co. v. *Mara*, 26 Ohio St. 185; *Williamson* v. *Cambridge R. R. Co.* 2

Mass. (L. ed.) 210, 3 New Eng. Rep. 750, 144 Mass. 148.

When are the employees fellow servants.

Randall v. *Baltimore & O. R. R. Co.* 109 U. S. 478 (27: 1002).

The law of the place where the right arises, governs.

The Scotland, 105 U. S. 24 (26: 1001); *Bank of U. S.* v. *Donnally*, 33 U. S. 8 Pet. 361 (8:974); *Andrews* v. *Pond*, 38 U. S. 13 Pet. 65 (10: 61).

The master is not a warrantor or insurer of the servant against harm. *Hough* v. *Texas & Pac. R. R. Co.* 100 U. S. 213 (25: 612); *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454 (27: 605).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Madison, the defendant in error, for injuries received by him through the alleged negligence of the New York, Lake Erie and Western Railroad Company, while he was in its employ as a brakeman. He charged in his petition that "After a train of cars operated by said defendant, and on which train he was employed as aforesaid, had stopped at the Town of Mantua, a station along the line of said Company in the district and division aforesaid, it became necessary in the course of his duties to step between two cars of said train for the purpose of uncoupling them, and while so engaged, without any fault or negligence on his part, but through the fault and negligence of this defendant in permitting its roadbed at said town to remain in an unsafe, insecure, and dangerous condition, all of which was unknown to this plaintiff, his right foot was caught and held fast in said roadbed, and while so caught and held, being unable to extricate it, he was, without any fault on his part, but through the negligence and carelessness of defendant, struck, jammed, and run over by one of defendant's cars, so injuring his left leg as to necessitate its amputation and cause the loss thereof."

The answer denied that the injury was caused by the negligence of the Company, and insisted that it happened through the fault of the plaintiff himself.

The errors assigned here are:

1. That the circuit court erred in the admission of incompetent evidence at the trial; and,

2. That the circuit court erred in its charge to the jury.

In reference to the first of these assignments the bill of exceptions shows that at the trial several witnesses were called by the plaintiff, who were permitted to testify to certain alterations which were made in the roadbed by the section foreman, with the knowledge and approval of the road master, after the accident occurred. This was objected to at the time, and exceptions were duly taken; but the court, in submitting the case to the jury, directed them to disregard that testimony altogether, as it had been improperly admitted, and must not be considered as tending to prove that the "railroad track was not in a reasonably safe condition at the time." It is true that, in one place in its charge, the court said this evidence was "not to be regarded * * * as an admission of the defendant of the defective character of the roadbed;" but afterwards it was expressly stated that the testimony was not to be considered at all, as the section foreman could not at the time the alternations were made do anything that would bind the Company upon the question of the condition of the track when the accident occurred. The jury could not have been misled on this subject.

As to the other error assigned, it is sufficient to say that there is nothing in the record to show the materiality of the charge complained of, or of the requests to charge which were refused. No part of the evidence, save that which was excepted to, is set out in the bill of exceptions, and there is no such statement of the facts proven as will enable us to see that the charge as given or refused had any reference to the case as it appeared at the trial. The record as it comes to us presents only abstract questions of law, which may or may not have been ruled in a way to affect the defendant injuriously. It has long been settled that such questions will not be considered here on a writ of error unless it appears from the bill of exceptions, or otherwise in the record, that the facts were such as to make them material to the issue which was tried. As was said in *Dunlop* v. *Munroe*, 11 U. S. 7 Cranch, 270 [3:339]: "Each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone that the court is to decide. We cannot go beyond it and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for." To the same effect is *Worthington* v. *Mason*, 101 U. S. 149, 152 [25:848, 849], where this appears: "As we understand the principles on which judgments here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When, in the latter, complaint is made of the instructions given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply." "The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them." See also *U. S.* v. *Morgan*, 52 U. S. 11 How. 154, 158 [13:643, 645]: *Reed* v. *Gardner*, 84 U. S. 17 Wall. 409 [21:665]; *Jones* v. *Buckell*, 104 U. S. 554 [26:-841]; *Phœnix L. Ins. Co.* v. *Raddin*, 120 U. S. 183, 196 [30: 644, 648].

Upon the record as it comes to us we find no error, and the judgment is consequently affirmed.

LOUIS BENITES, *Plff. in Err.*

v.

BENJAMIN HAMPTON.

(See S. C. Reporter's ed. 519-521.)

Assignment of errors—printed brief.

1. Where section 997, R. S., and Rules 8 and 21 of this court, have been disregarded, and there is no assignment of errors in the transcript, nor any specification of errors, nor statement presenting

the questions involved, nor the manner in which they are raised, in the brief, nor reference to the pages of the record relied on to support the points, the cases will be dismissed, under § 5 of Rule 21, for want of an assignment of errors, and of a brief such as is required by the rules.

2. The assignment of errors, on the appeal from the district court to the Supreme Court of the Territory, cannot be accepted in this court as the equivalent of the assignment required by the statute.

[No. 55]

Submitted Nov. 8, 1887. Decided Dec. 5, 1887.

IN ERROR to the Supreme Court of the Territory of Utah. *Dismissed.*

The case is stated in the opinion.

Mr. **E. D. Hoge,** for plaintiff in error:

Any statement of fact is not privileged, although made in the course of a compromise. It is merely the offers that are privileged.

2 Whart. Ev. § 1090; *Hollister* v. *Brown*, 19 Mich. 166; *Doon* v. *Ravey*, 49 Vt. 296; *Snow* v. *Batchelder*, 8 Cush. 513; 1 Greenl. Ev. § 192 and notes.

The defendant, having once refused to produce the account, could not afterwards introduce it to protect himself by it.

1 Greenl. Ev. § 560 and note.

What is an account stated.

2 Greenl. Ev. §§ 126–128 and note. *Godbe* v. *Young*, 1 Utah, 56; *Terry* v. *Sickles*, 13 Cal. 429; *Lockwood* v. *Thorne*, 11 N. Y. 170; *S. C.* 18 N. Y. 288; *White* v. *Campbell*, 25 Mich. 463; *Bullock* v. *Boyd*, 2 Edw. Ch. 293; 1 Greenl. Ev. §§ 40, 197.

It is not material when the admission was made, whether before or after action brought.

2 Greenl. Ev. §§ 126–128 and notes.

Messrs. **Samuel Shellabarger** and **J. M. Wilson,** for defendant in error:

This case should be affirmed, for noncompliance with Rule 21.

Portland Co. v. *U. S.* 82 U. S. 15 Wall. 1 (21:113); *Treat* v. *Jemison*, 87 U. S. 20 Wall. 652 (22:449).

There is no bill of exceptions. The stipulation does not relate to questions on a writ of error to this court.

Kerr v. *Clampitt*, 95 U. S. 188 (24:498); *Head* v. *Hargrave*, 105 U. S. 45 (26:1028).

Mr. Chief Justice **Waite** delivered the opinion of the court:

Section 997 of the Revised Statutes is in these words:

"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

Rule 8, § 1, of this court is as follows:

"The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, under his hand and the seal of the court."

Rule 21 requires printed briefs to be filed, and § 2 of that rule provides that the brief shall contain, " in the order here stated:

"(1.) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they were raised.

"(2.) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

"(3.) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length."

Sections 4 and 5 of the same rule are as follows:

"4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

"5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court."

This statute and these rules have been disregarded altogether in this case. No assignment of errors is found in the transcript annexed to and returned with the writ. The assignment of errors on the appeal from the District Court to the Supreme Court of the Territory cannot be accepted in this court as the equivalent of the assignment required by the statute.

The brief contains no specification of errors such as is required by the rule, and there is no statement of the case presenting the questions involved, or the manner in which they are raised. In the argument there is no reference to the pages of the record relied on to support the points which are made. Not only is there a failure to quote the full substance of the evidence admitted or rejected, of which complaint is made, but even the names of the several witnesses upon whose testimony the objections rest are not mentioned. In short, to get at the matter which is complained of, we must hunt through what is called a "proposed statement on appeal and motion for a new trial," filling thirty pages of the record, with nothing in the brief to aid us in the search. This we are unwilling to do. In the present crowded state of our docket, we must insist on a reasonable compliance with the rules which have been adopted to facilitate the investigation of cases and help us in our work.

We therefore dismiss the case, under § 5 of Rule 21, for want of an assignment of errors and of a brief such as is required by the rules. *Dismissed.*

LE SASSIER & BINDER, *Plffs. in Err.*,
v.
SAMUEL H. KENNEDY.

(See S. C. Reporter's ed. 521–524.)

Federal question—banking law.

1. A claim against a purchaser of shares of the capital stock of a national bank, for his failure to insert his own name or that of some other responsible person in the blank transfer, signed on the books of the bank, presents no federal question.
2. The purchaser's obligation, if any, grows out of his contract and not out of the banking law. There is nothing in that law which makes it his duty to save his assignors from harm by reason of their former ownership, or which requires him to register his ownership for their protection.

[No. 53.]

Submitted Nov. 8, 1887. Decided Dec. 5, 1887.

IN ERROR to the Supreme Court of the State of Louisiana. *Dismissed.*

The facts are stated by the court.

Messrs. **Enoch Totten** and **Henry C. Miller,** for plaintiffs in error:

As between vendor and vendee the transaction was completed, and Kennedy was the owner of the stock.

Ang. & Ames, Corp., § 354, Field, Corp. § 354; Thomp. Bank Cas. 343; *Johnston* v. *Laflin*, 103 U. S. 804 (26:534).

The vendors remain liable for assessments on the stock, if the purchaser fails to have the stock transferred to him or to some one capable of becoming owner. Transfers to irresponsible parties are disregarded.

Thomp. Liabilities of Shareholders, § 217; *Germania Nat. Bank* v. *Case*, 99 U. S. 628 (25:448); *Pullman* v. *Upton*, 96 U. S. 330 (24:819); *Bowden* v. *Johnson*, 107 U. S. 260 (27:389); *Price* v. *Whitney*, 28 Fed. Rep. 297; *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 488 (28:480).

If the purchaser fails in this duty and keeps his stock standing after the sale in the names of his vendors, so as to subject them to liability for assessments, the purchaser is undoubtedly bound to his vendors for the assessments they have been made to pay.

Thomp. Liabilities of Shareholders, § 217; *Walker* v. *Bartlett*, 86 Eng. C. L. 845; *Lord* v. *Governor & Co. of Copper Miners*, 2 De Gex & S. 310; *Humble* v. *Langston*, 7 Mees. & W. 517; *Webster* v. *Upton*, 91 U. S. 71 (23:387); *Johnson* v. *Underhill*, 52 N. Y. 203; *Du Bouchet* v. *Wharton*, 12 Conn. 538.

The case presents the federal question arising under the laws of the United States, defining the liabilities of shareholders of national banks.

Rev. Stat. U. S. § 709; *Armstrong* v. *Athens County*, 41 U. S. 16 Pet. 285 (10:966); *Ocean Ins. Co.* v. *Polleys*, 38 U. S. 13 Pet. 164 (10:108); *Union Nat. Bank* v. *Matthews*, 98 U. S. 621 (25:188); *Swope* v. *Leffingwell*, 105 U. S. 3 (26:939); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 636 (22:444); *Factors & T. Ins. Co.* v. *Murphy*, 111 U. S. 741 (28:583); *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130 (22:588).

Messrs. **W. Hallett Phillips** and **James Mc Connell,** for defendant in error:

This court is without jurisdiction, as the record fails to present a federal question. The question involved and decided was one of general law.

Chicago & A. R. R. Co. v. *Wiggins Ferry Co.* 119 U. S. 624 (30:523); *Williams* v. *Weaver*, 100 U. S. 547 (25:708).

Should the court decide to entertain jurisdiction, the decision of the state supreme court was manifestly correct.

Mr. Chief Justice **Waite** delivered the opinion of the court:

At the hearing of this cause a motion was made to dismiss the writ of error for want of jurisdiction, on the ground that no federal question was involved in the decision below. This motion will be first considered. The facts as disclosed by the record are as follows:

On the 24th of February, 1873, Le Sassier & Binder sold to Samuel H. Kennedy at New Orleans, through his broker, E. C. Feinour, forty shares of the capital stock of the Crescent City National Bank, and in accordance with the prevailing custom at that place upon such sales, signed a transfer of the shares sold upon the transfer book of the bank, leaving the name of the transferee blank. On the 15th of March Kennedy sold the same stock to Thomas A. Adams, a responsible person; but at the request of the purchaser the transfer on the books of the bank was made to Morris Dyer, who was irresponsible, by writing his name in the blank left for the name of the transferee in the assignment which had been signed by Le Sassier & Binder. The bank was known to be embarrassed March 14, and on the 17th of that month it closed its doors, and soon afterwards a receiver was appointed, under the National Banking Act, by the Comptroller of the Currency. On the first of August, 1874, the receiver, by direction of the Comptroller, brought a suit against the shareholders, to enforce their individual liability for the debts of the bank, under § 5151 of the Revised Statutes. To this suit Kennedy was made a party as the holder of the shares which had been sold to him as above. He appeared and filed an answer, setting up his sale to Adams as a defense. Upon the hearing a final decree was rendered June 2, 1876, dismissing the bill as to him. A suit was then brought by the receiver against Le Sassier & Binder, alleging that they were the owners of the stock at the time of the failure of the bank. They notified Kennedy that this suit had been begun, and that if their defense failed they should fall back on him, and hold him for whatever amount they might be compelled to pay "on stock which, from February 24, 1873, they had ceased to own, and had transferred to him." In the answer of Le Sassier & Binder they set up the sale to Kennedy as a defense to the action. At the final hearing a judgment was rendered against them on the pleadings and proofs, May 16, 1879, for $2,800, and interest at five per cent per annum from July 23, 1874. This judgment they paid, and then brought the present suit against Kennedy to recover from him the amount of their payment.

In the petition it was alleged that, upon the sale of the stock to Kennedy and the signing of the transfer on the books of the bank, it became his duty to insert his name in the blank left for that purpose, and that they had been compelled to pay the judgment in favor of the

receiver "owing to the conduct of the said Kennedy in not causing his name to be inserted in the transfer book aforesaid as transferee of said stock, and preserving in said transfer book of said bank, contrary to his obligation and duty, the said transfer in blank, with your petitioners' name signed thereto, from the time of said sale to him until said * * * bank failed, and owing to the other acts of the said * * * Kennedy in the premises, by which he subjected your petitioners to a liability which was his own, and which he should have met; that his said conduct and acts were violative of his obligations in the premises and your petitioners' rights; were unlawful, illegal, and have caused to your petitioners loss and damage to the extent of * * * said amount paid by them."

From this statement of the case it is apparent that the suit was not brought against Kennedy to enforce any liability of his under the National Banking Act. That liability was disposed of in the suit of the receiver against him for its enforcement. Neither do Le Sassier & Binder claim under the receiver, nor are they seeking to enforce the liability of Kennedy as a shareholder. Their claim, and their only claim, against him is for his failure to insert his own name, or that of some other responsible person, in the blank which had been left by them in the transfer they signed on the books of the bank for the stock he had bought. His obligation to them, if any there is, grows out of his contract with them as a purchaser, and not out of the banking law. That presents no federal question. There is nothing in that law which makes it his duty to save his assignors from harm by reason of their former ownership, or which required him to register his ownership for their protection.

Neither is it at all important that, in its opinion, the Supreme Court of the State expressed a doubt as to the correctness of the judgment against Le Sassier & Binder. That judgment, as it stood, was conclusive on that point, and if Kennedy had been liable to them at all, it would have been for the amount adjudged, because he had been called upon to defend if he desired to do so. He was discharged, not because the judgment was wrong, but because he had not, in the opinion of the court, been guilty of any neglect of duty towards those against whom it was rendered, which would make him liable to them therefor.

The motion to dismiss is granted.

JOSEPH TEAL ET AL., Partners, etc.,
Plffs. in Err.,
v.
JOHN S. BILBY.

SAME *v.* SAME.

(See S. C. Reporter's ed. 572–582.)

Contract, how varied—decision of arbitrator—provision of contract.

1. A contract, although written and signed by the parties, may be varied by a subsequent verbal contract, where there is nothing in the nature of the contract itself requiring it to be in writing.

2. Where it was agreed that the quality of cattle should be decided by an arbitrator named, *held*, that the parties were bound to disclose to the arbitrator any disease which to their knowledge the cattle had and which could not be discovered by careful examination.

3. Where one of the parties to the contract was to preserve the hides of the cattle which died, as evidence of death, and the ears of any which had ear marks, and there was no provision in the contract, when the hides of cattle which had died should be counted, *held*, that the hides preserved should be counted at the time of death, with a view of making them available for use or sale.

[Nos. 51, 52.]

Argued Nov. 7, 1887. Decided Dec. 5, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri. *Affirmed.*

The case is stated by the court.

Messrs. James S. Botsford and **A. H. Garland**, for plaintiffs in error:

A. V. Bass was to be judge of the cattle arriving; and in the absence of fraud or collusion with plaintiffs, or intentional misconduct on his part, his determination was conclusive.

Martinsburg & P. R. R. Co. v. *March*, 114 U. S. 549–554 (29: 255, 256); *Sweeney* v. *U. S.* 109 U. S. 618–620 (27:1053); *Kihlberg* v. *U. S.* 97 U. S. 403 (24:1108); *Nofsinger* v. *Ring*, 71 Mo. 149; *Board of Education* v. *Shaw*, 15 Kan. 33.

The charge of the court is erroneous.

U. S. v. *Breitling*, 61 U. S. 20 How. 252 (15: 900); *Michigan Bank* v. *Eldred*, 76 U. S. 9 Wall. 544–554 (19:763,767); *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 299 (23:900); *Meguire* v. *Corwine*, 101 U. S. 111 (25:906).

The court is bound to instruct the jury on a point of law relevant to the issue, if requested.

Douglass v. *McAllister*, 7 U. S. 3 Cranch, 298 (2:445); *Smith* v. *Carrington*, 8 U. S. 4 Cranch, 62 (2:550); *Whitney* v. *Sherborn*, 12 Allen, 111; *Ranney* v. *Barlow*, 112 U. S. 207 (28:662), and cases cited.

The court erred in refusing to charge the jury as requested.

Thurston v. *Ludwig*, 6 Ohio St. 1; *Cutler* v. *Smith*, 43 Vt. 577; *Pratt* v. *Morrow*, 45 Mo. 407; *Henning* v. *U. S. Ins. Co.* 47 Mo. 431; *Cummings* v. *Arnold*, 3 Met. 486.

To render the waiver of performance of the terms of the contract effectual, it must have occurred before the contract was broken by defendant.

Cumber v. *Wane*, 1 Smith, L. Cas. 633 and cases cited; *Wharton* v. *Missouri Car Foundry Co.* 1 Mo. App. 577 and cases cited.

The instruction should have been given to the jury.

State v. *Dwire*, 25 Mo. 553; *Gillett.* v *Wimer*, 23 Mo. 77; *Paulette* v. *Brown*, 40 Mo. 52; *Brown* v. *Hannibal & St. J. R. R. Co.* 66 Mo. 588–600.

It belongs to the jury to determine matters of fact.

Georgia v. *Brailsford*, 3 U. S. 3 Dall. 1 (1: 483); *McLanahan* v. *Universal Ins. Co.* 26 U. S. 1 Pet. 170–183 (7:98–104); *Van Ness* v. *Pacard* 27 U. S. 2 Pet. 137 (7:374); *Chesapeake & O. Canal Co.* v. *Knapp*, 34 U. S. 9 Pet. 541 (9:222); *Greenleaf* v. *Birth*, 34 U. S. 9 Pet. 299 (9:135).

The charge was calculated to prejudice the jury.

Phœnix Ins. Co. v. *Doster*, 106 U. S. 30 (27: 65); *State* v. *Shields* 13 Mo. 236; *State* v. *Breeden*, 58 Mo. 507; *State* v. *Miller*, 71 Mo. 590; *Jones*

v. *Randolph*, 104 U. S. 108 (26: 671); *Chicago, R. I. & P. R. R. Co.* v. *Houston*, 95 U. S. 697 (24:542).

The contract was the law of the case.

Goodfellow v. *Meegan*, 32 Mo. 283.

The construction of the written contract was a question of law for the court, and not one of fact for the jury.

Levy v. *Gadsby*, 7 U. S. 3 Cranch, 180 (2:404); *Goddard* v. *Foster*, 84 U. S. 17 Wall. 142 (21: 595); *State* v. *Lefaivre*, 53 Mo. 470; *Edwards* v. *Smith*, 63 Mo. 119; *Rohrabacher* v. *Ware*, 37 Iowa, 85.

Messrs. Wm. Warner, O. H. Dean, and **James Hagerman**, for defendant in error:

The entire charge of the court was exceedingly favorable to the plaintiffs.

Dilworth v. *McKelvy*, 30 Mo. 149; *Gillham* v. *Kerone*, 45 Mo. 487; *Fallon* v. *Manning*, 35 Mo. 271.

The defendant was entitled to recover for his care of the cattle, and for his advances; and the plaintiffs were entitled to recover for violations of the contract which resulted in substantial damages to them.

Dermott v. *Jones*, 69 U. S. 2 Wall. 1 (17:762); *Cutter* v. *Powell*, 2 Smith, L. Cas. 1 and notes; *S.C.* 6 T. R. 320; Chitty, Cont. 612 and notes.

There could be a recovery of the purchase price if the property was not accepted upon proof of the inspection and approval.

Nofsinger v. *Ring*, 71 Mo. 149.

As long as a contract remains in part executory and an agreement is made changing its terms and acted upon, that is a consideration sufficient to support the modification of the contract.

Greenl. Ev. § 303; *Goss* v. *Nugent*, 5 Barn. & Ad. 58: *Emerson* v. *Slater*, 63 U. S. 22 How. 43 (16:365); *Violett* v. *Patton*, 9 U. S. 5 Cranch, 150 (3: 63); Chitty, Cont. 28 *Townsley* v. *Sumrall*, 27 U. S. 2 Pet. 182 (7:389).

Mr. Justice **Miller** delivered the opinion of the court:

These are separate actions brought by the same plaintiffs against the same defendant in the Circuit Court of the United States for the Western District of Missouri.

The first was an action of replevin, under which plaintiffs got possession of 1,232 head of cattle; and the second was an action to recover damages for a failure on the part of defendant to fulfill a contract of agistment with regard to the same cattle. As the rights of the parties depended upon the same contract, and as the testimony in each case was pertinent in the other, the court very properly ordered their consolidation and trial together before the same jury. The testimony submitted to the jury on both sides of the controversy is embodied in a single bill of exceptions under the introductory phrase that each party offered testimony tending to prove such and such facts. This bill of exceptions is very voluminous, consisting of a great variety of evidence running through twenty-eight pages of printed matter; and to none of it does there appear to have been any objection offered by either party. The questions presented in the record are exclusively upon the charge of the judge to the jury, on exceptions taken by the plaintiffs below, who are also plaintiffs here, and to the refusal of the court to grant such instructions as the plaintiffs' counsel prayed for.

A verdict was rendered for the defendant, holding that he was entitled to the return of the property replevied from him, or to the sum of $23,885.12, which was found by the jury to be the value of his interest in the property. In regard to the other suit the verdict of the jury was simply for the defendant. Judgments were rendered in accordance with these verdicts to which the present writs of error are prosecuted.

It seems from the evidence that the plaintiffs, under the partnership style of J. Teal & Company, were owners of about 3,000 head of cattle, which they had driven across the plains from Oregon to a shipping point on the Union Pacific Railroad, called Rock Creek Station, in Wyoming Territory. These cattle were shipped from this point to Council Bluffs, in the State of Iowa, between the 14th day of October and the 10th day of November, 1880. On the third day of November of that year Teal & Company entered into a written contract with John S. Bilby, of Nodaway County, Missouri, by which Bilby agreed to keep, feed and care for 1,500 of these cattle until December 1, 1881. By this instrument he agreed that he would so feed and care for them that they would increase in weight 450 pounds each, on an average, for which the plaintiffs were to pay him, on their delivery to them, at the rate of five cents per pound for such increase.

It also appears that before the terms of this agreement were decided upon one lot of about 200 cattle had arrived at Council Bluffs, and had been seen by Bilby. It was a part of the agreement that the remainder, as they arrived, should be average lots with those that Bilby had seen, of which fact Mr. Bass, of the firm of Rosenbaum, Bass & Co., who resided at Council Bluffs, was to be the judge. The expense of transporting the cattle to Dawsonville, Missouri, where Mr. Bilby resided, was to be paid by plaintiffs; but if Mr. Bilby should pay any of that expense, he was to be repaid with ten per cent interest upon his money on final settlement.

There is also evidence to show that Mr. Bilby was a man of means, owning extensive lands in the neighborhood of Dawsonville, and accustomed to the business of feeding cattle; and the agreement was that the cattle should be weighed at Dawsonville, or the nearest scales thereto, upon their arrival, under circumstances minutely provided for, and that Bilby contracted "to take the cattle and winter them well on hay, straw, and stalk fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date, on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Company;" and that the cattle were to be redelivered to the plaintiffs between the 15th day of October and the first day of December, 1881, by giving ten days' notice. Bilby was also to be responsible for all cattle lost, strayed, or stolen, and for any dying through his neglect or carelessness; but if any died through causes which were unavoidable, the loss of such cattle was to be borne by Teal & Company, and the loss of the feed by Bilby.

Another provision to which some import-

ance is attached is in the following language: "If any steers die, John S. Bilby shall preserve the hides as evidence of death, and the ears if there are any ear marks."

It is agreed that 268 of these cattle were not recovered by plaintiffs under the writ of replevin; nor were they tendered by Bilby under the tender which he sets up in his answer; nor did the weight of the cattle at the time Bilby was ready to deliver them, or offered to deliver them, or at the time they were replevied, come up to that which was required to make the increase of 450 pounds each on an average. It is on the ground of this failure to bring the cattle up to the contract weight, alleging that it was the fault of Bilby in not giving sufficient care and attention to them, as well as want of proper feed according to the contract, by reason of which a part of the 268 died and were lost, that the plaintiffs assume that they have a right to recover possession of the property without making any compensation to Bilby for his services.

A large amount of testimony was submitted to the jury on both sides with regard to this question of proper feeding, care, and attention, without objection apparently by either party, as well as instructions asked of the court to the jury upon these subjects, and the consequences of the supposed failure on the part of Bilby to comply with his contract. The exceptions taken to the general charge of the judge are also numerous, and many of them too unimportant to receive special notice at our hands.

A principal question, and the most important one in the case, arises out of the fact that Bilby gave testimony of a subsequent oral agreement changing very materially the terms of the written contract. The bill of exceptions which relates to the evidence introduced on this subject reads as follows:

"The defendant introduced evidence tending to show that the appearance of the cattle when they were delivered to him by the plaintiffs would not disclose the treatment they had received previously, and that it required time to develop the evil effects of such treatment; that although the cattle might appear to be very thin and weak, yet it would not be apparent that they were diseased; on the contrary, experienced cattle men might well suppose that they would, upon the treatment provided for in the contract, soon recover their flesh and strength.

"He also introduced testimony tending to show, not only the death of two hundred and sixty-eight of the cattle as aforesaid, but that as to many of the others that survived the winter of 1880 and 1881, although they were fed upon corn, all they could eat during the winter, they always presented a scabby appearance and did not thrive from their food, and that when the spring came they were placed upon grass. They did not shed their hair, but were, in the language of a number of the witnesses, 'stuck cattle.'

"And that upon an examination of the cattle, it was considered by said Coleman and defendant that the cattle could not be wintered on hay, straw, and stalk fields; and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time that they went into corn that winter should be deducted off of the corn feed next year at the end of the next grain feeding, and that defendant should also be released from the stipulation of the written contract requiring him to increase the average weight of the cattle four hundred and fifty pounds per head."

While this testimony does not seem to have been objected to at the time it was offered and permitted to go to the jury, the counsel of plaintiffs in error, in several prayers for instructions to the jury, and in objections made to what the court said to the jury, set forth the proposition that this being an attempt to substitute a verbal contract, or change of contract, for a written one, it must be made clear that, so far as it changed the obligation of Bilby, it was made upon a good consideration; and they in various ways object to the rights of the parties being governed by this supposed change in the contract. It is an answer to a very large amount of what is said on this subject that the testimony in regard to it was permitted to go to the jury, as given by Bilby on the stand. Coleman, one of the plaintiffs, also testified in regard to this, and denied that the agreement was as stated by Bilby; and a third witness was introduced on this subject, who was present at the conversations in which the change in the agreement is said to have been made. The whole testimony upon this subject was, therefore, before the jury without objection.

It further appears that Coleman, whose interest in the cattle was as large as any of the plaintiffs, substantially remained with them during the whole period from the time they were delivered to Bilby until their replevin. Part of this time he was at Bilby's house, and the remainder somewhere in the neighborhood, giving his attention closely to the cattle, as one of the plaintiffs, who were the real owners.

It is also manifest, from the testimony offered, that the cattle were not in good condition to go through the winter without other food than the hay, straw, and stalk fields, which was all that Bilby was bound to furnish them, until grass came in the spring, but that some other kind of food was necessary to prepare them for this. Of this Coleman, who was present superintending them and had a right to control the matter, was the best judge, and the most interested. It must also have been apparent to Bilby that if the cattle entered upon the grass in the spring in an enfeebled condition, or if many of them died during the winter, he would not be able to return them in October or December with an average increase of 450 pounds, according to the contract. It was, therefore, to the mutual interest of the parties to make some different arrangements, by which Bilby should furnish the cattle more nutritious food during the autumn and winter, and that he should also, in consideration of that change, be relieved of his obligation to bring them up to an average increase of 450 pounds.

It is hardly pretended by counsel for plaintiffs that it was not competent, after the written contract was made and signed by the parties, for them to make another verbal contract in regard to some parts of it, which to that extent should be a substitute for the first one. There is nothing in the nature of the contract itself requiring it to be in writing; nor is there any principle making it necessary that the new one

should be reduced to writing because the first was written. 1 Greenl. Ev. § 308; *Goss* v. *Nugent*, 5 Barn. & Ad. 58; *Lattimore* v. *Harsen*, 14 Johns. 330; *Munroe* v. *Perkins*, 9 Pick. 298.

What the judge said to the jury on the subject of the modification of the contract is in substance as follows: that it was set up by Bilby, and he was bound to prove it; that the written contract must prevail unless a change or modification of its terms is proved to your satisfaction; you should inquire whether there was a reason or necessity for the change; the parties alike interested in preserving the cattle were upon the ground; the cattle were dying in large numbers from some cause; would a change of food suggest itself to meet the contingency? If so, there would be a reason and a motive for that change. He then recites what Bilby says about the contract, and Coleman's denial of it, and that an unimpeached witness was called by Bilby to whom Bilby had repeated the agreement in the presence of Coleman; that a number of witnesses testify the cattle were put upon corn about the time that the change was claimed to have been made in the contract; and other testimony was given of the acts, conversations, and admissions of the parties, both for and against the change. From all this, he says, you must determine whether there was any change, and if you find that there was, what it was; if you find, however, that there was no modification or change, then the written contract remained in full force.

We are of opinion that this charge, the substance of which only is given by us, fairly placed before the jury the law which governed the proof and effect of that contract in the case, and that no other instructions upon that subject were necessary to enable them to arrive at a just verdict, so far as that was affected by the supposed change of contract.

Another error is alleged in regard to the charge of the court, and its refusal to grant prayers for instructions by the plaintiff, relative to the conclusiveness of Bass' action in passing upon the cattle as they arrived at Council Bluffs, as being average lots with the train load which had already arrived and been seen by Mr. Bilby. A portion of the testimony which we have already cited tended to show that, when the cattle were delivered to Bilby by the plaintiffs, their appearance would not disclose the bad treatment they had previously received, but that it required time to develop the evil effects of such treatment. Much other testimony was introduced on the same subject, tending to show that Bass was misled as to the real condition of the cattle when he inspected them, and also that he was influenced by partiality towards plaintiffs, who employed him, not only in regard to the cattle now in controversy, but other cattle, as a broker or agent.

To the reception of all this testimony there is no exception; and it affords sufficient reason, in our opinion, why the court should not have charged peremptorily, as requested by plaintiffs, that Bass' examination of these cattle and passing them was conclusive that they were in proper condition and came up to the requirements of the contract. We think it was a question for the jury, under all the circumstances, to decide whether they were equal to the lot first examined by Bilby.

On that subject the judge said to the jury: "It is only in case Bass was himself deceived by plaintiffs, in not putting him, Bass, in full possession of the knowledge possessed by them and necessary for proper discharge of his, Bass', duties as arbitrator, that you can go behind Bass' acts. Then, if the cattle of the Teal herd were infected by a disease incurred through careless handling, want of sufficient or proper food or water, and such disease could not be discovered by a careful examination, which Bass is presumed to have made, in such a case the plaintiffs were bound, if they knew of such disease, to disclose it to Bass or Bilby, and their failure to do so was a fraud upon Bilby; and if damages have resulted to him, Bilby, in consequence, he is entitled to recover them in this action."

We see no objection to this charge, which is the one complained of by plaintiffs in error.

A third question, to which some importance is attached, arises out of the language of the contract, and the action of Bilby under it, in regard to the hides of the cattle which should die while they were under his control. This language which immediately succeeds the agreement as to the responsibility for cattle lost, strayed or stolen, or dying through the neglect or carelessness of Bilby, is as follows: "If any steers shall die, John S. Bilby shall preserve the hides as evidence of death, and the ears if there are any ear marks." Of the 268 steers not on hand at the time Bilby proposed to deliver the remainder of the cattle to the plaintiffs, the hides were not produced. It is insisted by plaintiffs that the failure to produce these hides makes him responsible for the value of the steers. Evidence, however, was offered by Bilby tending to show that during the winter in which these cattle died he had produced the hides to Coleman, counted them to him, and requested him to accept the delivery of them. There was also testimony to prove that during the succeeding summer the hides decayed and became offensive, and could not be produced at the time the cattle were to be delivered.

The question of these hides is considered in two aspects by the court in its charge to the jury, and in both we think it is justly treated. The first charge, which related to the evidence of the hides as tending to show the loss of the cattle which Bilby was otherwise bound to account for, is in the following language:

"Bilby, under the written contract, was to preserve the hides of the cattle which died and the ears of any which had ear marks. Under this provision Bilby was bound to preserve the hides of all the cattle which died; and unless he has done so, he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived.

"There is testimony showing the number of hides preserved by Bilby, and as to an agreement with plaintiff Coleman waiving the preserving of some of them. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction, Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of Bilby, as already instructed. The offer to count the hides,

claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made as testified to, if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract where the hides of cattle which had died should be counted; and the reasonable construction thereupon is that the hides preserved should be counted at the time, and with a view of making the hides themselves available for use or sale."

In charging the jury in reference to the damages which the plaintiffs might recover, he afterwards said: "Under the written contract, the plaintiffs are entitled to the hides of the cattle which unavoidably died. Unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them, there is no proof before you as to the value of the hides, and in order to recover their value the plaintiffs would have to show it; the hides seem to be out of the question even if defendant's tender was invalid."

It is seriously urged in argument by counsel that this latter charge concerning the value of the hides was misleading, as tending to divert the jury from the consideration of the failure to produce the hides as evidence of the death and loss of the cattle, and exempting Bilby from responsibility for these cattle. But it is too clear for argument that, in that part of the charge first cited, he points their attention to that aspect of the failure to produce the hides, and to the consideration which should govern the jury in that respect, in charging Bilby or in releasing him from responsibility for their loss; while in the second and later part of the charge he is considering the mere moneyed value of the hides, and charges the jury that the plaintiffs cannot recover for that, because they have made no proof of such value.

While there are other assignments of error that have been examined by us, we do not perceive that any of them are well founded, nor do we think that they are worthy of any extended inquiry. As these, to which we have adverted, are the most important, and as we see no error in what the court charged or refused to charge the jury on these subjects, and as we have already said there is no exception to the introduction of testimony, *we see no error in the record, and the judgment of the court below is, in each case, affirmed.*

WILLIAM SMITH ET AL., *Appts.*,
v.
WILLIAM H. CRAFT ET AL.

(See S. C. Reporter's ed. 436-442.)

Fraudulent preference—void bill of sale—fraudulent stipulation—questions on division.

1. Where there was an understanding between a bank and a borrower of money, that if the bank would lend him money from time to time, and anything should occur by which he was not able to pay his debts, he would secure the bank, it is a question of fact and not one of law whether such agreement is fraudulent or not.

2. Where the borrower sold his stock in trade to the bank to pay such indebtedness, the question whether the bill of sale was rendered void as to other creditors by containing a stipulation that the bank should employ such borrower in the business at a stipulated price per month, so long as the bank should continue the business, and whether such a stipulation was valid or invalid, depends upon its intention. If its object was to secure a benefit to the debtor or his family, it would be fraudulent in law; but if its sole purpose was to obtain services necessary to wind up the business and turn the goods into money, for the benefit of the other party, it is valid.

3. It cannot be concluded, as matter of law, that the compensation was unreasonable, or that the stipulation in question was fraudulent; whether it was fraudulent in fact was a question to be decided by the trial court.

4. The whole case cannot be referred to the decision of this court upon a certificate of division.

[No. 49.]

Argued Nov. 4, 1887. *Decided Dec. 5, 1887.*

APPEAL from the Circuit Court of the United States for the District of Indiana. *Dismissed.*

The case is stated by the court.

Messrs. **Benjamin Harrison** and **Horace Speed,** for appellants:

A sale by an insolvent to one creditor of all the insolvent's property, where a part of the consideration is payment of a debt, and where part of the consideration is that the insolvent shall be given a valuable employment, is fraudulent and will be set aside by the court.

McClurg v. *Lecky*, 3 Penr. & W. 88–91; *S. C.* 23 Am. Dec. 64; *Mackie* v. *Cairns*, 5 Cow. 566–584; *Lukins* v. *Aird*, 73 U. S. 6 Wall. 78 (18: 750); *Weed* v. *Pierce*, 9 Cow. 725, 726; *Grover* v. *Wakeman*, 11 Wend. 202, 208; *Chicago, R. I. & P. R. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 392 (18: 117); Burrill, Assignments, 5th ed. § 198.

A parol agreement upon consideration of loans then being negotiated, to pay or secure the lender at any time thereafter when the borrower becomes unable to pay all his creditors, is a chattel mortgage by parol and is an actual fraud on other creditors.

Ex parte Fisher, L. R. 7 Ch. App. 644, 645; *Ex parte Kilner*, L. R. 18 Ch. Div. 248, 249; *Ex parte Burton*, L. R. 18 Ch. Div. 108, 109; *Ex parte Hauxwell*, L. R. 23 Ch. Div. 638–642; *Ex parte Mackay*, L. R. 8 Ch. App. 648; *Ex parte King*, L. R. 2 Ch. Div. 262–5.

It is not important whether the promise is binding in law or equity, if intended to be carried out.

Ex parte Wilkinson, L. R. 22 Ch. Div. 788.

Messrs. **Joseph E. McDonald** and *John M. Butler*, for appellees:

This court has no jurisdiction of the questions certified.

The difference must be real, and if the record shows the contrary, the appeal will be dismissed.

Colorado Cent. R. R. Co. v. *White*, 101 U. S. 98 (25: 860).

The statute gives this court jurisdiction over points of law and not over the whole case.

Williamsport Bank v. *Knapp*, 119 U. S. 357 (30: 446); *Saunders* v. *Gould*, 29 U. S. 4 Pet. 392 (7: 897); *U. S.* v. *Bailey*, 34 U. S. 9 Pet. 267 (9: 124); *Weeth* v. *New England Mort. S. Co.* 106 U. S. 605 (27: 99); *California Art. S. Paving Co.* v. *Molitor*, 113 U. S. 609, 615–617 (28: 1106, 1108, 1109); *Waterville* v. *Van Slyke*, 116 U. S. 699–704 (29: 772–774).

The promise of the defendants to make a pref-

erential assignment is not a fraud upon other creditors.

National Park Bank v. *Whitmore*, 104 N. Y. 297; *Walker* v. *Adair*, 1 Bond, C. C. 158; *Anderson* v. *Lachs*, 59 Miss. 111; *Spaulding* v. *Strang*, 37 N.Y. 135; *S. C.* 38 N.Y. 1; *Haydock* v. *Coope*, 53 N. Y. 68.

As to the point stated in the second question, namely, the employment of Craft, the decisions are equally satisfactory.

Wilcoxon v. *Annesley*, 28 Ind. 285; *Hall* v. *Wheeler*, 13 Ind. 371; *Griffin* v. *Cranston*, 1 Bosw. 281; *People's Sav. Bank* v. *Bates*, 120 U. S. 556 (30: 754).

Mr. Justice **Gray** delivered the opinion of the court:

This case also comes before the court upon a certificate of division of opinion, and resembles in many respects that of *Jewell* v. *Knight*, *ante*, argued with it, and just decided.

It is a bill in equity by several creditors, each of whose claims is for less than $5,000, to set aside as fraudulent a sale made by their debtor, Craft, a dealer in watches and jewelry, of his whole stock in trade to Fletcher and Churchman, a banking partnership known as Fletcher's Bank.

The first question certified is whether the understanding between the bank and Craft, that if the bank would lend him money from time to time, and if anything should occur by which he was not able to pay his debts, he would secure the bank, constituted a fraud upon his other creditors, so as to invalidate the subsequent sale of his stock.

What the understanding here referred to was, or how long it had existed, can only be gathered from the statement of a different understanding at the time of the giving of the latest notes by Craft to the bank; from the recital of a conversation between Craft and Churchman on the very day when the bank was first informed of Craft's insolvency and when the bill of sale was executed; and from the other circumstances set forth in the certificate of division.

As the debtor might lawfully prefer one of his creditors if there was no actual fraud, it cannot, in the absence of any finding upon that point, be said, as matter of law, either that the previous agreement to prefer was fraudulent, or that it was not; but the question of fraud or no fraud involved a question of fact, which, if this case had been on the common-law side of the court, and either party had desired it, must have been submitted to a jury. *Bank of Leavenworth* v. *Hunt*, 78 U. S. 11 Wall. 391 [20: 190]; *National Park Bank* v. *Whitmore* 104 N. Y. 297.

The second question certified is whether the bill of sale was rendered void as to other creditors by containing a stipulation that the bank should "employ said Craft in said business at the rate of $150 per month so long as" the bank should "carry on or continue said business."

But whether such a stipulation is valid or invalid depends upon its intention. If its object appeared on its face to have been to secure a benefit to the debtor or his family, it would be fraudulent in law. *Lukins* v. *Aird*, 78 U. S. 6 Wall. 78 [18: 750]; *McClurg* v. *Lecky*, 8 Penr. & W. 83; *Harris* v. *Sumner*, 2 Pick. 129. But if its sole purpose was to obtain services necessary to wind up the business and turn the goods into money as promptly and economically as possible, for the benefit of the other party, it is valid. *Wilcoxon* v. *Annesley*, 28 Ind. 285; *Baxter* v. *Wheeler*, 9 Pick. 21; *Strong* v. *Carrier*, 17 Conn. 319. As was well said by the Supreme Court of Indiana in *Wilcoxon* v. *Annesley*: "Where, as in this case, the purchase was of a stock of goods in a store, and an established trade existing, it seems but reasonable that, at a fair salary, the grantor might be employed, for a time at least, to continue in charge of the business; and that circumstance will not in itself prove the transaction fraudulent." 28 Ind. 295.

The only facts stated in the certificate (other than the bill of sale itself), directly bearing upon the validity of the stipulation, are that the bank, with Craft as manager, carried on the business, reducing the stock as rapidly as possible, "with a view to closing it out," for about six months, when the stock remaining was sold by auction; that the bank realized for the entire stock $20,000, and Craft received the sum of $150 a month, or about $900 in all; and since the bill of sale, had no other interest, direct or indirect, in the stock of goods or its proceeds, it cannot be concluded as matter of law, either on the face of the bill of sale, or with the aid of this evidence of what was done under its provisions, that the compensation was unreasonable, or that the stipulation in question was fraudulent. Whether, taken in connection with all the previous transactions between the parties, it was fraudulent in fact, was a question to be decided by the Circuit Court.

The third question certified is clearly irregular, as avowedly referring the whole case to the decision of this court.

For these reasons, and upon the authorities collected in Jewell *v.* Knight, ante, *this court has no authority to answer any of the questions certified, and the entry must be, appeal dismissed.*

JOSIAH B. PLUMB, *Plff. in Err.*,
v.
GEORGE CRANE, Admr. of EDWARD K. GOODNOW, Deceased.

(See S. C. Reporter's ed. 560-562.)

A decree binds parties and their privies.

Where one is not named as a party to a suit, but is represented in the suit by one who is a party, and under whom he claims, and he employs counsel, and puts in an answer in the name of such party, setting up title, and pays his proportion of the expenses of litigation, and controls the defense, he is bound by the decree therein.

[No. 350.]

Argued Nov. 1, 1887. *Decided Dec. 5, 1887.*

IN ERROR to the Supreme Court of the State of Iowa. *Reversed.*

The facts are stated by the court.

Mr. **C. H. Gatch,** for plaintiff in error.

Mr. **George Crane,** for defendant in error:

No person can have the benefit of an adjudication in an action, except the parties thereto or their privies.

Bigelow, Estoppel, 4th ed. 98, 324, and cases cited; *Kerr* v. *Watts*, 19 U. S. 6 Wheat. 552 (5:

328); *Brooklyn C. & N. R. R. Co.* v. *National Bank*, 102 U. S. 35 (26:69).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is another suit brought by Edward K. Goodnow, assignee of the Iowa Homestead Company, to recover taxes paid on "Des Moines River Lands" for the years 1864 to 1871, both inclusive. For a general statement of the facts reference is made to *Stryker* v. *Crane*, *ante*, 194. Plumb, the plaintiff in error, was defendant below, and set up the prior adjudication in the suit of *Iowa Homestead Co.* v. *Des Moines Nav. & R. R. Co.* 84 U. S. 17 Wall. 153 [21:622] as a bar to the action. This defense was overruled, and a judgment given against him on the ground that he was not a party to that suit. *Goodnow* v. *Plumb*, 64 Iowa, 672. The judgment was not only against Plumb personally, but it was made a special lien on the lands, which were the subject of taxation, because he was the actual owner at the time of the levy. The case was treated in all material respects the same as that of *Litchfield's Admr.* v. *Crane*, *ante*, 199. In this there was error, in our opinion.

Edward Wade was a party to the suit as the apparent owner of the lands now in question, and which were properly described in the bill and included in the litigation. The record in this case shows that the lands were conveyed by the Navigation and Railroad Company to Plumb in 1859; and he, in 1861, conveyed them to Wade in trust as security for a debt he owed a bank. This deed was duly recorded in the proper recording office. In 1865 the lands were sold by Wade under his trust, and conveyed to Edward Wesley, for the sole use and benefit of Plumb. This deed was not put on record before the suit of the Homestead Company was begun. As soon as Plumb heard of the suit he employed counsel, and had an answer filed in the name of Wade, setting up a defense to the claim of the company, and asserting that the superior title was in those who held under the river grant. He paid his proportion of the expenses of the litigation, and controlled the defense, so far as Wade was concerned. His interests in the suit were properly represented by Wade, whom he allowed to appear on the records of the county as the real owner of the lands. If there had been a decree against Wade for the taxes, and a lien therefor established on the lands, he would have been bound, and could not have resisted the enforcement of the lien. So, too, if a personal decree had been rendered against Wade for the money, it would have been conclusive in an action by Wade to recover from him money paid for his use in satisfaction of the decree. He was bound, because he was represented in the suit by Wade, under whom he claimed. This case is the converse of that of *Litchfield's Admr.* v. *Crane*, *ante*, 199. There Mrs. Litchfield was not represented in the suit by anyone who was a party, and, therefore, she could not claim the benefit of the decree. Here Plumb was represented by Wade, and he stands, consequently, as if he had been himself a party by name.

There were other questions in the case that might have been considered by the court below, but as they were not, and the decision was put entirely on the ground that Plumb was not a party to the decree which was pleaded in bar, we need not pass upon them here.

Because, therefore, the court failed to give due faith and credit to the decree of the court which was pleaded in bar, *we reverse the judgment, and remand the cause for further proceedings not inconsistent with this opinion.*

JAMES P. CRAWFORD, *Appt.*,
v.
ISAAC W. HEYSINGER ET AL.

(See S. C. Reporter's ed. 589–607.)

Reissued patent—claims in—infringement of.

1. A patentee, who has imposed words of limitation upon himself in his claims, especially when so required by the patent office in taking out his reissue, is bound by such limitation in subsequent suits on the reissued patent.

2. Claims of a patent for a combination of parts which are found in reversed position in a former device are to be construed as covering only the precise combinations described.

3. Claims 1 and 2 of reissued letters patent No. 9208, granted July 12, 1881, to George W. Heyl, for an improvement in devices for inserting metallic staples, do not cover the defendant's device called the "Victor Tool," and are not infringed thereby.

[No. 82.]

Argued Nov. 29. 1887. Decided Dec. 12, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

The case is stated by the court.

Mr. **Hector T. Fenton,** for appellant:

The case presents facts like those in *Saxby* v. *Gloucester Waggon Co.*, 7 L. R. Q. B. Div. 305, cited in *Gardner* v. *Herz*, 118 U. S. 180 (30:158); and is controlled by the decisions in the latter case, as well as by *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286 (30:942), which is a parallel case; and see also *Clark Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335 (30:406); *Thompson* v. *Boisselier*, 114 U. S. 1 (29:76), and *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554 (29:952).

If it is possible to sustain this patent for any purpose, it must be for the precise device shown in the drawings and described in the specification.

Bragg v. *Fitch*, 121 U. S. 484 (30:1010); *Snow* v. *Lake Shore & M. S. R. Co.* 121 U. S. 629 (30:1008); *Thompson* v. *Boisselier*, 114 U. S. 13 (29:80); *White* v. *Dunbar*, 119 U. S. 47 (30:303); *Sutter* v. *Robinson*, 119 U. S. 541 (30:495).

The record and proof show a bar, by reason of laches, from asserting anything by reason of this reissue, beyond the matter of the first claim only, which is substantially the same as the fourth claim of the original.

Miller v. *Bridgeport Brass Co.* 104 U. S. 350 (26:783) *Mahn* v. *Harwood*, 112 U. S. 354 (28:665); *Wollensak* v. *Reiher*, 115 U. S. 99 (29:351); *Ives* v. *Sargent*, 119 U. S. 652 (30:544).

Mr. **Joshua Pusey,** for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a bill in equity filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, by Isaac W. Heysinger, Christian H. Hershey, and J. Loren Heysinger, against James P. Crawford, founded on the alleged infringement of reissued letters patent

No. 9,803, granted July 12, 1881, to George W. Heyl, assignee of Henry R. Heyl, the inventor, for an "improvement in devices for inserting metallic staples," the application for the reissue having been filed May 10, 1881, and the original patent, No. 195,603, having been granted to Henry R. Heyl, September 25, 1877, on an application filed September 20, 1877. Henry R. Heyl assigned the original patent to George W. Heyl, March 20, 1878, and George W. Heyl assigned the reissued patent to the plaintiffs, November 23, 1881. This bill was filed June 9, 1883. The answer of the defendant sets up as defenses the invalidity of the reissue, want of novelty, and noninfringement. After issue joined, proofs were taken, and the circuit court, in November, 1883, entered an interlocutory decree, adjudging the reissued patent to be valid as respects claims 1 and 2, and that those claims had been infringed by the defendant, and awarding a perpetual injunction, and referring it to a master to take an account of profits and damages. On his report, a final decree was entered, in May, 1884, in favor of the plaintiffs, for $225.75 damages, and for costs.

In order to consider any question involved as to the reissue, it is necessary to compare the specifications of the original and reissued patents. They are here placed in parallel columns, the parts of each which are not found in the other being in italics, the drawings in the two being substantially alike, with only immaterial differences in the lettering:

Fig. 1.

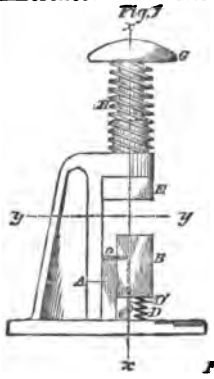


Fig. 2.

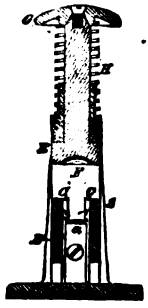


Fig. 4.

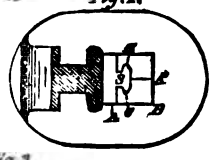


Fig. 3.

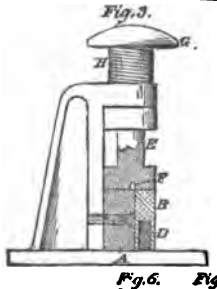


Fig. 5.

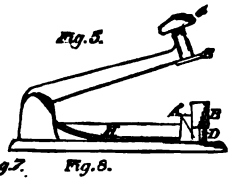
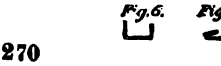


Fig. 6. Fig. 7. Fig. 8.



Original.

"To all whom it may concern: Be it known that I, Henry R. Heyl, of the City and County of Philadelphia and State of Pennsylvania, have invented a new and useful improvement in paper fasteners, which improvement is fully set forth in the following specification and accompanying drawings, in which Figures 1 and 5 are side elevations of the fastener embodying my invention. Fig. 2 is a vertical section in line *x x*, Fig. 1. Fig. 3 is a side elevation, partly sectional. Fig. 4 is a horizontal section in line *y y*, Fig. 1. Similar letters of reference indicate corresponding parts in the several figures.

"My invention consists of an implement of the form of a hand stamp, by which metallic staples may be forced through sheets of paper documents, and secured by clinching the legs on the reverse side.

"Referring to the drawings, A represents a stationary anvil, which is secured to or formed with an arm rising from a suitable stand of convenient form for use upon a writing desk; and B represents a sliding guide block fitted to the anvil A by a sliding joint, and having grooves C C, which match with the tongue of the anvil, the upper face of the block being flat. The normal position of the guide B is elevated; and in order to keep it in this position, or from dropping prematurely, I employ a spring, D, which may press up under the guide or a spring, D', which may press against it, and thus produce the necessary friction. E represents a reciprocating driver, whose under face is flat; and in the same is a concave recess, F, said driver having a knob, G, for receiving the blows of the hand, and provided with a spring, H, for causing the return or elevation of the driver.

"The operation is as follows: A staple is placed within the grooves C C, with its crown resting on the anvil A, the points thus being *upward*. The papers to be united are now placed *upon the face of the guide B over the staple points*, and, by a sharp blow of the hand upon the knob G, the driver is forced downward upon the papers. *The guide B gives way, and* the staple legs come up through the papers into the recess F, where they are bent over *preparatory to the final clinching. The hand is now released from the knob of the driver, the*

Reissue.

"To all whom it may concern: Be it known that I, Henry R. Heyl, of the City and County of Philadelphia and State of Pennsylvania, have invented a new and useful improvement in paper fasteners, which improvement is fully set forth in the following specification and accompanying drawings, in which Figures 1 and 5 are side elevations of the fastener embodying my invention. Fig. 2 is a vertical section in line *x x*, Fig. 1. Fig. 3 is a side elevation, partly sectional. Fig. 4 is a horizontal section in line *y y*, Fig. 1. Similar letters of reference indicate corresponding parts in the several figures.

"My invention consists of an implement of the form of a hand stamp, by which metallic staples may be forced through sheets of paper *or* documents, and secured by clinching the legs on the reverse side.

"Referring to the drawings, A' represents a stationary anvil, which is secured to or formed with an arm rising from a suitable stand of convenient form for use upon a writing desk; and B represents a sliding guide block fitted to the anvil A' by a sliding joint, and having grooves C C, which match with the tongue of the anvil, the upper face of the block being flat. The normal position of the guide B is elevated; and in order to keep it in this position, or from dropping prematurely, I employ a spring, D, which may press up under the guide, or a spring, D', which may press against it, and thus produce the necessary friction. E represents a reciprocating driver, whose under face is flat; and in the same is a concave recess, F, said driver having a knob, G, for receiving the blows of the hand, and provided with a spring, H, for causing the return or elevation of the driver.

"The operation is as follows: A staple is placed within the grooves C C, with its crown resting on the anvil A', the points thus being *turned toward the bending recess F*. The papers to be united are now placed *beneath the driver*, and by a sharp blow of the hand upon the knob G, the driver is forced downward upon the papers. The staple legs come through the papers into the recess F, where they are bent over *by the slanting ends thereof*.

latter then rising, and the papers are drawn somewhat forward, until the staple crown rests upon the face of the guide B, when another blow is imparted to the driver, and the flat portion of its face descends forcibly on the staple legs, so as to bend the latter close to the paper, thus completing the operation.

"It will be seen that the grooves C C serve to support and guide the staple legs during their penetration though the papers, and the recess F is so shaped that, as the staple legs enter thereinto, they will strike the concave or slanting walls of said recess, and thus be bent inward toward each other sufficiently to insure their being bent down properly when again struck between the faces of the guide B and driver E. A plate, a, may be advantageously employed to overlap the staple crown, for preventing the latter from binding while the legs are being forced through the papers.

"It will be seen that the grooves C C serve to support and guide the staple legs during their penetration through the papers, and the recess F is so shaped that, as the staple legs enter thereinto, they will strike the concave or slanting walls of said recess, and thus be bent inward toward each other, as shown in Figs. 2 and 3. A plate, a, may be advantageously employed to overlap the staple crown, for preventing the latter from bending while the legs are being forced through the papers.

"It will be seen that the staple support or anvil A,' with the slotted or recessed hammer, operates to insert a staple through layers of stock to be united, and simultaneously bends over its projecting ends.

"In my original specification I described the further separate operation of completely flattening down the ends of the staple thus bent over, by a second blow between the upper and lower jaw of the implement, believing that the same was new; but I have since learned that the same result was obtained by devices described in previous letters patent of the United States. Should the legs of the staple, when bent over by the same blow which drives the same, as is hereinabove described, be found not to lie sufficiently close to the surface of the paper, the same may be further flattened down by a second blow between flat surfaces in front of the staple channel and bending recess, respectively, provided therefor.

"Figs. 1, 2, and 3 show a hand stamp embodying my invention, in which the driver reciprocates in a fixed head in the manner of a plunger, while Fig. 5 shows the same invention embodied in a hand stamp in which the driver is mounted at the end of a vibrating arm pivoted at its rear extremity to the base, which rests upon the table. It will be seen that the devices which constitute my invention are to be found in both these modifications, and that both operate in precisely the same manner, to insert by a blow upon the knob G of the hand stamp, the staple through layers of stock to be united, and simultaneously bend over the projecting ends in the opposite bending recess provided therefor.

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is—

"1. The reciprocating driver E, constructed with a flat face recessed substantially as described, whereby the projecting ends of staples may be first bent over by entering the recess and then flattened down by pressure from the flat face.

"2. The self-adjusting guide block B, having staple guiding grooves C C and a flat face, upon which to complete the clinching of the staple substantially as and for the purpose set forth.

"3. The combination of the stationary staple support or anvil A with the sliding guide B, grooved to partially embrace and guide the staple legs, substantially as and for the purpose set forth.

"4. The combination of the stationary staple support or anvil A with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over its projecting ends, substantially as and for the purpose set forth."

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is—

"1. The combination of the stationary staple support or anvil A', and the sliding staple guide B, with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over its projecting ends, substantially as and for the purpose set forth.

"2. In a device for inserting metallic staples, the combination of the staple guide B, anvil A', spring D, and reciprocating driver, provided with the knob G, the whole arranged to operate substantially as and for the purpose set forth.

"3. A staple-inserting implement having two opposite jaws arranged with relation to each other, substantially as shown, one of which is provided with a recess, the other with a vertically channeled staple guide, an anvil, and a spring, so that when the jaws are separated, after driving a staple, the guide will be open for the reception of the succeeding staple, substantially as described.

"4. An implement for inserting metallic staples, consisting of two opposite jaws, one of which is provided with a staple-bending recess, and the other with staple-guiding grooves and an anvil fitted thereto, in combination with a knob to receive the blow of the hand and insert a staple by a sudden percussion, substantially as described.

"5. In a staple-inserting machine constructed to operate substantially as described, the staple-guiding block B, having staple-holding grooves C C, forming side extensions of the vertical slot S, substantially as shown and described.

"6. An implement for inserting metallic staples, consisting of two opposite jaws, one of which is provided with a staple-bending recess, and the other with staple-guiding grooves and an anvil fitted therein, the said jaws being arranged to be separated and stand apart, to admit the requisite manipulation for conveniently placing a staple in the open end of the staple-guiding grooves substantially as set forth.

"7. The combination of the stationary staple sup-

port or anvil A' with the sliding-guide B, grooved to partially embrace and guide the staple legs, substantially as and for the purpose set forth.

"8. In an implement for inserting metallic staples, a reciprocating driver provided with a knob to receive the blow of the hand, in combination with a grooved staple-guiding block and an anvil attached to a stand of convenient form for use upon a writing desk, the said stand having an arm arising therefrom, and over and above it a guide for the purpose of guiding the said driver to the said anvil, substantially as and for the purpose set forth."

The differences which thus appear in the descriptive parts of the specification are these:

In the original, in stating the operation of the machine, it is said that the points of the staple point "upward" when the staple is within the grooves. In the reissue, it is stated that those points are "turned toward the bending recess F."

In the original, it is said that the papers to be united are "placed upon the face of the guide B over the staple points." In the reissue, it is said that the papers to be united are "placed beneath the driver."

In the original, it is said that "The guide B gives way, and the staple legs come up through the papers into the recess F, where they are bent over preparatory to the final clinching." In the reissue, it is said that "The staple legs come through the papers into the recess F, where they are bent over by the slanting ends thereof."

The original then contains the following statement, which is wholly omitted in the reissue: "The hand is now released from the knob of the driver, the latter then rising, and the papers are drawn somewhat forward, until the staple crown rests upon the face of the guide B, when another blow is imparted to the driver, and the flat portion of its face descends forcibly on the staple legs, so as to bend the latter close to the paper, thus completing the operation."

The reissue omits the statement of the original, that as the staple legs strike the slanting walls of the recess, they will be bent inward toward each other sufficiently to insure their being bent down properly when again struck between the faces of the guide B and driver E, and substitutes the statement that when the staple legs strike the slanting walls of the recess they will be bent inward toward each other, as shown in Figures 2 and 3.

The following sentence, not in the original, is found in the reissue: "It will be seen that the staple support or anvil A', with the slotted or recessed hammer, operates to insert a staple through layers of stock to be united, and simultaneously bends over its projecting ends."

The specification of the reissue then states that the separate operation described in the original, of flattening down by a second blow the ends of the staple when bent over, was not new, but that the legs of the staple, if not laid sufficiently close to the surface of the paper, when bent over by the driving blow, may be further flattened down by a second blow between flat surfaces.

Figure 5 of the drawings, though contained in the drawings of the original patent, was not described or referred to in the original specification; but the reissued specification speaks of Figures 1, 2, and 3 as showing a hand stamp in which the driver reciprocates in a fixed head in the manner of a plunger, while Figure 5 shows a hand stamp in which the driver is mounted at the end of a vibrating arm, pivoted at its rear extremity to the base which rests upon the table; that the devices which constitute the invention are found in both of these modifications; and that both operate to insert, by a blow upon the knob G of the hand stamp, a staple through layers of stock to be united, and to simultaneously bend over the projecting ends in the opposite bending recess provided therefor.

On the question of novelty, the alleged prior invention principally relied upon is a patent of the United States, No. 187189, granted to George L. Ward and Orianna S. Smyth, assignees of James C. Smyth, February 6, 1877, for an "improvement in machines for stitching books with staples."

The circuit court, in its opinion accompanying the record, held that the patented invention was not anticipated by that of Smyth; that claims 1 and 2 of the reissue were substantially the same as claim 4 of the original patent, when the latter claim was read in the light of the specification; and that the defendant's device infringed claims 1 and 2 of the reissue.

Claim 1 of the reissue is for a combination of (1) the stationary staple support or anvil; (2) the sliding staple guide; and (3) the reciprocating slotted or recessed hammer or driver; the conjoined operation of the three being to insert a staple through layers of stock to be united, and to simultaneously bend over its projecting ends. Claim 2 of the reissue is for a combination with the same three elements, of (4) the spring D, and (5) the knob G. Claim 4 of the original patent was for a combination of only two of these elements, namely, (1) the stationary staple support or anvil and (2) the reciprocating slotted or recessed hammer or driver. It left out the sliding staple guide, and yet the claim stated that the combination of the two elements, without the staple guide, would operate to insert the staple and simultaneously bend over its projecting ends. It would, however, wholly fail to so operate without the use of the sliding staple guide. The use and operation of the sliding staple guide, its arrangement so as to slide, the use of the spring D to keep it in its normal elevated position so that it will not drop prematurely, and the use of the knob G, with which to impel the driver, are fully set forth in the original specification, and described as necessary, in combination with the stationary staple support and the reciprocating slotted or recessed hammer, to insert a staple through layers of stock and simultaneously bend over its projecting ends; and the invention is stated, in the original specification, to consist in a hand stamp by which metallic staples may be forced through sheets of "paper documents" and secured by clinching the legs on the reverse side.

We do not find it necessary, however, to decide whether the reissue is to be considered a proper one, so far as claims 1 and 2, rightly construed, are concerned, on the view that it was an inadvertence, accident, or mistake to have left out of claim 4 of the original the elements which, by the description in the original specification, were made necessary to the performance of the operation specified in that claim. We dispose of the case on the assumption that the reissued patent is valid as respects claims 1 and 2.

What is the proper construction of those claims? In claim 1, the staple support or anvil is described as being "stationary," and the slotted or recessed hammer or driver as being "reciprocating." In claim 2, the anvil must be regarded as a "stationary" anvil, and the hammer or driver is expressly stated to be "reciprocating." In claim 4 of the original, the staple support or anvil is said to be "stationary," and the slotted or recessed hammer to be "reciprocating." So in claim 1 of the original, the driver is said to be "reciprocating," and in claim 3 of the original the staple support or anvil is said to be "stationary." In the description in the original specification, the anvil is described as being "a stationary anvil," and the hammer or driver as being a "reciprocating driver." In the specification of the reissue, the staple support is described as being "a stationary anvil," and the driver or hammer as being "a reciprocating driver."

The file wrapper and contents in the matter of the reissue are part of the evidence in the case, and throw light upon what should be the proper construction of claims 1 and 2. The application for the reissue was filed May 10, 1881. In the application as then presented eleven claims were proposed, the first and ninth of which were as follows:

"1. The staple guide B, driving head A', operating therein, recessed bending block E, spring D, and knob G, combined and operating substantially as and for the purpose set forth."

"9. The combination of the anvil or driving head A' with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united, and simultaneously bend over the projecting ends, substantially as and for the purpose set forth."

On the 12th of May, 1881, the applicant canceled claims 1 and 9, and converted claim 9 into a new claim 1, and claim 1 into a new claim 2, as follows:

"1. The combination of the stationary staple support or anvil A' with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united and simultaneously bend over its projecting ends, substantially as and for the purpose set forth.

"2. In a device for inserting metallic staples, the combination of the staple guide B, anvil A', operating therein, spring D, recess F, and knob G, the whole arranged to operate substantially as and for the purpose described."

On the 14th of May, 1881, the examiner notified the applicant as follows: "Upon further consideration of this matter, in connection with amended specification, applicant is advised that the 1st clause of claim does not present an operative combination of mechanical devices for the purpose stated. It is obvious that without a staple holding device the parts enumerated would be inoperative, in view of which a staple-holding device should be included. In reference to the 2d and 3d clauses of claim, the statement that the anvil operates in the guide block is unwarranted, inasmuch as the anvil is stationary and the guide block slides up and down upon the anvil. With proper correction as to this point, the 2d and 3d clauses of claim may be allowed."

On the 31st of May, 1881, the applicant adopted the suggestions of the examiner and amended claim 1, by inserting after the words "stationary staple support or anvil A'," the words "and the sliding staple guide B," and amended claim 2 by canceling the words "operating therein," so that claims 1 and 2 then read as follows:

"1. The combination of the stationary staple support or anvil A' and the sliding staple guide B with the reciprocating slotted or recessed hammer, operating to insert a staple through layers of stock to be united and simultaneously bend over its projecting ends, substantially as and for the purpose set forth.

"2. In a device for inserting metallic staples, the combination of the staple guide B, anvil A', spring D, recess F, and knob G, the whole arranged to operate substantially as and for the purpose described."

On the 4th of June, 1881, the examiner notified the applicant as follows: "Upon further consideration of this matter, in connection with the last amendment, it is obvious that the 'recess F' should not form an element of the mechanical combination, as such recess is a provision of the 'hammer' referred to in the first clause of claim, and such recess is not an operative element independent of such hammer."

On the 14th of June, 1881, the applicant made further amendments, leaving claim 1 as last recited, and as it is found in the reissued patent, and amending claim 2, as last recited, by striking out the words "recess F," so that it read as follows:

"2. In a device for inserting metallic staples, the combination of the staple guide B, anvil A', spring D, and knob G, the whole arranged to operate substantially as and for the purpose described."

On the 15th of June, 1881, the examiner notified the applicant as follows: "Upon further consideration of this matter, with a view to final action, the 2d clause of claim is found defective, in the absence of any mechanical combination between the 'knob G' and the other elements included in the combination. To obviate this objection a 'reciprocating driver' should be added to the combination."

On the 18th of June, 1881, the applicant amended claim 2 by substituting for the words "and knob G" the words "and reciprocating driver provided with the knob G," so that the claim, as thus amended, read as follows, the same as claim 2 in the reissued patent:

"2. In a device for inserting metallic staples, the combination of the staple guide B, anvil A', spring D, and reciprocating driver provided with the knob G, the whole arranged to operate substantially as and for the purpose set forth."

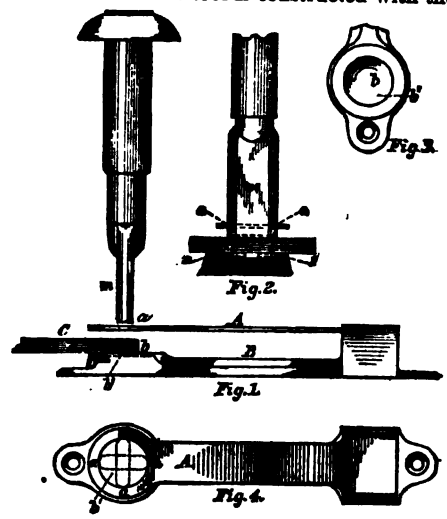
From these proceedings in the patent office, in regard to the allowance of claims 1 and 2 of

the reissued patent, it is apparent that the applicant carefully limited himself, in those claims, to a stationary staple support or anvil and a reciprocating slotted or recessed hammer or driver. This result must also follow in view of the devices existing in the various prior patents introduced in evidence, showing the state of the art. The various elements entering into the combinations of claims 1 and 2 of the reissue were old, considered singly. The recessed clinching base was old; the driver in the staple case was old; the combination of those two devices in a power machine was old. The J. C. Smyth machine was a hand lever machine, and contained in combination all the elements of the Heyl device, though differently arranged. In both the Smyth and the Heyl devices there are means of forcing out a staple from a case by a contained plunger, and bending the legs against a concave recess. In view of this Smyth machine, the plaintiffs' expert stated that the novelty of the Heyl devices consisted particularly "in the automatic adjustment to various thicknesses of paper, by means of which, without any added parts, the jaws are adapted to grip and hold all thicknesses of paper while being stapled and clinched; in their capacity for being opened to allow the eye to see the staple while being inserted by hand at the open end of the staple case, whereby a length of staple may be adapted or selected to suit the material; in the retracting spring to keep the staple case constantly open for a new staple; in a hand knob for driving down the plunger; and in the general construction and adaptation of all the parts to be used as a light, portable desk tool, low in price, simple in construction and operation, and of universal use."

In prior devices, the clinching part was the base and the inserting device was above it. This arrangement did not permit of the proper support of the staple in the tube. Heyl reversed the position of the parts, and placed the inserting device on the base, so that the staple could be inserted by hand into the open mouth of the tube, and be supported, until it should be driven, by the tube and its contained driver; this reversal of the parts necesitating the use of a spring underneath, to support the tube and keep it above the end of the driving blade, or of a spring at the side to press against the guide and keep it in place by friction. Claims 1 and 2 of the reissued patent must therefore be limited to the specific combinations and arrangements of parts described and shown in the specification and drawings, and enumerated in those claims. The staple support or anvil must be stationary, and the slotted or recessed hammer or driver must be reciprocating.

In the defendant's device called the "Victor tool," the anvil or staple blade is movable, and the recessed clinching base is fixed or stationary. It is a device constructed under and in accordance with letters-patent No. 218227, granted to William J. Brown, Jr., August 5, 1879, and a second patent, No. 260865, granted to the same person July 4, 1882. The drawings of No. 260865 are as follows:

An expert for the plaintiffs testifies that he regards the lower part of the defendant's device, which is fixed or stationary and contains the clinching cavity, and resists the driving and clinching blow of the hand from the opposite part of the tool, as the equivalent for the "reciprocating driver provided with the knob G," mentioned in claim 2 of the reissue. As the defendant's tool is constructed with the



stationary recessed clinching base made to rest upon a table, and to receive the impact from above of the detached driving tool, it is a misnomer to say that such stationary base is the mechanical equivalent of the reciprocating driver E of the Heyl patent. The patentee having imposed words of limitation upon himself in his claims, especially when so required by the patent office in taking out his reissue, is bound by such limitations, in subsequent suits on the reissued patents. Such have been the uniform decisions of this court in like cases. *Leggett* v. *Avery*, 101 U. S. 256 [25:865]; *Goodyear Dental V. Co.* v. *Davis*, 102 U. S. 222, 228 [26:149,151]; *Fay* v. *Cordesman*, 109 U. S. 408 [27:979]; *Mahn* v. *Harwood*, 112 U.S. 354, 359 [28:665,667]; *U. S. Cartridge Co.* v. *Union Met. Cartridge Co.* 112 U. S. 624, 644 [28:828, 834]; *Sargent* v. *Hall Safe & L. Co.* 114 U. S. 63 [29:67]; *Shepard* v. *Carrigan*, 116 U. S. 593 [29:723]; *White* v. *Dunbar*, 119 U. S. 47 [30:303]; *Sutter* v. *Robinson*, 119 U. S. 530 [30:492]; *Bragg* v. *Fitch*, 121 U.S. 478 [30:1008]; *Snow* v. *Lake Shore & M. S. R. Co.* 121 U. S. 617 [30:1004].

Assuming, therefore, that claims 1 and 2 of the reissued patent are valid, they are to be construed as covering only the precise combinations enumerated in them and described in the specification and shown in the drawings; and they do not cover the defendant's device, which has a stationary recessed clincher and a movable detached staple inserting tool, because claims 1 and 2 of the reissued patent expressly call for a reciprocating clincher and a stationary staple supporting anvil. Those elements, in those forms, in claims 1 and 2, were made necessary by the requirements of the patent office, before it would grant the reissue; and the applicant, having voluntarily made the limitations, is bound by them.

Although, in the proofs, the plaintiffs under-

took to show that three other claims of the reissued patent, in addition to claims 1 and 2, were infringed by the "Victor tool," the circuit court, in its interlocutory decree, states that it considered only claims 1 and 2; and, as the decree holds those claims alone to be valid and to have been infringed, and the master's report and the final decree apply only to those claims, and the counsel for the plaintiffs does not contend, in his brief, that any other claim is infringed, we necessarily have confined our consideration of the case to those two claims, leaving all questions as to every other claim of the reissued patent entirely open for consideration in a case which may involve them.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to dismiss the bill of complaint.

UNITED STATES, *Piff. in Err.*,

v.

CLEMENT HUGH HILL ET AL.

(See S. C. Reporter's ed. 681-686.)

Jurisdiction as to amount—revenue law.

1. In an action on the official bond of the clerk of the district court, for not accounting for moneys in his hands, although the bond is in the penal sum of $20,000, yet where the record shows that the value of the matter in dispute does not exceed $5,000, and that no recovery could be had in the action for more than $517.07, and a small amount of interest, after deducting the fees due the clerk, this court has no jurisdiction of the cause; its jurisdiction depends on the amount due for the breach of the condition, and not on the penal sum.

2. Section 844, R. S., which provides for the payment by the clerk, into the treasury, of the surplus moneys received by him as the fees and emoluments of his office, is not a revenue law within section 699, R. S., which gives jurisdiction to this court without regard to the sum in dispute.

[No. 1050.]

Submitted Nov. 21, 1887. Decided Dec. 12, 1887.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

On motion to dismiss. *Granted.*

The case is stated by the court.

Mr. **John Lowell**, in support of motion:

This court has no jurisdiction, because the amount in dispute is not sufficient, being only $517.07.

Hagan v. *Woison*, 35 U. S. 10 Pet. 160 (9:381); *Parker* v. *Morrill*, 106 U. S. 1 (27:72); *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564 (27:828).

The amount in dispute was not the penalty, but the damages for the breach. This court always looks beyond the forms of action to ascertain whether the amount actually in dispute is sufficient.

Brown v. *Shannon*, 61 U. S. 20 How. 55 (15:826); *Lee* v. *Watson*, 68 U. S. 1 Wall. 337 (17:557); *Gray* v. *Blanchard*, 97 U. S. 564 (24:1103); *Shacker* v. *Hartford F. Ins. Co.* 93 U. S. 241 (23:862); *Bowman* v. *Chicago & N. W. R. Co.* 115 U. S. 611 (29:502); *Elgin* v. *Marshall*, 106 U. S. 578 (27:249); *Bruce* v. *Manchester & K. R. R. Co.* 117 U. S. 514 (29:990); *U. S.* v. *McDowell*, 8 U. S. 4 Cranch, 316 (2:632).

The judgment below should be affirmed, because the case is governed by *U. S.* v. *Hill*, 120 U. S. 169 (30:627).

Messrs. **A. H. Garland**, *Atty-Gen.*, and **William A. Maury**, *Asst. Atty-Gen.*, for plaintiff in error, *opposed:*

The court will not look generally beyond the amount of the damages laid in the declaration or writ.

Bennett v. *Butterworth*, 49 U. S. 8 How. 129 (12:1015); *Hilton* v. *Dickinson*, 108 U. S. 174 (27:691).

The law in question here is a revenue law, within the meaning of section 699, R. S., giving appellate jurisdiction to this court, without regard to the sum or value in dispute. R. S. §§ 833, 844.

The motion to affirm is founded on the judgment of this court in *U. S.* v. *Hill*, 120 U. S. 170 (30:628), as an estoppel; but no question of estoppel arises.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a suit brought on the official bond of Clement Hugh Hill, as Clerk of the District Court of the United States for the District of Massachusetts, for "not properly accounting for all moneys coming into his hands, as required by law, according to the condition of said bond." The bond was in the penal sum of $20,000, and in the original writ the damages were laid at $2,000. The bill of exceptions shows that the controversy in the suit was as to the liability of the clerk to account to the United States for moneys received by him in naturalization business. The questions involved are in many respects the same as in *U. S.* v. *Hill*, 120 U. S. 169 [30:627]; though in some important particulars the two cases differ.

Under the instructions of the court the jury found a verdict for the defendants on the 26th of July, 1887. On the third of August, and before judgment, the writ was amended, with leave of the court, by increasing the *ad damnum* from $2,000 to $20,000. Then, on the 24th of August, a judgment was entered in due form on the verdict, "that the plaintiff take nothing by the writ." To reverse that judgment this writ of error was brought, which the defendants now move to dismiss, because the value of the matter in dispute does not exceed five thousand dollars. The motion is based upon the following statement which appears as part of the bill of exceptions:

"This is an action upon the official bond of the defendants, given by the defendant Hill as clerk of the district court for this district. The pleadings are made a part of this bill of exceptions, and may be referred to. The only breach of the bond relied upon was that set out in the declaration of the failure of Hill to account for all moneys received; and, under this assignment of breach, no claim was made that the said Hill had neglected to account for any other sums or moneys than those received by him in naturalization cases. It appeared as a fact that the total amount of naturalization fees received by the defendant Hill since the date of former suit, viz, December 4, 1884, and not accounted for, was as follows:

"July to Dec., 1884	$2,720	58
1885	1,146	50
1886	2,825	00
"Jan. to June, 1887	838	00

"It also appeared that in 1884, adding the naturalization fees to the other fees, the two together exceeded the clerk's maximum allowance by the amount of $517.07; but since then, adding the two together, the clerk has not received the maximum allowed him by law."

As early as *U. S.* v. *McDowell*, 8 U. S. 4 Cranch, 316 [2:632], it was decided that in an action on an official bond given for the faithful performance of the duties of an office our jurisdiction would depend on the amount due for the breach of the condition, and not on the penal sum. This is not denied in the argument of the Attorney-General submitted in opposition to this motion, but he insists:

1. That it does not appear legitimately on the face of this record that the amount due is less than the penalty of the bond; and,

2. That this is a suit brought for the enforcement of a "revenue law" of the United States, and, therefore, this court has jurisdiction for the review of the judgment under § 699 of the Revised Statutes "without regard to the sum or value in dispute."

In support of the first objection, it is claimed that the foregoing statement as to the amount due from the clerk is not properly a part of the bill of exceptions. We cannot so understand the record, which shows this entry: "The following is the bill of exceptions presented to the plaintiffs and allowed by the court before entry of judgment." Then, evidently as the file mark of the paper, "*Plaintiff's exceptions—Allowed August 24, 1887.*"

The paper itself, thus described and identified, began with the statement given above, which was evidently intended as an admission on both sides of the undisputed facts in the case, so that the trial might be confined to the real matter in dispute, to wit, the liability of the clerk to account for moneys received in naturalization business as part of his official emoluments. To show this liability, notwithstanding the case of *U. S.* v. *Hill*, *ubi supra*, which had been decided on an agreed statement of facts, the United States attorney offered to prove that "Hill had received large sums of money as the ordinary and usual fees upon the application of foreigners to be naturalized in the district court of which he was clerk, and for the issuance of certificates of naturalization, and for filing papers and administration of oaths, and for other official acts required by law in the naturalization in due manner of foreigners." In another part of the bill of exceptions it appears that "The attorney for the United States stated that he claimed that the fees received by said Hill in naturalization cases were those specifically provided for by statute for like acts done by the clerk in all cases; that he did not claim to recover for any sums received for services and acts which any unofficial person might do for the court, but for those sums received for acts done as clerk of the district court, which make the history of the case on the records of the court, and which cannot legally be performed by any other than a clerk of a United States court, and which are done in that capacity." Read in the light of this disclaimer, the offer of proof was no more than that "large sums" of the money, which it was admitted Hill had received in naturalization business, were for fees specifically fixed by statute, and therefore to be accounted for. Such being the case, there is nothing inconsistent between the introductory statement and the offer of proof. It is clear, therefore, that the statement was intended to be, and is in fact, a part of the record to be considered by us. Being a part of the record, it shows that the value of the matter in dispute does not exceed $5,000, because in no event could there have been a recovery in the action of more than $517.07, and possibly a small amount of interest.

The part of § 699 of the Revised Statutes which is relied on as giving us jurisdiction, notwithstanding the small amount involved, is the second subdivision, which provides for a writ of error without regard to the sum or value in dispute, upon "any final judgment of a circuit court * * * in any civil action brought by the United States for the enforcement of any revenue law thereof." The original statute, of which this is a re-enactment, was passed May 31, 1844, chap. 81, 5 Stat. at L. 658, and is as follows:

"That final judgments of any Circuit Court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of duties due, or alleged to be due, on merchandise imported therein, may be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon writs of error, as in other cases, without regard to the sum or value in controversy in such action, at the instance of either party."

Section 828 of the Revised Statutes provides that "The following and no other compensation shall be taxed and allowed to * * * clerks of the circuit * * * courts." "The following" here referred to is found in § 828, which prescribes the fees of a clerk. Thus far the legislation has reference only to the compensation to be paid a clerk for his services. But § 839 provides that the clerk shall be allowed to retain of the fees and emoluments of his office, for his personal compensation, a sum not exceeding $3,500 a year. Section 838 makes it his duty to report, semi-annually, to the Attorney-General, all the fees and emoluments of his office, and all necessary expenditures, with vouchers for their payment. Section 844 then requires him to pay into the Treasury any surplus of such fees and emoluments which his return shows to exist over and above the compensation and allowances authorized by law to be retained by him.

The precise question for decision is whether this section, which provides for the payment by the clerk into the Treasury of the surplus moneys received by him as the fees and emoluments of his office, is a "revenue law," within the meaning of that clause of § 699 which is relied on; and we have no hesitation in saying that it is not. As the provision relates to the jurisdiction of this court for the review of the judgments of the circuit courts, it is proper to refer to the statutes giving jurisdiction to those courts to see if there is anything there to show what the term "revenue law," as here used, means. Looking, then, to § 629 of the Revised Statutes, we find that by the fourth subdivision the circuit courts have been granted original jurisdiction "of all suits at law or in equity arising under any Act providing for revenue from im-

ports or tonnage," and "of all causes arising under any law providing internal revenue." And again, by the twelfth subdivision, "of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof." This clearly implies that the term "revenue law," when used in connection with the jurisdiction of the Courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by § 8, Art. I, of the Constitution, "to lay and collect taxes, duties, imposts, and excises." This view is strengthened by the third subdivision of § 699, which gives this court jurisdiction, without reference to the value in dispute, of "any final judgment of a circuit court * * * in any civil action against an officer of the revenue, for any act done by him in the performance of his official duty." Certainly it will not be claimed that the clerk of a District Court of the United States is an "officer of the revenue;" but there is nothing to indicate that the term "revenue" has any different signification in this subdivision of the section from that which it has in the other. The clerk of a Court of the United States collects his taxable "compensation," not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any "revenue law," properly so called, but out of a statute governing an officer of a Court of the United States.

It follows that this is a case where our jurisdiction depends on the value of the matter in dispute, and, as that is not sufficient in amount, that the motion to dismiss must be granted. It is consequently so ordered. Dismissed.

L. ZECKENDORF ET AL., Partners, etc. *Appts.*,

v.

JOHN S. JOHNSON.

(See S. C. Reporter's ed. 617-618.)

Jurisdiction as to amount—findings of fact, conclusive.

1. On appeal from the supreme court of a Territory, the value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the supreme court; and not at the time of the judgment of the district court of the Territory; interest must be added to the judgment of the district court until the date of that of the supreme court, for the purpose of determining the jurisdiction of this court.

2. Errors assigned, which relate only to the sufficiency of the evidence to support the findings, cannot be considered here. The findings of fact of the court below are conclusive, and cannot be re-examined here.

[No. 1044].

Submitted Nov. 21, 1887. Decided Dec. 12, 1887.

APPEAL from the Supreme Court of the Territory of Arizona.

On motion to dismiss, with which is united a motion to affirm. Motion to dismiss, *denied;* motion to affirm, *granted.*

The facts are stated by the court.

Messrs. **Van H. Manning** and **J. B. Edmonds,** for the motions:

The amount in controversy does not exceed $5,000 and this court has no jurisdiction.

The matter in dispute is that for which suit is brought.

Lee v. *Watson,* 68 U. S. 1 Wall. 337, 339 (17:557, 558).

The amount in dispute on appeal is no more than it was below.

Wabash, St. L. & P. R. Co. v. *Knox,* 110 U. S. 304, 305 (28: 155); *Shacker* v. *Hartford F. Ins. Co.* 93 U. S. 241 (23: 862); *Gray* v. *Blanchard,* 97 U. S. 564 (24: 1108).

Interest accruing on a judgment subsequent to its rendition cannot enter into the computation.

Knapp v. *Banks,* 43 U. S. 2 How. 73 (11:184); *Walker* v. *U. S.* 71 U. S. 4 Wall. 163 (18:319); *Western Union Tel. Co.* v. *Rogers,* 93 U. S. 565 (23:977); *Baltimore & P. R. R. Co.* v. *Trook,* 100 U. S. 112 (25:571); *Udall* v. *The Ohio,* 58 U. S. 17 How. 17 (15:42).

If the judgment be for the plaintiff, that ascertains the value of the matter in dispute.

Gordon v. *Ogden,* 28 U. S. 3 Pet. 33 (7:592); *Merrill* v. *Petty,* 83 U. S. 16 Wall. 345 (21:500), and the cases cited; *Baltimore & P. R. R. Co.* v. *Trook, supra; N. Y. Elevated R. R. Co.* v. *Fifth Nat. Bank,* 118 U. S. 608 (30:259); *Zeigler* v. *Hopkins,* 117 U. S. 684 (29:1019).

Suppose, however, this court has jurisdiction. Then the judgment should be affirmed. The parties waived a right of review.

Madison County v. *Warren,* 106 U. S. 622 (27: 311) and cases cited; *U. S.* v. *Harris,* Id. 634, 635 (27: 292).

The record shows no demurrer, objection or exception taken below; and they cannot be taken for the first time on appeal.

Turner v. *Yates,* 57 U. S. 16 How. 14 (14:824); R. S. U. S. § 700: *Stebbins* v. *Duncan,* 108 U. S. 32 (27:641); *Martinton* v. *Fairbanks,* 112 U. S. 670 (28: 862); *Canal & C. Streets R. R. Co.* v. *Hart,* 114 U. S. 655 (29: 226).

Findings of facts are not reviewable here.

Martinton v. *Fairbanks, supra; The Abbotsford,* 98 U. S. 443 (25:169); R. S. U. S. § 1011; *Booth* v. *Tiernan,* 109 U. S. 205 (27:907); *U. S.* v. *Dawson,* 101 U. S. 569 (25: 791); *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 309 (28: 157).

A bill of exceptions for refusing a new trial presents no question reviewable here.

Kansas Pac. R. Co. v. *Twombly,* 100 U. S. 78 (25: 550), and cases cited.

The errors assigned present no question reviewable by this court, or are frivolous.

James v. *Bank,* 74 U. S. 7 Wall. 692 (19: 275); *Evans* v. *Brown,* 109 U. S. 180 (27:898); *Deitsch* v. *Wiggins,* 82 U. S. 15 Wall. 539 (21:228); *Lucas* v. *Brooks,* 85 U. S. 18 Wall. 436 (21:779).

Mr. **E. M. Marble,** in opposition:

The court will examine the whole record to determine the amount in dispute.

Gray v. *Blanchard,* 97 U. S. 564, 565 (24:1108, 1109); *Shacker* v. *Hartford F. Ins. Co.* 93 U. S. 241 (23:862); *Stinson* v. *Dousman,* 61 U. S. 20 How. 461-467 (15:966); *Sampson* v. *Welsh,* 65 U. S. 24 How. 207, 208 (16:632, 633); *Benja-*

min v. *Dubois*, 118 U. S. 46–48 (30: 52); *Street* v. *Ferry*, 119 U. S. 385, 386 (30: 439).

Where interest is allowed and the principal sums with the interest added exceeds the jurisdictional limit, this court has jurisdiction.

The Rio Grande v. *Otis*, 86 U. S. 19 Wall. 178 (22: 60); *Bank of U. S.* v. *Daniel*, 37 U. S. 12 Pet. 32 (9:989); *The Patapsco* v. *Boyce*, 79 U. S. 12 Wall. 451 (20:457).

And especially this is so where the interest is specifically claimed in the complaint.

Olney v. *The Falcon*, 58 U. S. 17 How. 19 (15: 43).

Appeal is proper for review.

Stringfellow v. *Cain*, 99 U. S. 612 (25: 422); *Hecht* v. *Boughton*, 105 U. S. 235, 236 (26:1018); *Woolf* v. *Hamilton*, 108 U. S. 15 (27: 635).

Mr. Chief Justice **Waite** delivered the opinion of the court:

A judgment was rendered September 28, 1885, by the District Court of Arizona, in and for the County of Pima, against L. Zeckendorf & Co., the appellants, and in favor of Johnson, the appellee, for $4,304.93, "with interest on $2,800 of said sum, at the rate of two per cent per month from the date hereof until paid, and interest on $1,504.33, at the rate of ten per cent per annum from the date hereof until paid." This judgment was affirmed by the Supreme Court of the Territory on appeal, November 8, 1886. From that judgment of affirmance this appeal was taken, which the appellee moves to dismiss, on the ground that the value of the matter in dispute does not exceed $5,000, as now required by law. Act of March 3, 1885, chap. 355, 23 Stat. at L. 443.

The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the supreme court of the Territory, and not at the time of the judgment of the district court. Adding the interest to the judgment of the district court until the date of that of the supreme court, as we must for the purpose of determining our jurisdiction—*The Patapsco* v. *Boyce*, 79 U. S. 12 Wall. 451 [20:457]; *N. Y. Elevated R. R. Co.* v. *Fifth Nat. Bank*, 118 U. S. 608 [30:259]—we find that the amount due at the time of the judgment of the supreme court was considerably more than $5,000. *The motion to dismiss is therefore denied.*

But, on looking into the record, we discover that the errors assigned relate only to the sufficiency of the evidence to support the findings. These we cannot consider. The findings of fact by the court below are conclusive, and cannot be re-examined here. *The Abbotsford*, 98 U. S. 440 [25: 168], and cases there cited. Upon the facts as found there can be no doubt of the correctness of the judgment. It is apparent if the case is kept here longer it will be for delay only. *For that reason the motion to affirm is granted. Affirmed.*

ROGER M. SHERMAN, *Plff. in Err.*,
v.
IRVING GRINNELL ET AL., Executors of MOSES GRINNELL, Deceased.

(See S. C. Reporter's ed. 679-680.)

Review of order of circuit court remanding suit —repeal of law.

1. This court cannot review, on appeal or writ of error, the order of a circuit court remanding a suit made while the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, was in force, where the writ of error was not brought until after the Act of March 3, 1887, went into effect.

2. If a law conferring jurisdiction is repealed, without a reservation as to pending cases, all such cases fall with the law.

[No. 932.]

Submitted Nov. 21, 1887. Decided Dec. 12, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Dismissed.*

The case is stated by the court.

Mr. **Roger M. Sherman**, plaintiff in error, in person:

It could not judicially appear, before any obligation rested on the defendant to present the record, that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court.

U. S. R. S. § 645; Act March 3, 1875, §§ 5, 6, 18 Stat. at L. 472; *Bradstreet* v. *Thomas*, 37 U. S. 12 Pet. 177 (9:1046); *Gold W. & W. Co.* v. *Keyes*, 96 U. S. 204 (24:659).

The withholding of the complaint cannot inure to the advantage of the plaintiffs below.

Act of 1875, § 7; *Dennistoun* v. *Draper*, 5 Blatchf. 336; *Fisk* v. *Union Pac. R. R. Co.* 6 Blatchf. 381; *S. C.* 8 Blatchf. 246; *McBratney* v. *Usher*, 1 Dill. 367.

The determination, in the absence of the complaint, would have been error for which this court would reverse.

U. S. v. *Kirkpatrick*, 22 U. S. 9 Wheat. 729 (6:201); *Garland* v. *Davis*, 45 U. S. 4 How. 131 (11: 907); *Mandeville* v. *Burt*, 33 U. S. 8 Pet. 256 (8:936).

An essential ingredient in the cause of action is the legal title of the plaintiffs. Public moneys cannot come to hand so as to be subject to a mere equitable title to the use of the principal.

2 Story, Eq. Jur. §§ 1042, 1045; U. S. R. S. § 3477.

It is presumable that such an award could occur only upon some mistake of fact.

Daniels v. *Tearney*, 102 U. S. 421 (26:189).

The money has been paid from the treasury contrary to law.

U. S. Const. § 9; *Reeside* v. *Walker*, 52 U. S. 11 How. 291 (13:701); *Whiteside* v. *U. S.* 93 U. S. 247 (23: 882); *Knote* v. *U. S.* 95 U. S. 154 (24:443); *Steele* v. *U. S.* 113 U. S. 134 (28: 954); *Coppell* v. *Hall*, 74 U. S. 7 Wall. 558 (19: 248); *U. S.* v. *Grossmayer*, 76 U. S. 9 Wall. 75 (19: 629).

No estoppel could operate in favor of plaintiffs.

Holman v. *Johnson*, 1 Cowp. 343; *Nellis* v. *Clark*, 20 Wend. 24; *Armstrong* v. *Toler*, 24 U. S. 11 Wheat. 258 (6:468); *Coppell* v. *Hall*, *supra*; *Colvin* v. *Holbrook*, 2 N. Y. 129; *Cox* v. *Prentice*, 3 Maule & S. 345; *Buller* v. *Harrison*, 2 Cowp. 566; Smith, Merc. Law, 8th Eng. ed. 162, 163.

Such cause of action involves a federal question.

The Siren, 74 U. S. 7 Wall. 154 (19:130); *Carr* v. *U. S.* 98 U. S. 433 (25:211); *U. S.* v. *Peters*, 9 U. S. 5 Cranch, 115 (3:53).

Messrs. **Wm. M. Evarts, Joseph H. Choate & Charles Beaman** and **Treadwell Cleveland,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error brought for the review of an order of a circuit court remanding a suit which had been removed from a state court. The suit was begun October 28, 1885; removed October 30, 1885, the state court making an order to that effect on that day; and remanded by the circuit court, May 4, 1886. All this was before the Act of March 3, 1887, chap. 373, 24 Stat. at L. 552, went into effect. The writ of error from this court was not sued out, however, until April 8, 1887, which was after that statute.

The first question which presents itself is whether we have jurisdiction of the writ. We have already decided, at the present term, in *Morey* v. *Lockhart*, 123 U. S. 56 [*ante*, 68] that this court cannot review, on appeal or writ of error, the order of a circuit court remanding a suit which had been removed under the Act of 1887, and which was begun, removed, and remanded after that Act went into effect. Later in the term we decided (*Wilkinson* v. *Nebraska*, 123 U. S. 286, *ante*, 152) that we had no jurisdiction when the suit was begun and removed before the Act of 1887, but not remanded until afterwards. In the last case we said that this statute showed "unmistakably an intention on the part of Congress to take away all appeals and writs of error to this court from orders thereafter made by circuit courts remanding suits which had been removed from a state court, and this whether the suit was begun and the removal had before or after the Act of 1887." That was as far as it was necessary to go in any suit that had come before us down to that time. Here, however, the question reaches one step further, and requires us to determine whether we can take jurisdiction on appeal or writ of error if the order to remand was made whilst the Act of March 3, 1875 (chap. 137, 18 Stat. at L. 470), was in force; but the writ of error was not brought until after that of March 3, 1887, went into effect, and we are of opinion that we cannot. This is the logical result of what has already been decided. Until the Act of 1875 there was no such jurisdiction. *Chicago & A. R. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 [23: 103]. The provision of that Act giving the jurisdiction was repealed by the Act of 1887 without any reservation as to pending cases, the proviso in the repealing section having reference "only to the jurisdiction of the circuit court and the disposition of the suit on its merits." *Wilkinson* v. *Nebraska*, *ubi supra*. As a consequence of this the repeal operated to take away jurisdiction in cases where the order to remand had been made, but no appeal or writ of error taken, because "If a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law." *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398, 401 [25: 231, 232] and cases there cited.

It follows that we have no jurisdiction of this writ of error, and it is accordingly dismissed.

HENRY R. BOND, *Appt.*,
v.
SARAH G. DAVENPORT.

(See S. C. Reporter's ed. 619-622.)

Decree reversed on stipulation.

Decree reversed in accordance with the stipulation of the parties, and the cause remanded with instructions to enter a decree in favor of the complainant, as agreed by the parties to the appeal, but without prejudice to the rights of the other parties to the suit.

[No. 145.]

Submitted Dec. 8, 1887. Decided Dec. 12, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa. *Reversed.*

The facts are stated by the court.

Messrs. **Jayne & Hoffman** and **W. F. Brannan,** for appellant.

No one appeared for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is an appeal by the complainant below from the following part of the decree in the cause:

"It is further ordered, adjudged, and decreed that the said respondent, Sarah G. Davenport, pay to the complainant the sum of five hundred and sixteen and $\frac{77}{100}$ dollars, with interest at the rate of six per cent per annum from the 10th day of May, 1883, the same being the amount, with interest, which the undivided half of the south half of block fifty-nine (59) which descended to, and has become vested in, the said Sarah G. Davenport as the mother and an heir at law of the said George A. Davenport, deceased, is chargeable for and on account of taxes on said block fifty-nine (59), which were paid and discharged out of the money advanced by the said Equitable Trust Company on the 28th of June, 1875; and that on failure to pay the said sum within the time herein limited the said master sell, at public sale, so much of the said Sarah G. Davenport's undivided half of the south half of said block fifty-nine (59) as shall be necessary to pay the same.

"Such sale to be made at the same place and in the same manner, and in all respects as is herein prescribed for the sale of the property of the said George A. Davenport, and with like effect. It is further ordered, adjudged, and decreed that upon payment by the said Sarah G. Davenport of the said sum of five hundred and sixteen and $\frac{77}{100}$ dollars to the said complainant, complainant's bill be dismissed as to the undivided one-half of the south half of said block fifty-nine (59), which vested in, and to which the said Sarah G. has become entitled, as the mother and heir-at-law of the said George A. Davenport, deceased. And it is further ordered, adjudged, and decreed that, as between the complainant and the said Sarah G. Davenport, the said Sarah G. Davenport recover of complainant the costs of this suit, so far as made, in trying the issue of the sanity of said George A. Davenport at the time of the making and delivery of said mortgage set up in complainant's original bill."

The only parties to the suit who are before this court are Henry R. Bond, trustee, complainant below and appellant, and Sarah G. Davenport. These parties have filed in this court the following stipulation:

"In the Supreme Court of the United States.

"*Henry R. Bond, Trustee, Appellant,* }
v. }
Sarah G. Davenport, Appellee. }

"Appeal from the Circuit Court of the United States for the Southern District of Iowa.

"In the beforementioned suit it is stipulated by and between Henry R. Bond, trustee, complainant and appellant, The Equitable Trust Company of New London, Connecticut, the holder of the bonds secured by the mortgage sought to be enforced, and Sarah G. Davenport, appellee, being the sole parties in interest, as follows, to wit:

"1. Said Sarah G. Davenport hereby withdraws the answer and cross petition filed by her in said suit, and all evidence offered and introduced by her in said circuit court, and consents and agrees that the same shall not be considered as part of the record.

"2. It is agreed that a decree shall be entered by the supreme court in said suit, reversing the decision and decree of the said circuit court, in so far as said court found in favor of said Sarah G. Davenport, and in so far as said court by its decree denied to complainant the relief by him prayed, as against the undivided half of the south half of block fifty-nine (59), in the City of Davenport, Iowa, claimed by Sarah G. Davenport, as mother and heir at law of George A. Davenport, deceased, and in so far as said court, by its said decree, undertook to dismiss complainant's bill as against said property, and tax certain costs to complainant, and that this cause be remanded to said circuit court, with instructions to enter a decree in complainant's favor, declaring the sums owing upon said bonds, secured by said mortgage, to be a lien upon the premises in said mortgage, described as of the date of said mortgage, and directing sale of sufficient of said premises to pay the same, and further directing that the receiver heretofore appointed in said cause shall turn over to the complainant all the funds in his hands arising from the rentals of said premises, the same to be credited upon the amount found to be owing upon said bonds secured by said mortgage before sale of said premises, and further directing that the complainant be permitted to further plead and bring in new parties if so advised.

"3. The complainant and appellant is excused from printing the record in this suit, save and except such portions thereof as to him shall seem material to enable the court to dispose of said suit under this stipulation.

"4. The attorney or solicitor who has entered his appearance in this suit is authorized to consent to such demand or requirement of the complainant, or the said court, as shall enable the complainant to have the said decree of the circuit court reversed, said cause remanded, and a final decree entered in the circuit court in complainant's favor, and for that purpose is hereby authorized to appear in said circuit court to any pleading filed by the complainant.

"5. No personal judgment shall be entered against the said Sarah G. Davenport in said suit, or any costs taxed either against her or in her favor.

"November 16, 1887.

"HENRY R. BOND, Trustee,
"By JAYNE & HOFFMAN, Attorneys.
"SARAH G. DAVENPORT. [Seal.]
"THE EQUITABLE TRUST COMPANY,
"By JAYNE & HOFFMAN, Attorneys.
"W. F. BRANNAN,
"Of Counsel for Complainant.
"GEORGE E. HUBBELL,
"Attorney for Sarah G. Davenport."

The appellant now moves that the foregoing part of the decree, from which the appeal was taken, be reversed in accordance with the stipulation of the parties, and that the cause be remanded with instructions to enter a decree in favor of the complainant as agreed.

This motion is granted and the decree reversed without costs; and the cause is remanded with instructions to proceed in accordance with the foregoing stipulation of the parties to this appeal, but without prejudice to the rights of the other parties to the suit.

BENJAMIN J. WILSON, *Appt.*, *v.* WILLIAM C. RIDDLE, Trustee, ET AL.

(See S. C. Reporter's ed. 608–617.)

Issues in equity case—trial of them by jury—exceptions—voluntary settlement by husband.

1. On the trial of an equity case, a jury may be called into the court, and issues submitted to it by the court; a previous order for the trial of the issues by jury is unnecessary.

2. The question as to what issues should be submitted to the jury is one for the discretion of the court.

3. Where the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, it is not the practice of an appellate court to consider formal exceptions to rulings in the course of the trial of the issues before the jury.

4. In Georgia, a voluntary settlement may be made by one for the benefit of his wife and children, provided it is recorded in the office of the clerk of the superior court of the county of the residence of the husband, within three months after its execution; and such conveyance is valid against a subsequent mortgagee who had notice of it before the mortgage to him was executed.

[No. 86.]

Argued Nov. 30 and Dec. 1, 1887. Decided Dec. 12, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Affirmed.

The facts and case are fully stated by the court.

Mr. **Clifford Anderson,** for appellant:

A voluntary settlement is void as against a *bona fide* purchaser or mortgagee even with notice.

1 White & T. Lead. Cas. Eq. ed. 1876, marg. p. 284; *Dolphin* v. *Aylward*, 4 L. R. H. L. Cas. 486; *Buckle* v. *Mitchell*, 18 Ves. Jr. 100.

Defendant's answer on oath, responsive to the bill, could only be overcome by two credible witnesses.

Union Bank v. *Geary*, 30 U. S. 5 Pet. 99 (8: 60); *Randel* v. *Brown*, 43 U. S. 2 How. 406 (11: 318), *Carpenter* v. *Providence Wash. Ins. Co.* 45 U. S. 4 How. 185 (11: 931); *Tobey* v. *Leonards*, 69 U. S. 2 Wall. 423 (17: 842); *Voorhees* v. *Bonesteel*, 83 U. S. 16 Wall. 16 (21: 268); *Vigel* v. *Hopp*, 104 U. S. 441 (26: 765).

Notice of a deed is unavailing to defeat a mortgage given a year afterwards.

Hamilton v. *Royse*, 2 Sch. & L. 377; *Henry* v. *Morgan*, 2 Binn. 497; *Boggs* v. *Varner*, 6 Watts & S. 469; *Bracken* v. *Miller*, 4 Watts & S. 111; 2 Sugd. Vend. 277.

The notice must be actual.

Fleming v. *Townsend*, 6 Ga. 103; *Fowler* v. *Waldrip*, 10 Ga. 350; *Black* v. *Thornton*, 31 Ga. 641.

Submission of the issues of fact to a jury was error.

Johnson v. *Harmon*, 94 U. S. 378 (24: 273); 2 Dan. Ch. Pr. 4th Am. ed. 1, 120; *Watkins* v. *Carlton*, 10 Leigh, 560.

Such notice must have existed as affects the conscience of the purchaser or mortgagee.

Jordan v. *Pollock*, 14 Ga. 158; 2 Pom. Eq. Jur. § 649; *Thrasher* v. *Partee*, 37 Ga. 392; *Lane* v. *Partee*, 41 Ga. 202.

A voluntary deed by husband for benefit of his wife is void against a purchaser without actual notice, and the registry of such a deed is not notice.

Harper v. *Scott*, 12 Ga. 131; *Cathcart* v. *Robinson*, 30 U. S. 5 Pet. 279 (8: 125); *Kitchen* v. *Bedford*, 80 U. S. 13 Wall. 413 (20: 637); *Kennedy* v. *Head*, 32 Ga. 632.

Mr. **George A. Mercer**, for appellees:

If *Judge* Pardee committed error in ordering change of the pleadings, the appellant cannot urge the same, as the alteration was made at the instance of his counsel.

State v. *Gaskill*, 68 Ga. 518; *Van Leonard* v. *Eagle & P. Mfg. Co.* 60 Ga. 545; *Daniels* v. *Tearney*, 102 U. S. 415 (26: 187); Herman, Estop. § 165; *Terry* v. *Abraham*, 93 U. S. 88 (23: 794).

The court of chancery has a discretion to submit any issue of fact to a jury.

2 Dan. Ch. Pr. 5th Am. ed. 1071, 1072, 1081.

The court has a discretion to set aside the verdict or to disregard it, or to adopt it.

Allen v. *Blunt*, 3 Story, 746; *Prout* v. *Roby*, 82 U. S. 15 Wall. 475 (21: 59); *Basey* v. *Gallagher*, 87 U. S. 20 Wall. 680 (22: 453); *Garsed* v. *Beall*, 92 U. S. 695 (23: 690).

This court will not review on error any matter resting in the discretion of the court below.

Liter v. *Green*, 15 U. S. 2 Wheat. 308 (4: 246).

The exceptions are not sufficient.

Ingram v. *Little*, 14 Ga. 173; *Smith* v. *Atwood*, 14 Ga. 402; *Lopez* v. *McArdle*, 41 Ga. 414; *Washington & G. R. R. Co.* v. *Varnell*, 98 U. S. 479 (25: 233).

If the charge of the court collectively be right a new trial will not be granted, although some isolated part of it be wrong.

Newton v. *Price*, 41 Ga. 186; *Bradstreet* v. *Huntington*, 30 U. S. 5 Pet. 438 (8: 183); *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 15 (7: 332); *U. S. Express Co.* v. *Kountze*, 75 U. S. 8 Wall. 354 (19:461).

A father not insolvent can make a voluntary conveyance in favor of his wife and children.

1 Am. Lead. Cas. 17; *Sexton* v. *Wheaton*, 21 U. S. 8 Wheat. 229, 252 (5: 603, 610); *Salmon* v. *Bennett*, 1 Conn. 525; Atherly, Marriage Settlements, 165, n. 1; Hill, Trustees, 88-90, 106; 4 Kent, Com. 464, note; *Hinds* v. *Longworth*, 24 U. S. 11 Wheat. 199 (6:454); *Brown* v. *Spivey*, 53 Ga. 155.

The evidence clearly proves notice.

Cummings v. *Boston*, 25 Ga. 277; *Urquhart* v. *Leverett*, 69 Ga. 92; *Smith* v. *Phinizy*, 71 Ga. 641; *Johnson* v. *Dooly*, 72 Ga. 297; *Poulet* v. *Johnson*, 25 Ga. 403.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, in the Circuit Court of the United States for the Southern District of Georgia, originally brought as an action of ejectment, by the wife of William C. Riddle, four of their married daughters, an unmarried daughter, three sons, and two daughters of a deceased daughter, against J. Ben. Wilson, in the Superior Court of the County of Washington, in the State of Georgia, in August, 1881, to recover the possession of 1,500 acres of land, and the mesne profits thereof, alleged to be of the yearly value of $1,300, since the first of January, 1877.

The original petition, by which the suit was brought, alleged that in the year 1853 the said William C. Riddle, then being the owner of the 1,500 acres of land, conveyed the same, by deed of trust, to himself as trustee for the petitioners, and that, although the defendant was in possession of the land, setting up a claim of title adverse to the title of the trustee and of the petitioners, Riddle, in violation of his trust, refused to bring suit for the recovery of the land or to collect the rents and profits.

In March, 1882, J. Ben. Wilson appeared and disclaimed all title to the land in dispute, and averred that he had never received any of the rents or profits thereof. At the same time, Benjamin J. Wilson, his father, appeared and asked to be made a party to the suit, claiming to be the owner of the land in dispute, and was, by an order of the court, made a party defendant. He being an alien, and the petitioners being citizens of Georgia, the suit was removed by him into the Circuit Court of the United States for the Southern District of Georgia, under the Act of March 3, 1875. After the removal of the cause, the original petition or declaration was amended by adding, as parties plaintiff, William C. Riddle and the husbands of the four married daughters. The circuit court then, by an order, placed the case on the equity docket, and directed that the plaintiffs reform their pleading, so as to present their cause of action in an equitable shape.

In December, 1882, all of the above named plaintiffs filed in the circuit court a bill in equity against Benjamin J. Wilson, making the following averments: On the 23d of April, 1853, William C. Riddle, in consideration of natural love and affection for his wife and children, conveyed to himself as trustee, for the use, benefit and advantage of his wife and their children, for and during the natural life of the wife, "and, on her decease, to such child or children, or representative of child or children, as she might leave in life," two tracts of land in the County of Washington, one of 1,000 acres, known as the Brantley Mill

place, and the other of 500 acres, known as the Brown place, to be held for ever free from the debts, liabilities, and contracts of Riddle and all other persons. The trust deed was duly recorded, on the 26th of May, 1858, in the office of the clerk of the Superior Court of the County of Washington. Riddle, after the conveyance, held the lands as trustee for his wife and children only, and under the terms of the trust deed. In 1866 Riddle was engaged in planting operations, and, in order to raise money, applied to the firm of Wilkinson & Wilson, doing business in Savannah, of which the defendant was a member. That firm, in consideration of consignments of cotton to be sent to them by Riddle, advanced to him, on his own account and not for the trust estate, large sums of money. The defendant was obliged to raise the money so supplied on the credit of his firm, and to furnish to parties advancing the money to his firm, planters' notes and mortgages and other collateral security. On his request, Riddle gave a mortgage lien, for a large amount, upon lands owned by him in his own right, and in that mortgage included the lands embraced in the trust deed. Riddle, at the time he created such mortgage lien, notified the defendant that part of the lands was trust property; but the defendant replied that it did not matter, as he only wished to use the lien as collateral. The defendant took the lien with full notice that it included the trust estate, as well as the individual property of Riddle. In 1870, the first mortgage was canceled and a new mortgage lien was given to the defendant, at his request, which lien was taken by him with full notice that the trust estate was included in the lien. The defendant, with such knowledge, caused the lien to be foreclosed, and, in 1877, bid in all the lands covered by it, including the trust estate, and caused a deed of the lands to be made to him by the sheriff of the county, and took possession of the trust estate with full notice of the rights of the plaintiffs. An answer on oath is waived, and the prayer of the bill is for a decree for the restoration to the plaintiffs of the trust lands and the recovery of the mesne profits; that the defendant be adjudged to hold the lands only as trustee for the plaintiffs, and be required to convey them to Riddle, or some other person, as trustee, on the uses and trusts contained in the deed; that the mortgage lien and the deed to the defendant under the foreclosure be declared null and void as to the trust estate, and reformed or canceled, so as to remove the cloud upon the title of the plaintiffs; and for general relief.

The answer of the defendant to the bill, filed in February, 1883, raises an issue as to the making and recording of the deed of trust. It avers that, after the date of the deed, Riddle continued in possession of the land as before, claiming and using it, and paying taxes on it as owner, in his individual capacity and not as trustee. It admits that the firm of Wilkinson & Wilson furnished money and plantation supplies to Riddle, from 1866 to 1870, on consignments by him of cotton to that firm. It avers that, at the close of the transactions, Riddle owed the firm over $80,000; that he gave no notice of any trust; that he gave a mortgage, as security for such indebtedness, covering his entire plantation and embracing the lands in controversy, with others; that he did not, before or at the time of the execution of the mortgage, notify the defendant that part of the lands was trust property; that he was then in possession of the premises, using them as his own; that the first mortgage was superseded by a second one, which was also taken without notice and under like circumstances of possession and use by Riddle; that money and supplies were advanced on the faith of the second mortgage; that, after its foreclosure, the whole mortgaged premises, except 3,000 acres, were sold at sheriff's sale under the morgage *fi. fa.*, and the defendant became the purchaser; that at the sale no distinct notice was given of the trust claim or any particular claim, nor was any specific portion of the premises sold designated as the subject of an adverse title; that something was said to the effect that whoever bought would have trouble, but the warning, such as it was, applied alike to all the premises sold, and there was nothing to restrict it to the land in controversy or any other definite part; that the defendant heard nothing then about any trust; that the 3,000 acres not sold had been claimed, in the mode applicable to claims under the laws of Georgia, by Mrs. Riddle, and so could not be sold at that time; that she suffered the property now in controversy to be sold, without interposing any claim to it, although it was embraced in the same levy with the 3,000 acres which she did claim; that it is not true that the defendant knew that the mortgage deed included any trust land when he caused the mortgage to be foreclosed, nor did he know that the lands now in controversy were trust lands when he purchased them at the sale and took the sheriff's deed for them, nor did he have notice of the alleged right of the plaintiffs when he took possession of his purchase, unless what was so said at the sale, as above set forth, amounted to such notice; and that, even if it did, the right of the defendant could not be affected by notice, as he and his firm were innocent mortgagees for value, and had no notice at the time they gave credit and took the security. In April, 1883, the answer was amended by averring that the trust deed was not executed, signed or delivered, nor even written, at the time it bears date, nor until within the last few years; that it is a much younger instrument than the mortgage under which the defendant claims title; and that it was fabricated and antedated, and not recorded, and could not have been recorded, at the time the certificate of record entered on it represents it to have been recorded.

Issue being joined, the proofs on both sides were taken by depositions, according to the usual practice in equity cases. In December, 1883, a jury trial was had. The record does not disclose any order of court for the trial of feigned issues, or of issues of fact, by a jury, but merely states that, on the 5th of December, 1883, a jury was empaneled to try certain issues of fact, and gives the names of the jurors, and states the appearance of the respective parties at the trial, and the result, as follows:

"To the first issue of fact submitted by the court, to wit, 'Is the deed of trust presented a true, valid, and authentic instrument executed at the time it purports to be?'

"We, the jury, find that the deed of trust pre-

sented is a true, valid, and authentic instrument executed at the time it purports to be."

"To the second issue of fact submitted by the court, to wit, 'Did the defendant, B. J. Wilson, have notice of the existence of this trust deed at or before the execution of mortgage by plaintiff to defendant, May 5, 1870, or before the sheriff's sale in 1876?'

"We, the jury, find that the defendant, B. J. Wilson, had notice of the existence of this trust deed at or before the execution of the mortgage by plaintiff to defendant, May 5, 1870, and before the sheriff's sale in 1876."

There are eight bills of exceptions found in the record. One of them sets forth an exception by the defendant to the submission to a jury of the issues of facts arising in the case; four of them contain exceptions by the defendant to the rejection of evidence; and three of them contain exceptions to instructions given to the jury.

On the 6th of December, 1888, the circuit court made a final decree, which contains no reference to the jury trial, but states that the cause came on to be heard and was argued by counsel, and that the court, upon the proof submitted, finds and decrees that the deed of trust "is a true, valid, and authentic instrument, executed at the time it purports to be;" and "that the defendant, B. J. Wilson, had notice of the existence of this trust deed at or before the execution of the mortgage by the complainant, William C. Riddle, to defendant, May 5, 1870, and before the sheriff's sale in 1876." These findings are in the exact language of the findings of the jury. The decree then proceeds to adjudge that the defendant acquired no valid title to the lands embraced in the trust deed by virtue of the sheriff's deed made to him in 1876; that the 1,500 acres of land embraced in the trust deed are the property of the wife of Riddle and her children and grandchildren, under the terms and provisions of the trust deed; that the decree, by its own force and effect, establishes in and confirms to Riddle, trustee, and his successors in the trust, his right and title to the land, with the appurtenances and the rents and profits, upon the uses and trusts set forth in the deed, with full right to the possession, use, and control of the same; that the defendant, by the first of January, 1884, do restore the possession, use, and control of the trust estate to Riddle, trustee, and his successors in the trust; that the mortgage lien created by Riddle, May 5, 1870, to the defendant, and the deed executed and delivered to the defendant by the sheriff of the County of Washington in 1876, are null, void, and of no effect, as to the land and appurtenances embraced in the trust deed; and that the plaintiffs are entitled to $3,166.50 for the rents and mesne profits of the land, from the period when the defendant first took possession and control of it to the date of the decree, to be recovered by Riddle, trustee, or his successors in trust; that process of execution for the recovery of the same issue against the property of the defendant; and that the plaintiffs recover from him the costs of the suit. From this decree the defendant has appealed to this court.

The defendant objects to the submission to the jury of the issues of fact, on the ground that the chancellor should have first made an order directing a trial by a jury, at law, on issues framed; that the verdict of the jury on such issues should have been duly certified to the chancellor; that, on the contrary, a jury was called into the court of chancery and issues were submitted to it by the chancellor; that the findings of the jury were not properly before the chancellor, and he should have given no weight to them; and that no weight should be given to them by this court.

But we are of opinion that there is no force in this objection. It appears by the record that the same judge before whom the jury trial was had, acted as chancellor in making the decree in the suit in equity; and that the proofs taken and relied upon on the hearing in the suit in equity were the same proofs which were before the jury on the trial of the issues of fact. Under these circumstances, a previous order for the trial by jury, and any certificate of the result, by the judge presiding on the trial, to himself as chancellor, were unnecessary, although it would have been more formal if the court in equity had ordered a jury to be empaneled on the law side of the court, and the verdict had been certified by the clerk to the equity side, as was done in *Kerr* v. *South Park Comrs.* 117 U. S. 379 [29:924].

As to the objection to the submission to the jury of the issues passed upon by them, it is sufficient to say that the question of such submission was one for the discretion of the circuit court, and that it seems to have been not an unlawful exercise of such discretion to submit to the jury the particular issues upon which they passed.

The defendant assigns for error the rejections of evidence set forth in the bills of exceptions, and the instructions to the jury which were excepted to. No motion for a new trial was made in the circuit court. The submission of the issues to the jury was for the information of the conscience of the chancellor. It is evident from the terms of the decree that the chancellor adopted the findings of the jury as being satisfactory to him upon the whole testimony in the case, for the decree states that the court makes its finding "upon the proof submitted." Under such circumstances, it is not the practice of the appellate court to consider formal exceptions to rulings in the course of the trial of the issues before the jury. *Brockett* v. *Brockett*, 44 U. S. 8 How. 691 [11:786]; *Johnson* v. *Harmon*, 94 U. S. 371 [23:271]; *Watt* v. *Starke*, 101 U. S. 247 [25:826].

On the two issues submitted to the jury, we concur with the circuit court in its conclusions stated in the decree, which were in accordance with the findings of the jury, and in its other conclusions stated in the decree. We understand the finding of the decree to be that the defendant had actual, and not merely constructive, notice of the existence of the trust deed, at or before the execution of the mortgage to him in 1870, and before the sheriff's sale in 1876; and we concur in that finding. It is not necessary to discuss the evidence.

Nor do we consider it necessary to pass upon the question of the effect, as constructive notice to the defendant, of the recording of the trust deed in the office of the clerk of the superior court of Washington County, in May, 1853, in

view of the destruction of the records of deeds in that office by fire in 1864.

The defendant had no dealings, as a creditor, with Riddle, until the fall of 1866; but nevertheless he contends that a voluntary deed of trust, such as that in the present case, was not good as against him, as a *bona fide* purchaser or mortgagee for value, even though he had actual notice of the voluntary deed at the time of the purchase or mortgage. We understand the law of Georgia to have been otherwise. A voluntary settlement such as was made in this case was authorized by the Statute Law of Georgia in force at the time, provided the conveyance was recorded in the office of the clerk of the superior court of the county of the residence of the husband, within three months after its execution. That was done in the present case, as the proof shows.

Section 1776 of the Code of Georgia, in force at the time the deed was made, provided that a husband might, at any time during coverture, either through trustees, or directly to his wife, convey any property, subject to the rights of prior purchasers or creditors without notice. Such a conveyance for the benefit of the children and grandchildren of the grantor, was also valid, if he was solvent, and if the provision was a proper one and free from fraud. Section 1778 of the Code, enacted in 1847, provided that every voluntary settlement made by the husband on the wife should be recorded in the office of the superior court of the county of the residence of the husband within three months after the execution thereof; and that, on failure to comply with this provision, such settlement should not be of any force or effect against a purchaser, or creditor, or surety, who, *bona fide* and without notice, might become such before the actual recording of the same. Section 2305 provides that a trust estate may be created for the use of some other person than the grantee; that no formal words are necessary to create such an estate; and that, whenever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee. Section 2632 provides that every voluntary deed shall be void as against subsequent *bona fide* purchasers for value without notice of such voluntary conveyance. It follows, from these provisions, that as the deed in this case was recorded in due time, it was valid as against the defendant, who had notice of it before the mortgage to him of May, 1870, was executed, and before the sheriff's sale in 1876. This result is in accordance with the decisions of the Supreme Court of Georgia. (*Gordon* v. *Green*, 10 Ga. 584, 543; *Horn* v. *Ross*, 20 Ga. 210, 228; *Cummins* v. *Boston*, 25 Ga. 277, 283; *Brown* v. *Spivey*, 53 Ga. 155; *Adair* v. *Davis*, 71 Ga. 769).

The decree of the Circuit Court is affirmed.

WILLIAM HAILES ET AL., *Appts.*
v.
ALBANY STOVE COMPANY.

(See S. C. Reporter's ed. 582–589.)

Patent for coal stoves—disclaimer—secs. 4917, 4922, R. S.

1. The patent granted to Lewis Rathbone and William Hailes, Nov. 21, 1865, for an alleged improvement in coal stoves, was anticipated by prior patents.

2. A disclaimer cannot be used to change the character of the invention. A man cannot, by merely filing a paper, drawn up by his solicitor, make to himself a new patent, or one for a different invention from that which he had described in his specification; nor can the drawings be used on a disclaimer to change the patent.

3. Sections 4917, 4922, R. S., do not apply to different classes of cases; one section authorizes a disclaimer to be filed in certain cases; the other enables patentees to maintain suits in those cases, provided a disclaimer is filed without unreasonable delay.

[No. 79.]

Argued Nov. 23, 1887. Decided Dec. 12, 1887.

APPEAL from the Circuit Court for the Northern District of New York. *Affirmed.*

The facts and case are fully stated by the court.

Mr. **Andrew J. Todd,** for appellants:

Disclaimer has been properly filed.

Silsby v. *Foote*, 61 U. S. 20 How. 378 (22:953); *Burdett* v. *Estey*, 15 Blatchf. 347.

The time of unreasonable delay in filing a disclaimer begins when knowledge that claim is bad comes home to the patentee.

Singer v. *Walmsley*, 1 Fish. Pat. Cas. 558; *O'Reilly* v. *Morse*, 56 U. S. 15 How. 62 (14:616); *Seymour* v. *McCormick*, 60 U. S. 19 How. 96 (15: 557); *McCormick* v. *Seymour*, 3 Blatchf. 209; *Potter* v. *Whitney*, 3 Fish. Pat. Cas. 77; *S. C.* 1 Lowell, 87; *Ralston* v. *Smith*, 9 C. B. N. S. 147.

The disclaimer meets all the requirements of section 4922, R. S.

Earle v. *Sawyer*, 4 Mason, 1; Curt. Pat. § 262; *Howes* v. *Nute*, 4 Fish. Pat. Cas. 265, 266; *Thomas* v. *Welch*, 1 L. R. C. P. 202.

Mr. **Esek Cowen,** for respondent:

The patentee can only recover for an infringement of what he claims as new.

Lehigh Valley R. R. Co. v. *Mellon*, 104 U. S. 112 (26:689).

The following are cases in which the claim was for two or more distinct inventions:

Silsby v. *Foote*, 55 U. S. 14 How. 218 (14: 894); *S. C.* 61 U. S. 20 How. 378 (22: 953); *McCormick* v. *Seymour*, 3 Blatchf. 222; *Tuck* v. *Bramhill*, 6 Blatchf. 95; *Taylor* v. *Archer*, 8 Blatchf. 315; *Schillenger* v. *Gunther*, 17 Blatchf. 66.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit on a patent, in which the court below decided adversely to the complainants. The patent sued on was granted to Lewis Rathbone and William Hailes, November 21, 1865. It was for an alleged improvement in coal stoves, of the class known as "cannon" or circular stoves, so called in consequence of their consisting of one cylinder or cannon, without flues or separate fire chambers. The patentees in their specification allege that such stoves have generally been constructed with a contracted outlet, and with provision for admitting air above the fire. This, they say, they desire to obviate, having found that a much more perfect combustion can be maintained by enlarging the outlet for the smoke, and admitting air through the sides of a suspended firepot, at all points, and thus facilitating combustion by supplying oxygen to the burning coals beneath the surface of the firepot. Another object, they

say, is to construct an open, circular firepot, which can be applied to or removed from the stove at pleasure, with a grate in its bottom, said grate being so applied that it can be moved for shaking the ashes from the firepot when desired.

They then proceed to describe their improved fire pot, referring to accompanying drawings. They say:

"The firepot is made of cast iron of a flaring form and of such diameter as to leave a free space, *d*, all around it when arranged within the stove. It extends from the enlarged fire chamber C down into the ash chamber B, and it is made with vertical openings through its sides for the admission of air into the body of coal within it.

"The bottom of this firepot is an open grate, G, which may be so applied that it can be moved around a central pin, *e*, or turned upon a horizontal bar, *g*; or both of these movements may be provided for.

"It will then be seen that the firepot and its grate are united together, so that both can be removed from the stove together.

"By thus connecting the grate and firepot together and arranging them within the stove, so that they are supported or suspended by means above mentioned, they can be removed very readily from the stove when it is necessary to renew them. .

"At the junction of the body of the stove with the ash pit section B is a ledge, *h*, extending entirely around the top of said section, as shown in figure 3. This ledge is perforated at regular intervals, and it is covered by means of a marble ring plate, *i*, which is also perforated in a manner corresponding to the perforations through the ledge. This ring plate, *i*, being provided with a knob or handle, it constitutes an annular register for regulating the admission of air into the section B of the stove below the point of suspension of the firepot, as indicated by the arrows in figure 2.

"The flanges *b* and *c* effectually close the upper portion of the space *d* surrounding the fire pot, so that no air can pass at this point; the air which enters the smoke chamber above the fire pot must either be admitted through the register J, in the feed door, or it must pass through the firepot.

"Our object is to maintain such an intense heat—in thefire pot, by the free supply of oxygen to the incandescent coal therein—all around this pot—that there will be little or no smoke formed after the fire is fully started. In this way we obtain a more perfect combustion, and are enabled to burn soft coal and obtain the greatest heating effects therefrom.

"Having thus described our invention, what we claim as new and desire to secure by letters patent, is—

"1st. Arranging a perforated firepot with a grate bottom within a circular stove having provision for the admission of air below the point of suspension of said firepot, substantially as described.

"2d. The combination of an annular horizontal register with a suspended firepot which has perforated sides, substantially as described."

The drawings and model exhibited at the hearing show that the firepot referred to in the patent was in the form of a basket, with grated bottom, and grated sides, for the admission of air, not only through the grated bottom, but through the sides. In the drawing the grated portion of the sides extends from the bottom nearly two thirds of the way upwards towards the top; but the specification speaks generally of vertical openings through the sides for the admission of air into the body of coal, without calling attention to or specifying any limitation to the extent of the openings, whether all the way, or only part of the way up the side of the firepot; and, as seen, the principal claim is for arranging a perforated firepot with a grate bottom within a circular stove, having provision for the admission of air below the point of suspension of said firepot.

Now it turns out that, before the issue of the patent sued on, there were already in existence two patents for a firepot of precisely the same description; one an English patent, granted to Robert Russell in July, 1857; and the other an American patent, granted to Zebulon Hunt on the 14th of June, 1864. The English patent shows two separate devices, one of a tapering firepot or basket having grated sides, but without a grate at the bottom. "Another modification consists in constructing the fire basket with perforated sides all around it by means of tubes." The patentee adds that "Solid bars may be used instead of tubes;" and again, "Instead of making the fire dishes to turn on a pivot as previously described, I sometimes hang them by a projection or flange formed upon the upper flange of a fire dish, which flange rests upon a corresponding projection on the inside of the casing." When the latter modification is used the inventor provides for a grated bottom to the fire dish in the following language: "The lower ring (*f*) may be formed in one piece with the bottom of the fire basket, and may be made solid or with apertures. . . . Apertures may be formed in the plate (*j*) to correspond to similar holes in the bottom of the fire basket so as to regulate the admission of air to the fuel."

The Russell stove, therefore, contains all the elements of the first claim of the complainants' patent, the perforated firepot with a grate bottom, suspended by a flange from the body of the stove, projecting into an ash pit or draft chamber, having provision for the admission of air below the point of suspension of the firepot.

It is true that the device of Russell is not placed in a circular, or "cannon" stove, consisting of a single cylinder, as defined in the patent of Rathbone & Hailes, the Russell stove being composed of two cylinders, one of which forms the coal magazine or reservoir. But we fail to see that any inventive power was required to apply the same firepot to a different kind of circular stove. That no invention was required seems to us too plain for argument. The patent of Zebulon Hunt shows a grated firepot of flaring form, suspended within the draft chamber of the stove, and provided with a grated bottom, the firepot suspended in precisely in the same manner as in the patent in suit, and the ash pit is provided with means for the admission of air below the point of suspension of the firepot. Hunt's stove was also a magazine stove.

We have no hesitation in holding that the

supposed invention of Rathbone & Hailes, as described and claimed in their patent, was anticipated by the prior patents referred to.

Probably in anticipation or apprehension of this result, the complainants, after the commencement of this suit, on the 30th of October, 1882, filed in the Patent Office a disclaimer, which they suppose has the effect of narrowing their patent, and of obviating the objection of prior discovery. The substantive part of the disclaimer is as follows, to wit:

"Your petitioners, William Hailes, &c., represent that in the matter of certain improvements in coal stoves, for which letters patent of the United States, No. 51,085, were granted Lewis Rathbone and William Hailes on the 21st day of November, 1865, * * * they have reason to believe that through inadvertence, accident, or mistake, the specification and claims of said letters patent are too broad, including that of which said patentees were not the first inventors.

"Your petitioners, therefore, hereby enter their disclaimer to so much of the first claim as covers perforations or openings in the sides of a suspended firepot extending throughout the entire depth of sides, and limiting such perforations or openings to substantially the lower half of the firepot, the material or substantial part of the thing patented in and by said claim not hereby disclaimed being as follows:

"A firepot suspended from its upper edge with substantially the upper half of its sides made solid, and substantially the lower half of its sides containing perforations or openings."

Viewed as a disclaimer, this instrument naturally excites attention. A disclaimer is usually and properly employed for the surrender of a separate claim in a patent, or some other distinct and separable matter, which can be exscinded without mutilating or changing what is left standing. Perhaps it may be used to limit a claim to a particular class of objects, or even to change the form of a claim which is too broad in its terms; but certainly it cannot be used to change the character of the invention. And if it requires an amended specification or supplemental description to make an altered claim intelligible or relevant, whilst it may possibly present a case for a surrender and reissue, it is clearly not adapted to a disclaimer. A man cannot, by merely filing a paper drawn up by his solicitor, make to himself a new patent, or one for a different invention from that which he has described in his specification. That is what has been attempted in this case. There is no word, or hint, in the patent, that the invention claimed was a firepot with sides grated only half way, or part of the way from the bottom towards the top, or that such partially grated sides have any advantage over those grated all the way to the top. The first claim, as modified by the disclaimer, has nothing in the specification to stand upon, nothing to explain it, nothing to furnish a reason for it.

It is contended that the drawings annexed to the patent may be referred to for the purpose of defining the invention and showing what it really was. But the drawings cannot be used, even on an application for a reissue, much less on a disclaimer, to change the patent and make it embrace a different invention from that described in the specification. This is fully and clearly shown in the recent case of *Parker & Whipple Co.* v. *Yale Clock Co.* 123 U. S. 87 [31:100].

The counsel for the appellants suggests that there is a difference between sections 4917 and 4922 of the Revised Statutes (corresponding respectively to sections 7 and 9 of the Act of 1837,) and that the disclaimer filed in this case satisfies the conditions of the former of these sections. He says: "Evidently there are two sections under which a disclaimer can be made in this country: First, under section 4917, where the claim is too broad; that is to say, in the language of the section, where the patentee 'has claimed more than that of which he was the original and first inventor or discoverer; Second, under section 4922, where a patentee 'has in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer;' and it goes on to state that he 'may maintain a suit at law or in equity for the infringement of any part thereof which was *bona fide* his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right.'"

We think that counsel is mistaken in supposing that these sections have reference to different sets of circumstances as grounds for a disclaimer. They both relate to the same condition of things in that regard, namely, to the case in which a patentee, through inadvertence, accident, or mistake, and without any fraudulent intent, has included and claimed more in his patent than he was entitled to, and where the part which is *bona fide* his own is clearly distinguishable from the part claimed without right. In every such case he is authorized by section 4917 to file a disclaimer of the part to which he is not entitled; and that is the only section which gives him this right. The object of the other section (4922) is to legalize and uphold suits brought on such patents as are mentioned in section 4917, to the extent that the patentees are entitled to claim the inventions therein patented; but no costs are allowed to the plaintiffs in such suits unless the proper disclaimer has been entered at the patent office before the commencement thereof; and no patentee is entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.

We do not see how it is possible to misunderstand the two sections when read together, as it is necessary to read them. One section authorizes a disclaimer to be filed in certain cases; the other enables patentees to maintain suits in those cases, provided a disclaimer is filed without unreasonable delay. They are parts of one law, having one general purpose; and that purpose is to obviate the inconvenience and hardship of the common law, which made a patent wholly void if any part of the invention was wrongfully claimed by the patentee, and which made such a defect in a patent an effectual bar to a suit brought upon it.

There is no such difference in the phraseology of the two sections as to make them apply to different classes of cases. They refer to the

same class, and, being read together, throw mutual light on each other. And viewed in that mutual light, we think it clear that there is no authority for amending a patent by means of a disclaimer in the manner in which the appellants have attempted to amend their patent in the present case.

The decree of the Circuit Court is affirmed.

NORTH PENNSYLVANIA RAILROAD COMPANY, *Plff. in Err.*,

v.

COMMERCIAL NATIONAL BANK OF CHICAGO.

(See S. C. Reporter's ed. 727–739.)

Power to direct verdict—carrier's duty to deliver—direction on way bills—duty of last carrier in connecting lines—endorsement of shipping receipts—exception, effect of.

1. The circuit court has power to direct a verdict for the plaintiff upon the evidence, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury.

2. The duty of a common carrier is not merely to carry safely the goods intrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination; and he incurs the same obligation so far as the delivery of animals, which he carries, is concerned; delivering them to one not entitled to receive them is a breach of duty, for which the carrier is accountable.

3. A direction on the receipts given on shipment and on the way bills, to "Notify J. & W. Blaker," does not qualify the duty of the carrier to deliver the animals to the order of the consignee.

4. The last carrier in connecting lines is bound to deliver the animals at the place of destination, and to the consignee there, or to his order, if he was made known to it on receiving the freight from the preceding connecting company. The custom of a company of delivering cattle without requiring the production of a bill of lading or the authority of the shipper, does not relieve the company from liability for cattle wrongly delivered by it.

5. The indorsement by the shipper to the plaintiff, the Commercial Bank of Chicago, of the receipts, taken on the shipment of the cattle, transferred the title, and gave to the Bank the right to their possession, and, if necessary, to sell them for the payment of the drafts taken by it against the shipment.

6. Under an exception taken by defendant, to the direction of the court upon the evidence to find a verdict for the plaintiff, the defendant may show, either that there was sufficient evidence to go to the jury, or that questions of law apparent upon the record would control the case in opposition to the directions.

[No. 33.]

Argued Nov. 22, 23, 1887. Decided Dec. 19, 1887.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

Statement of the case by *Mr. Justice* **Field:**

This was an action brought by the Commercial National Bank of Chicago against the North Pennsylvania Railroad Company, to recover the value of 404 head of cattle received by it in November, 1877, to transport to Philadelphia, and not delivered there to the plaintiff, the assignee of the shipper, or to its order. The facts out of which it arose are briefly as follows:

In 1877 one Paris Myrick was engaged at Chicago in the business of buying cattle and forwarding them by railway to Philadelphia. On the 7th of November of that year he bought 202 head of cattle, weighing 240,000 pounds, and on the same day delivered them to the Michigan Central Railroad Company at Chicago, to be transported to Philadelphia. That company is one of several railway carriers forming a continuous line from Chicago to Philadelphia. On the delivery of the cattle, Myrick took from the company the following receipt:

"Michigan Central Railroad Company,
Chicago Station, Nov. 7th, 1877.

Received from Paris Myrick in apparent good order. Consigned to order Paris Myrick.

Notify J. & W. Blaker, Philadelphia, Pa.

Articles.	Marked.	Weight or measure.
Two hundred & two (202)	Cattle.	240,000

Advanced charges, $12.00.

Marked and described as above (contents and value otherwise unknown), for transportation by the Michigan Central Railway Company to the warehouse at * * *

Notice.—See rules of transportation on the back hereof.

Use separate receipts for each consignment.

Wm. Grogan, Agent."

On the margin of the receipt was the following notice:

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller; the approximate weight having been ascertained by track scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller.

This receipt cannot be exchanged for a through bill of lading."

On the same day Myrick drew and delivered to the Commercial National Bank of Chicago a draft, of which the following is a copy:

"$12,287.57. Chicago, Nov. 7th, 1877.

Pay to the order of George L. Otis, cashier, twelve thousand two hundred and eighty-seven $\frac{57}{100}$ dollars, value received, and charge the same to account of—

Paris Myrick.

To J. & W. Blaker, Newtown, Bucks Co., Pa."

As security for the payment of the draft, Myrick indorsed the receipt obtained from the railroad company, and delivered it with the draft to the Bank, which thereupon gave him the money.

On the 14th of November, Myrick purchased 202 more head of cattle, weighing 260,000 pounds, and on that day delivered them to the Michigan Central Railroad Company at Chicago, to be transported to Philadelphia, and received from the company a receipt similar to the one taken on the first shipment. On the same day he drew another draft and delivered it to the Commercial National Bank, of which the following is a copy:

"$12,448.12. Chicago, Nov. 14, 1877.

Pay to the order of Geo. L. Otis, cashier, twelve thousand four hundred & forty-eight $\frac{12}{100}$ dollars, value received, and charge same to account of— Paris Myrick.

To J. & W. Blaker, Newtown, Bucks Co., Pa."

For the payment of this draft, Myrick indorsed the receipt obtained from the railroad company, and delivered it with the draft to the Bank, which thereupon gave him the money. The cattle of both shipments were conveyed on the road of the Michigan Central Railroad Company to Detroit, and thence over the roads of other connecting companies to Philadelphia. The last two carriers were the Lehigh Valley Railroad Company and the North Pennsylvania Railroad Company, whose lines extended between Waverly, Tioga County, N. Y., and Philadelphia. The cattle of both shipments were carried over the roads of these companies from Waverly on their joint way-bills. The thirteen covering the first shipment were dated November 10, 1877, and twelve of them were alike except in the number of cattle carried under them. The following is a copy of one of them:

Form 24—L. *Joint Way-Bill.*

Way-bill of merchandise transported by L. V. R. R. and N. P. R. R., from Waverly to Phila'a, Nov. 10th, 1877.

Kind and number of car.	Consignee or owner's name.	Description of articles.	Weight. 1st class.	Weight. 2d class.	Weight. 3d class.	Weight. 4th class.	Weight. Class A.	Rate.	Prepaid.	Freight.	Expenses.	Consignor.
Erie, 30483.....	P. Myrick. Notify J. & W. Blaker.	18 cattle, rec....	20,000	....	....	....	....	15 75	..	31 50	21 86	Buffalo.

R., 10.98; L. V. & N. P., 15.75. Chicago thro', 58c.

In the thirteenth joint way-bill of the first shipment the words "Notify J. & W. Blaker" were omitted.

The joint way-bills covering the second shipment were dated November 17, 1877, but, like the thirteenth joint way-bill of the first shipment, they did not contain the words "Notify J. & W. Blaker" after the name of the consignee or owner. In other respects, except in the number of cattle carried, they were similar to those covering the first shipment.

The cattle of both shipments arrived in Philadelphia—the first on November 11, and the second on November 18—and were immediately delivered by the Pennsylvania Railroad Company to the North Philadelphia Drove Yard Company, which was formed for the business of receiving, taking care of, and delivering live stock to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties. The Blakers were dealers in cattle, and had particular pens in the yard assigned to them. The cattle of both shipments were placed in these pens by the agent of the Railroad Company at the drove-yard station; and he then wrote on the thirteenth joint way-bill of the first shipment, and on all the joint way-bills of the last shipment from Waverly, under the name of the consignee or owner, these words: "Ac. J. & W. Blaker." On the day after they arrived and were placed in these pens, in each case, the Blakers sold the cattle and appropriated the proceeds. The cattle of both shipments were delivered by the Railroad Company to the drove-yard company without any direction to hold the cattle subject to the order of the consignee, who was also the owner and shipper, and the cattle were delivered to the Blakers without such order. It does not appear that any demand was made by the Railroad Company, or by the drove-yard company, for anything to show the right of those parties to receive the cattle.

The bank transmitted the drafts for collection, with the carriers' receipts attached, to its correspondent at Newtown, Pennsylvania. The Blakers were notified of the receipt of the drafts, but failed to accept them, and they were protested for nonacceptance, November 27, 1877. They disposed of the cattle before the arrival of the drafts and carriers' receipts, and soon afterwards failed, and the drafts were not paid.

It appeared in evidence that Myrick had previously made numerous shipments of cattle from Chicago to Philadelphia, and taken similar receipts from the Michigan Central Railroad Company; that these cattle had been received by the North Pennsylvania Railroad Company and delivered by it at Philadelphia to the drove-yard company; that it had been the practice of that Railroad Company to deliver the cattle to the drove-yard company, and of the latter company to deliver them to the Blakers without the production of the carrier's receipt or any bill of lading, or any order of the shipper for their delivery. It also appeared that there was no knowledge on the part of the Commercial Bank at Chicago, or of its correspondent at Newtown, of any such practice; that drafts of Myrick, cashed by that Bank, had accompanied previous shipments of cattle; that such drafts, upon notice to the Blakers of their receipt, had always been promptly paid, and that the bills of lading (the carriers' receipts in question) were not surrendered to the Blakers until such payment.

Upon these facts the Commercial National Bank originally recovered a verdict and judgment against the Michigan Central Railroad Company, the court below holding that the receipts of that company constituted contracts to carry the cattle from Chicago to Philadelphia, and deliver them there to the shipper or to his order; but the judgment was reversed by this court, on the ground that a through contract for their carriage was not established by those receipts, and that the question of whether or not there was such a contract for their carriage should have been submitted to the jury to determine from the circumstances of the case. *Myrick* v. *Michigan Cent. R. R. Co.* 107 U. S. 102 [27:325]. The present action was subse-

quently brought against the North Pennsylvania Railroad Company, the last of the series of railroad carriers in the line from Chicago to Philadelphia, for the nondelivery at Philadelphia of the cattle of both shipments to the order of the shipper, as designated in the receipts given to him at Chicago, and in the way-bills given at Waverly—that is, to his assignee, the plaintiff herein. Upon the evidence in the case, which developed the facts substantially as stated, the court directed a verdict for the plaintiff for the amount of its claim. A verdict was accordingly rendered for $84,271.41, which was the amount of the drafts with interest from their dates. The cattle sold in November, 1877, for a sum greater than the amount of both drafts.

Judgment being entered on the verdict, the case was brought to this court for review.

Messrs. **Wm. Rotch Wister** and **Geo. P. Edmunds,** for plaintiff in error:

The receipts issued to Myrick by the Michigan Central Railroad Company, were not bills of lading at common law, and when they were issued there was no statute in Illinois giving such receipts the effect of bills of lading.

See Stat. of Ill. July 1, 1884, § 96, chap. 114; R. S. Ill. 878; *People's Bank* v. *Gayley*, 92 Pa. 518.

A master of a vessel has no right to issue bills of lading for goods not received.

Brooke v. *New York, L. E. & W. R. R. Co.* 1 Cent. Rep. 123, 108 Pa. 529; *Illinois Cent. R. R. Co.* v. *Frankenberg*, 54 Ill. 88.

The Michigan Central Railroad Company had a right to demand the surrender of its receipts. It had fulfilled its contract.

Myrick v. *Michigan Cent. R. R. Co.* 107 U. S. 102 (27: 325) follows the decisions in *Babcock* v. *Lake Shore & M. S. R. Co.* 49 N. Y. 491; *Illinois Cent. R. R. Co* v. *Mitchell*, 68 Ill. 471; *Illinois Cent. R. R. Co.* v. *Frankenberg*, 54 Ill. 88; *Michigan Cent. R. R. Co.* v. *Mineral Springs Mfg. Co.* 88 U. S. 16 Wall. 318 (21: 297); *Ogdensburg & L. C. R. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 129 (22: 829); *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174 (23: 872); *St. Louis Ins. Co.* v. *St. Louis, V. T. H. & I. R. R. Co.* 104 U. S. 146 (26: 679); Hutchinson, Carriers, §§ 351,244; *Burroughs* v. *Norwich & W. R. R. Co.* 100 Mass. 26; *Ontario Bank* v. *New Jersey S. B. Co.* 59 N. Y. 510.

A bill of lading issued by the initiating company binds only for the route of that company.

Camden & A. R. R. Co. v. *Forsyth*, 61 Pa. 81; *Babcock* v. *Lake Shore & M. S. R. Co. supra; Ætna Ins. Co.* v. *Wheeler*, 49 N. Y. 620; *Myrick* v. *Michigan Cent. R. R. Co. supra.*

Mr. **J. A. Sleeper,** for defendant in error:

The evidence was insufficient to support a verdict for the defendant.

Baylis v. *Travelers Ins. Co.* 113 U. S. 316 (28: 989); *Randall* v. *Baltimore & O. R. R. Co.* 109 U. S. 478 (27: 1003); *Higgins* v. *McCrea*, 116 U. S. 671 (29: 764); *Vicksburg & M. R. R. Co.* v. *Putnam*, 118 U. S. 545 (30: 257).

A verdict for the defendant, if such a verdict had been returned, must have been set aside for want of evidence to support it.

Alderman v. *Eastern R. R. Co.* 115 Mass. 233.

The way-bills furnished evidence that the cattle belonged to *Myrick.*

Newcomb v. *Boston & L. R. R. Co.* 115 Mass. 230; *Fifth Nat. Bank* v. *Bayley*, 115 Mass. 228; *Stollenwerck* v. *Thacher*, 115 Mass. 224; *First Nat. Bank* v. *Dearborn*, 115 Mass. 219; *Libby* v. *Ingalls*, 124 Mass. 503.

The delivery to C. H. Lowell & Co., without authority, was a conversion.

Hathaway v. *Haynes*, 124 Mass. 311; *Forbes* v. *Fitchburg R. R. Co.* 133 Mass. 154.

The transfer of the draft and bill of lading passed the title.

Wright v. *Northern Cent. R. Co.* 8 Phila. Rep. 19; *Hieskell* v. *Farmers & M. Nat. Bank*, 89 Pa. 155; *Tiedeman* v. *Knox*, 58 Md. 612; *Shaw* v. *Little Ro... & F. S. R. R. Co.* 100 U. S. 605 (25: 757); *Dows* v. *National Exchange Bank*, 91 U. S. 618 (23: 214); *St. Louis & I. M. R. R. Co.* v. *Larned*, 108 Ill. 293; *Holmes* v. *Bailey*, 92 Pa. 57; *Bank of Commerce* v. *Bissell*, 72 N. Y. 615; *Farmers & M. Nat. Bank* v. *Logan*, 74 N. Y. 568; *Farmers & M. Nat. Bank* v. *Atkinson*, 74 N. Y. 587; *City Bank* v. *Rome, W. & O. R. R. Co.* 44 N. Y. 136; *Cayuga County Nat. Bank* v. *Daniels*, 47 N. Y. 631; *Marine Bank* v. *Wright*, 48 N. Y. 1; *Dows* v. *Greene*, 24 N. Y. 638; *Bank of Rochester* v. *Jones*, 4 N. Y. 497.

Mr. **Wayne MacVeagh,** also for defendant in error:

One who has discounted a draft drawn against a bill of lading and holds the bill of lading is entitled to the goods.

Jones, Pledges, § 273; *The Thames*, 81 U. S. 14 Wall. 98 (20: 804); *Gibson* v. *Stevens*, 49 U. S. 8 How. 384 (12: 1123).

A carrier delivering the goods to other than the holder of the bill of lading is defenseless.

Dows v. *National Exchange Bank*, 91 U. S. 718 (23: 214); *Farmers & M. Nat. Bank* v. *Logan*, 74 N. Y. 568; 2 Benj. Sales, 480; Hutchinson, Carriers, § 130 *et seq.*

The carrier is bound to hold the property until the bill of lading is presented.

First Nat Bank v. *Shaw*, 61 N. Y. 283; *City Bank* v. *Rome, W. & O. R. R. Co.* 44 N. Y. 136; *McEntee* v. *New Jersey S. B. Co.* 45 N. Y. 34; *Alderman* v. *Eastern R. R. Co.* 115 Mass. 233; *Libby* v. *Ingalls*, 124 Mass. 503; *Bank of Commerce* v. *Bissell*, 72 N. Y. 615; *Wright* v. *Northern Cent. R. R. Co.* 8 Phila. Rep. 19; *First Nat. Bank* v. *Northern R. R. Co.* 58 N. H. 203.

A carrier's receipt gives title in the goods.

Bank of Rochester v. *Jones*, 4 N. Y. 497; *First Nat. Bank* v. *Crocker*, 111 Mass. 169; *Newcomb* v. *Boston & L. R. R. Co.* 115 Mass. 230.

Parol evidence of a custom varying the bill of lading or carrier's receipt is incompetent.

Oelricks v. *Ford*, 64 U. S. 23 How. 49 (16: 534); *Orient Mut. Ins. Co.* v. *Wright*, 68 U. S. 1 Wall. 456 (17; 505); *Joslyn* v. *Grand Trunk R. Co.* 51 Vt. 92; *Farmers & M. Nat. Bank* v. *Erie R. Co.* 72 N. Y. 188; *Pittsburg, C. & St. L. R. R. Co.* v. *Barrett*, 36 Ohio St. 448.

It is no ground of reversal that the court below omitted to give directions to the jury upon points of law not requested.

Pennock v. *Dialogue*, 27 U. S. 2 Pet. 1 (7: 327); *Storm* v. *U. S.* 94 U. S. 76 (24: 42).

An objection not taken in the court below cannot be taken for the first time in this court.

Wilson v. *McNamee*, 102 U. S. 572 (26: 234); *Springer* v. *U. S.* Id. 586 (26: 253); *Belk* v.

Meagher, 104 U. S. 279 (26: 735); *Clark* v. *Fredericks*, 105 U. S. 4 (26: 938).

Mr. Justice **Field** delivered the opinion of the court:

There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way. *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241 [28: 966, 971].

Upon the evidence presented, and there was no conflict in it, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods entrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods. The undertaking of the carrier to transport goods necessarily includes the duty of delivering them. A railroad company, it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or of live stock, is more strictly enforced. *Forbes* v. *Boston & L. R. R. Co.* 133 Mass. 154; *McEntee* v. *New Jersey S. B. Co.* 45 N. Y. 34.

If the consignee is absent from the place of destination, or cannot, after reasonable inquiries, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store, with a responsible person, to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them. *Fisk* v. *Newton*, 1 Denio, 45. If the freight consist, as in this case, of live stock, the carrier will not, under the circumstances mentioned (that is, when the consignee is absent or cannot after reasonable inquiries be found, and no one appears to represent him) relieve himself from responsibility by turning the animals loose. He must place them in some suitable quarters where they can be properly fed and sheltered, under the charge of a competent person as his agent, or for account and at the expense of the owner. Turning them loose without a keeper or delivering them to one not entitled to receive them would equally constitute a breach of duty for which he could be held accountable. These principles are firmly established by the adjudged cases, and rest upon obvious grounds of justice. Angell, Carriers, § 291.

The Railroad Company, defendant below, should therefore have given necessary instructions to the drove-yard company, which was its agent for the custody and care of the cattle, respecting their delivery—that it should be made only upon the order of the consignee, who was also the owner and shipper. The joint way-bills given by the two companies at Waverly, equally with the original receipts given at Chicago, disclosed his name. Those joint way-bills were for the guidance of, and were used by, the conductors of both companies.

In the case of *The Thames*, 81 U. S. 14 Wall. 98 [20:804], it appeared that the purchaser of cotton at Savannah delivered it there to a vessel to be carried to New York, taking bills of lading, in which it was stated that the cotton was shipped by one Gilbert Van Pelt, and was to be delivered "unto order or to his or their assigns." Van Pelt was a member of a firm in New York, for which he purchased the cotton. Against the shipment he drew a draft on his firm, payable fifteen days after sight, and delivered it, with the bills of lading, to parties who obtained a discount of a draft from a bank in Atlanta. The draft and bills were at once forwarded to New York to an agent of the bank, to procure their acceptance by the firm. Before the draft became due the vessel arrived at New York and gave notice to the firm of the arrival of the cotton. That vessel had previously brought cotton in the same way for the firm, and the master of the vessel, knowing that the cotton was intended for the firm, and having no information from the bank's agent, or from any other source, of any other consignee or claimant, delivered to it the cotton, taking its receipt. When the draft became due, two weeks afterwards, and was not paid, the cotton was demanded of the owner of the vessel by the bank's agent. In the action which followed it was contended by the owner that the delivery was justified, and that the vessel had discharged its obligation; but this court held that, though the delivery had been made in ignorance of any outstanding claim to the cotton, it was, nevertheless, a breach of the contract of affreightment, and that the agent of the bank could libel the vessel, which was bound for the proper delivery of the property, for the loss sustained. And the court said: "By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given.

Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when the consignee is unknown, or is absent, or cannot be found after diligent search. And if, after inquiry, the consignee or the indorsee of the bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from the carrier's responsibility. He has no right under any circumstances to deliver to a stranger."

The direction on the receipts given at Chicago, and on the way-bills of the first shipment from Waverly, to "notify J. & W. Blaker," in no respect qualified the duty of the carrier to deliver the animals to the order of the consignee. If they were consignees, the direction to notify them would be entirely unnecessary, because the duty of the carrier is to notify the consignee on the arrival of goods at their place of destination. In the case of *Furman* v. *Union Pacific R. Co.*, recently decided by the Court of Appeals of New York, 9 Cent. Rep. 284 [106 N. Y. 579], it was held that placing in a bill of lading a direction to notify certain persons is a plain indication, in the absence of further directions, that they are not the consignees. The earlier case of *Bank of Commerce* v. *Bissell*, 72 N. Y. 615, is also in point on this subject. There the action was against the defendants as common carriers upon a bill of lading of a boat-load of wheat shipped at Buffalo for transportation to New York on account and order of the plaintiff. The bill of lading contained this direction: "Notify E. S. Brown, New York," and was given to the bank as security for a draft drawn by the shippers on Brown. With the draft annexed it was forwarded to New York, with an indorsement by the cashier of the bank that the wheat was subject to payment of the draft, and was to be delivered only on such payment. On the arrival of the wheat in New York it was delivered to Brown, and he became insolvent before the draft fell due. It was held that the defendants were not warranted by the bill of lading in delivering the wheat to Brown, and that the discount of the draft and its acceptance did not justify the delivery. It was also held that the fact that the plaintiff did not indorse over the bill of lading to anyone in New York authorizing him to receive the wheat, did not relieve the defendants from the duty of holding it as plaintiff's property or subject to its lien; that they could have given notice to Brown, "and if neither he nor anyone else came with authority to take delivery, they could and it was their duty to have put the wheat in store."

It follows from these views that the defendant, the North Pennsylvania Railroad Company, in allowing the cattle to go into the possession of the Blakers, through its agent, the drove-yard company, without the order of the consignee, who, as stated above, was also the owner and shipper, became responsible for their value to the Commercial National Bank, which held his orders indorsed on the receipts for the shipments. It is true that the original receipts only bound the Michigan Central Railroad Company to carry safely the animals on its own road and deliver them safely to the next connecting line to carry on the route beyond. *Myrick* v. *Michigan Cent. R. R. Co.* 107 U. S. 102 [27:325]. But the last carrier in the connecting lines was bound to deliver the animals at the place of destination, and to the consignee there, or to his order, if they were made known to it on receiving the freight from the preceding connecting company. In this case there is no question that the company had such knowledge when the cattle were received. The destination and the name of the consignee appear upon the way-bills given at Waverly. There were only two places at which the cattle were, on their way from Chicago, reshipped, that is, taken from the cars, and, after a short interval of rest, replaced. Waverly was one of these places, and when they were reshipped there these way-bills, with a designation of the destination and consignee of the cattle, were made out.

The indorsement by Myrick to the plaintiff, the Commercial Bank of Chicago, of the receipts, taken on the shipment of the cattle, transferred their title, and gave the Bank the right to their possession, and, if necessary, to sell them for the payment of the drafts. The fact that the Railroad Company at Philadelphia had been in the habit of delivering cattle, transported by it, to the Blakers through the drove-yard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieved the company from liability for the cattle in this case. It was not shown that the shipper or the bank which took the draft against the shipment, or its correspondent at Newtown in Pennsylvania, had any knowledge of the practice; and, therefore, if any force can be given to such a practice in any case, it cannot be given in this case where the party sought to be affected had no knowledge of its existence. In *Bank of Commerce* v. *Bissell*, cited above, the defendants offered to prove a custom in New York to deliver property under bills of lading to the person who was to have notice of its arrival. The evidence was rejected and the Court of Appeals held that there was no error in its rejection, stating that if the custom were established it could not subvert a positive, unambiguous contract.

Numerous other assignments of error are presented for which a reversal of the judgment is asked, but the propositions of law embodied in them were not urged in the court below; and, therefore, the fact that the court did not rule upon them constitutes no ground for interference with the judgment. The one exception taken was to the direction of the court upon the evidence to find a verdict for the plaintiff for the amount claimed. To that direction the defendant excepted, and it is at liberty to show, either that there was sufficient evidence to go to the jury, or that the questions of law apparent upon the record would control the case in opposition to the direction. But this it has not done. As before stated, there was no conflict in the evidence, and the law upon it was clearly with the plaintiff.

The judgment is therefore affirmed.

GEORGE W. RADFORD, Assignee, etc., ET AL., *Appts.*,
v.
AGNES FOLSOM, Admrx., ET AL.

(See S. C. Reporter's ed. 725–727.)

Date of appeal—appeal bond—appearance, effect of.

1. An appeal takes date from its allowance in open court, and, to be kept in force, it should be docketed here before the end of the term to which it was made returnable.
2. The subsequent acceptance of an appeal bond, to perfect the appeal, by the district judge, cannot be considered as the allowance of a new appeal at that date, where that was after the term at which the decree was rendered, and no citation was ever issued or served.
3. The appearance of counsel for appellee at the present term, on the making of this motion, is not a waiver of the citation.

[No. 768].

Submitted Dec. 8, 1887. Decided Dec. 19, 1887.

APPEAL from the Circuit Court of the United States for the Southern District of Iowa.

On motion to dismiss. *Granted.*

The facts are stated in the opinion.

Messrs. **H. H. Trimble, Joseph G. Anderson** and **Frank Hagerman,** for the motion:

Where an appeal is taken to this court, the transcript of the record must be filed and the case docketed at the term next succeeding the appeal.

Edmonson v. *Bloomshire,* 74 U. S. 7 Wall. 306, 309, 310 (19: 91, 92); *Hamilton* v. *Moore,* 3 U. S. 3 Dall. 371, 377 (1: 642,643); *Blair* v. *Miller,* 4 U. S. 4 Dall. 21 (1:724); *Villabolos* v. *U. S.* 47 U. S. 6 How. 81, 90, (12:352,356); *Steamer Virginia* v. *West,* 60 U. S. 19 How. 182, 183 (15:594,595); *Mesa* v. *U. S.* 67 U. S. 2 Black, 721, 722 (17:350); *Castro* v. *U. S.* 70 U. S. 3 Wall. 46, 49, 50 (18:163,164); *Mussina* v. *Cavazos,* 73 U. S. 6 Wall. 355, 358 (18:810,811); *The Lucy,* 75 U.S. 8 Wall. 307, 309, 310 (19:394,395): *The S. S. Osborne,* 105 U. S. 447, 451 (26:1065, 1066); *Hilton* v. *Dickinson,* 108 U. S. 165, 168 (27:688,689); *The Tornado,* 108 U. S. 342 (27:747); *State* v. *Demarest,* 110 U. S. 400, 401 (28:191); *Killian* v. *Clark,* 111 U. S. 784 (28:599); *Caillot* v. *Deetken,* 113 U. S. 215, 216 (28:983).

Messrs. **W. F. Sapp** and **Walter H. Smith,** *contra*:

The decree of April 2, 1884, was not final.

Bostwick v. *Brinkerhoff,* 106 U. S. 3 (27:73); *Grant* v. *Phœnix Ins. Co.* Id. 429 (27:237); *Parsons* v. *Robinson,* 122 U. S. 112 (30: 1122).

Messrs. **H. H. Trimble** and **Joseph G. Anderson,** in reply:

The decree of April 2, 1884, was final.

Curt. Pr. 74, 77, 78; *Forgay* v. *Conrad,* 47 U. S. 6 How. 201, 203, 204 (12:404,405); *Thompson* v. *Dean,* 74 U. S. 7 Wall. 342, 345, 346 (19:94, 95); *Stovall* v. *Banks,* 77 U. S. 10 Wall. 583, 586 (19:1036, 1037).

The appeal is taken when it is allowed by the court, and the transcript must be filed at the next term of this court, or it is too late.

Edmonson v. *Bloomshire, supra.*

The order made, allowing the giving of bond, and the actual giving of bond in pursuance thereof, did not constitute a new appeal. *Peugh* v. *Davis,* 110 U. S., 227, 228 (28:127, 128).

Neither a bond or citation was essential to the appeal.

Dodge v. *Knowles,* 114 U. S. 430, 438 (29:144, 297); *Chicago & P. R. R. Co.* v. *Blair,* 100 U. S. 662 (25:587).

The Judge of the Circuit Court had no power to take security to operate as a *supersedeas* after sixty days, although a justice of this court would have had such power; but even that would only be in case the appeal was taken or perfected within sixty days.

R. S. U. S. § 1007; See *Kitchen* v. *Randolph,* 93 U. S. 86 (23:810); *Sage* v. *Central R. R. Co.* Id. 412, 416, 417 (23:933,935).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought to foreclose a mortgage given to secure several alleged debts. On the second of April, 1884, the bill was dismissed on its merits as to the principal one of the debts and some others; but as to the rest, and as to matters contained in a cross bill of the defendants, the cause was referred to a master to find certain facts and state certain accounts. The complainant on the same day prayed an appeal to this court, which was allowed, but never docketed here.

On the 10th of October, 1885, the court, after overruling certain exceptions to the master's report, entered a second and last decree, which was against the complainant, for $14,084.77. At the end of that decree was the following:

"And the complainant prays an appeal from the foregoing decree, which appeal is by the court hereby allowed, and the penalty of the appeal bond, if the same is to operate as a *supersedeas,* is fixed at dollars, but if the same is not to operate as a *superedeas,* then the penalty of the appeal bond is fixed at dollars."

The next term of this court thereafter began October 12, 1885, and the appeal was not docketed here during that term.

On the 8th of February, 1886, there was filed in the office of the clerk of the circuit court, an order made by the district judge at his chambers, and after the term at which the decree was rendered, fixing the amount of the appeal bond at $20,000 if for *supersedeas,* and at $2,000 if for costs only. On the 8th of March the complainant filed a motion to modify the amount of the appeal bond. On the 8th of June, while this motion was pending, the complainant filed with the clerk of the circuit court an appeal bond dated March 1, 1886, in the penal sum of $25,000, which had been approved by the district judge as a *supersedeas* bond. On the second of October the motion to modify the amount of the appeal bond was overruled by the court, "On the ground that the case was then in the Supreme Court of the United States." The case was docketed in this court October 15, 1886. It does not appear that any citation has ever been signed or served.

This motion was made on the 8th of December, 1887, during the present term, to dismiss the case, "because each of said appeals became null and void when the return term of this court passed without a transcript of the record being filed in this court and being docketed herein."

The first appeal taken in open court on the second of April, 1884, became inoperative by reason of the failure to docket the same in this court before the end of October Term, 1884. Whether the decree from which that appeal was taken was a final decree, or interlocutory only, it is unnecessary now to consider. The appeal allowed in open court October 10, 1885, also became inoperative as it was not docketed here before the end of October Term, 1885, and this too whether the bond approved by the district judge after the term was accepted to perfect that appeal or not. If an appeal at all, it was of the date of its allowance in open court, and to be kept in force it should have reached here before the end of the term to which it was made returnable. *Grigsby* v. *Purcell*, 99 U. S. 505 [25:354] and cases there cited.

The acceptance of the bond by the district judge cannot be considered as the allowance of a new appeal at that date, because that was after the term at which the decree was rendered, and no citation was ever issued or served. *Hewitt* v. *Filbert*, 116 U. S. 142 [29:581]. The appearance of counsel for appellee at the present term on the making of this motion is not a waiver of the citation. It would have been different if there had been a general appearance at the last term, that being the term to which the appeal, if it had been properly taken, would have been returnable. *U. S.* v. *Armejo*, decided April 8, 1866, and reported in Book 18, U. S. L. ed. 247.*

The motion to dismiss is granted.

JANE S. ROBISON, Individually, and as EXTX. of ROBERT I. ROBISON, Deceased, *Appt.*

v.

The FEMALE ORPHAN ASYLUM OF PORTLAND, ET AL.

(See S. C. Reporter's ed. 702-710.)

Limitation of property by will—construction of—effect of death.

1. If property be limited, upon the death of one person, to another, by will, and the first donee happened to predecease the testator, the gift over will take effect notwithstanding the failure, by lapse, of the prior gift. And this applies whether the gift over of the legacy or share is to take effect on the death of the prior legatee generally or on the death under particular circumstances, and whether the legacy be immediate or in remainder.

2. Where a will, in its third clause, gave the testator's wife the income of all his estate, and in the fourth clause provided that if his sisters Ann Smith, and Eleonora Robison be living at the death of himself and his wife, they or the one that should then be living shall have the income of all his estate as long as they live, and at their death to be divided in three parts, one third part of the income to go to the Portland Female Orphan Asylum, one third of the income to the Widows' Wood Society, and one third of the income to the Home for Aged Women—*held*, that the limitations in the two subdivisions of the will are to be taken with each other as a complete disposition of the estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleonora Robison, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the Orphan Asylum, the Widows' Wood Society and the Home for Aged Women.

3. *Held, further*, that Ann Smith and Eleonora Robison having both died before the testator, such deaths did not cause the bequests to the three charitable institutions, above named, never to take effect, nor give the wife the estate absolutely.

[No. 103.]

Argued Dec. 7, 1887. Decided Dec. 19, 1887.

APPEAL from the Circuit Court of the United States for the District of Maine. *Affirmed.*

The facts are stated in the opinion.

Messrs. Elihu Root and **Samuel B. Clarke,** for appellant:

No interest in the testator's property has been acquired by the respondents.

Cattley v. *Vincent*, 15 Beav. 198; *Doe* v. *Watson*, 49 U. S. 8 How. 263, (12:1072); *Carpenter* v. *Heard*, 14 Pick. 457.

The condition of the fourth paragraph of the will having become impossible of fulfillment by the death of both of the testator's sisters before the will took effect, his whole estate is vested absolutely in the appellant individually.

Theobald, Wills, 243; 2 Roper, Legacies, 1480; *Adamson* v. *Armitage*, 19 Ves. Jr. 418; *Earl* v. *Grim*, 1 Johns. Ch. 498, 499; *Boyle* v. *Parker*, 3 Md. Ch. 42; *Collier* v. *Grimesey*, 36 Ohio St. 21-22; *Andrews* v. *Boyd*, 5 Me. 199; *Earl* v. *Rowe*, 35 Me. 414; *Sampson* v. *Randall*, 72 Me. 112; *Mannox* v. *Greener*, L. R. 14 Eq., 456, 462; *Gulick* v. *Gulick*, 25 N. J. Eq. 324, 327-30; *S. C.* 27 N. J. Eq. 498; *Patterson* v. *Ellis*, 11 Wend. 298; *Watkins* v. *Weston*, 32 Beav. 238; *Jenings* v. *Baily*, 17 Beav. 118; *Harrison* v. *Foreman*, 5 Ves. Jr. 207; *Howard* v. *Carusi*, 109 U. S. 725 (27:1089).

If the court is not satisfied that the appellant takes more than a life interest in the property, the conclusion must be that there is a partial intestacy.

2 Roper, Legacies, 1471; Fearne, Cont. Rem. 589.

Mr. **John Rand,** for respondents:

The words *if*, and *at their death*, do not make a contingency, but merely indicate when an estate shall take effect in possession.

1 Jarm. Wills, 807, note 2 and cases cited.

The recent cases go very strongly against allowing the lapse of a legacy.

2 Redf. Wills, 2d ed. chap. 1, §§ 8, 7, 23 and cases cited. *Prescott* v. *Prescott*, 7 Met. 141.

The only contingency to be found in the will affects but the interest of the sisters.

1 Jarm. Wills, 5th ed. 830.

Mr. Justice **Matthews** delivered the opinion of the court:

Robert I. Robison, formerly of Portland, in the State of Maine, died on the 18th day of June, 1878, at that time a citizen of the State of New York and resident of Brooklyn, leaving a last will and testament, which was subsequently admitted to probate in the Surrogate's Court of Kings County, New York, and duly recorded on December 27, 1878. Letters testamentary thereon were on the same day issued and granted to Jane S. Robison, his widow, who alone qualified as executrix. The testator at the time of his death was seised of real estate in the City of Portland, and also possessed of a considerable amount of personal property.

*Not elsewhere reported.

The following is a copy of the will:

"I, Robert I. Robison, of Portland, in the State of Maine, being in a sound disposing mind and memory, do make and publish this my last will and testament. And, first, my will is that my executors see that my body be buried in a decent and proper manner in the family vault in the Eastern Cemetery in the City of Portland aforesaid. Secondly, I will all my just debts be paid in full; and from the balance I will that with whatever property may be standing in my wife's, Jane S. Robison's, name, at the time of my death, that my executors make up said amount to the sum of eight thousand and five hundred dollars, it being the amount, or thereabouts, which she received from her father and mother's estate, it being my will that the principal shall be kept good to her and her heirs, but not the interest. This is to be in full for all claims she may have on my estate arising out of the use of her property. Thirdly, I further will that she may have the income of all my estate, she having the right to spend the same, but not to have it accumulate for her heirs. Fourthly, it is my will that if my sister, Ann Smith, wife of Jacob Smith, of Bath, in the State of Maine, and Eleonora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one third part of the income to go to the Portland Female Orphan Asylum, one third of the income to the Widows' Wood Society, and one third of the income to the Home for Aged Indigent Women, all of the City of Portland and State of Maine. Lastly, I do nominate and appoint my wife, Jane S. Robison, and John Rand, Esq., to be my executors of this my last will and testament.

In testimony whereof I have hereunto subscribed my name and affixed my seal this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two.

"(S'd) Robert I. Robison. [L. S.]

Signed, sealed, and declared by the said Robert Ilsley Robison to be his last will and testament in the presence of us, who, at his request and in his presence, have subscribed our names as witnesses hereto.

Chas H. Adams,
B. F. Harris,
Jason Berry."

On December 29, 1881, the present bill in equity was filed by Jane S. Robison, as widow and executrix, for the purpose of obtaining a construction of the will, the defendants being charitable institutions named therein, and the only other parties in interest, Ann Smith and Eleonora Cummings Robison, the persons mentioned in the fourth item of the will, having both died before the testator.

It was contended on the part of the complainant that, in consequence of the lapse of the devise and legacy to Ann Smith and Eleonora Cummings Robison, the bequest to the defendants never took effect, and that consequently the complainant was entitled to the estate absolutely, by virtue of the devise to her—or, in the alternative, because the testator had died intestate as to that part of the estate mentioned in the fourth subdivision of the will. The decree of the circuit court, however, was: "That the complainant is entitled only to the income of the estate during her natural life, and that the fourth subdivision of the last will and testament of the testator is operative and valid, and was so at the time the will took effect, and that the defendant Corporations acquired by virtue thereof the right, from and after the death of the complainant, to the perpetual income of the said estate." To review that decree the present appeal has been brought.

It is now contended in argument on the part of the appellant: 1, that the language of the third subdivision of the will, considered by itself, is sufficient to give to her the real estate in fee and the personal estate absolutely; 2, that the bequest in the fourth subdivision of the will to Ann Smith and Eleonora Cummings Robison is contingent on one of them surviving both the testator and the complainant; and, as the event happened, never became vested, 3, that the bequest to the defendants is dependent upon the vesting of the bequest to Ann Smith and Eleonora Cummings Robison, being affected by the same contingency, namely; one of them surviving the testator and the complainant; and 4, that if the interest of the complainant under the third subdivision of the will must be limited to a life estate, as the bequests contained in the fourth subdivision have lapsed, or cannot take effect, the testator died intestate in respect to that portion of his estate.

In support of the proposition that the bequest to the defendants must fall with that to Ann Smith and Eleonora Cummings Robison, counsel for the appellant rely upon the rule laid down by Mr. Jarman in the following language: "When a contingent particular estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only or extends to the whole series. The rule in these cases seems to be that if the ulterior limitations be immediately consecutive on the particular estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them." 1 Jarm. Wills, 5th Am. ed. by Bigelow, *831.

But the rule referred to is one of construction, merely, and intended only as a formula for the purpose of classifying cases in which the meaning is gathered from the language of the testator expressing such intention, and is not to be applied to instances in which it appears that the contingency is restricted to the immediate estate. The same author divides those instances into two other classes: "First. Where the words of contingency are referable to and evidently spring from an intention which the

testator has expressed in regard to that estate by way of distinction from the others. Secondly. The contingency is restricted to the particular estate with which it stands associated where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts." *Id.* 831, 832.

Under the second of these classes is ranged the case of *Boosey* v *Gardener*, 5 De Gex, M. & G. 122. In that case the testator bequeathed to his two sisters the interest of his long annuities for their lives; and in case of one or both of their deaths before his he gave the whole interest in long annuities to his brother for life; at his death (that is, the death of the brother) the testator gave half of the capital to his niece A., his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; likewise, the testator bequeathed to his nephew S., his brother's son, if not further family, his other half, in case of further family, to be divided between them, not dividing the half left to A. It was held by Turner, *L. J.*, that the bequest to the niece and nephew was not contingent upon the death of the sisters in the testator's lifetime, although the preceding estate for life to the brother was.

But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention.

In applying this principle, the Supreme Judicial Court of Massachusetts, in the case of *Metcalf* v. *Framingham Parish*, 128 Mass. 370, 374, speaking by Gray, *C. J.*, said: "The decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture; but if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mold the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Ferson* v. *Dodge*, 23 Pick. 287; *Towns* v. *Wentworth*, 11 Moore P. C. 526; *Abbott* v. *Middleton*, 7 H. L. Cas. 68; *Greenwood* v. *Greenwood* L. R. 5 Ch. Div. 954."

Looking into the present will, therefore, for that purpose, we find it evident that the testator did not intend by the third subdivision of his will to give to his widow an interest in his estate beyond her life. This conclusion is not based on any distinction between a bequest of the income of the estate and a bequest of the body of the estate itself; nor do we lay any stress on the declaration in that clause, "she having the right to spend the same, but not to have it accumulate for her heirs," although that language does afford an indication in support of the conclusion. But whatever force, standing by itself, the third subdivision might have, it is clear that the testator intended, in the event that his sister Ann Smith and Eleonora Cummings Robison should survive both himself and his wife, that they should have an estate for life, beginning at the death of his widow. That would necessarily limit the widow's estate to her own life. But as the estate given by the fourth clause to Ann Smith and Eleonora Cummings Robison for their lives was contingent on the event that one or the other of them should be living at the death of the wife, the question remains whether that contingency also entered into the bequest in remainder to the defendants. The fact that Ann Smith and Eleonora Cummings Robison died before the testator, whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift over of the legacy or share is to take effect on the death of the prior legatee generally or on the death under particular circumstances, and whether the legacy be immediate or in remainder. It was so held in *Willing* v. *Baine*, 3 P. Wms. 113, where the bequest was to A, but if he died under twenty-one, to B.

In *Humberstone* v. *Stanton*, 1 Ves. & Bea. 388, it was said: "It seems formerly to have been a question whether a bequest over, in case of the death of the legatee before a certain period, could take effect where he died during the testator's life, though before the period specified. In the case of *Willing* v. *Baine* legacies were given to children, payable at their respective ages of twenty-one; and if any of them died before that age, the legacy given to the person so dying to go to the survivors; one having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors." The argument was that the bequest over could not take place, as "There can be no legacy unless the legatee survives the testator, the will not speaking until then; wherefore, this must only be intended where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one. It was, however, held, and is now settled, that in such a case the bequest over takes place."

It follows, therefore, that unless it appear on the face of the will that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which, by reason of the contingency, has failed.

The scheme and intention, therefore, of the present will seems to us, considering the third and fourth subdivisions together, to be this: an estate for life to the testator's widow; an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent on one of them surviving the widow, with the ultimate remainder in fee as to the real estate, and absolutely as to the personalty, in the defendants. The language of the contingency in the fourth clause, in our opinion, affects only the intermediate life estate of Ann Smith and Eleonora

Cummings Robison, it being, we think, the plain intention of the testator to give to his widow the estate in question only for her life, and not to die intestate as to any portion of the estate, and to limit the contingency only to the gift to Ann Smith and Eleonora Cummings Robison. It is true that the ultimate gift to the defendants is described as commencing "at their death," that is, at the death of Ann Smith and Eleonora Cummings Robison; but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended. Certainly those words are not to be construed so as to require that the gift to the defendants shall take effect at the death of Ann Smith and Eleonora Cummings Robison, irrespectively of the prior decease of the widow. The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants.

The decree of the Circuit Court is, accordingly, affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

RICHARD MARES.

(See S. C. Reporter's ed. 710-721.)

Injury to employee, liability for—question for jury—error in charge—preponderance of evidence—waiver of exception.

1. In an action against a railway company, by an employee, to recover damages for a personal injury occurring through the negligence of an engineer, *held*, that the evidence introduced that the engineer had, by his conduct, frequently shown his negligence, recklessness and unfitness for the place, and that, notwithstanding complaints made respecting him, he was retained by defendant, except during short intervals when he had been discharged two or three times for misconduct, together with the other evidence in the case, made a case for the plaintiff, unless overthrown by a successful defense.

2. *Held*, further, that the court was right in refusing to give peremptory instructions that if plaintiff knew, before his injury, of the unfitness of the engineer, it was plaintiff's duty to refuse to work with him any longer, and that his failure to do so would prevent his recovery. It was for the jury to say, from all the attending circumstances, whether the plaintiff's failure to do so was, in fact, contributory negligence.

3. It was not error for the court to charge the jury that the plaintiff had a right to suppose and assume that the Railroad Company had used proper diligence and care in the employment and retention of an engineer.

4. It was not error for the court to charge that the defendant, having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by preponderance of evidence to warrant the jury in finding it.

5. Where, upon the conclusion of plaintiff's case, counsel for defendant moved for a nonsuit, which the court denied and an exception was taken and defendant's counsel offered evidence in support of the defense, he thereby waived the exception.

[No. 102.]

Argued Dec. 7, 1887. *Decided Dec. 19, 1887.*

IN ERROR to the Supreme Court of the Territory of Dakota. *Affirmed.*

Statement of the case by *Mr. Justice* **Matthews:**

This is an action at law brought by the defendant in error against the Northern Pacific Railroad Company, in the District Court of the Third Judicial District of the Territory of Dakota, to recover damages for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant, by reason of its alleged negligence.

The complaint alleges that on October 31, 1881, the plaintiff was in the employ of the defendant as a brakeman, on duty as such in the yard at the City of Fargo, used for the purpose of switching cars to make up trains, in which service a switch engine was used; that at the time of the injury the engineer of the switch engine was one Bassett, who, it is alleged, was a man of hasty and excitable disposition and ungoverned, violent, and hasty temper, "And was and had for a long time been, while in the employ of this defendant as engineer, accustomed to become unduly and dangerously excited and angry, and while under the influence of anger or excitement, and while in the performance of his duty as engineer, was and had been accustomed to act and conduct himself as engineer in a most reckless manner, causing great danger and peril to his fellow servants, and especially to the brakemen on the train or cars attached to or moved by the engine on which he was engineer;" and that in consequence thereof "The said engineer was, at the time of the injury hereinafter referred to, and for a long time prior thereto had been, negligent, unskillful, unfit, and incompetent to act as engineer of said switch engine, or of any engine or locomotive; of which facts the defendant had notice and knowledge, and by the use of ordinary diligence defendant would have discovered and learned that he was a negligent and an unfit, unskillful and unsafe engineer. And this plaintiff had not notice or knowledge, prior to the injury to him hereinafter referred to, that the said engineer was for any reason or on any account an unfit or unsafe person to act as engineer."

It is further alleged that at the time of the injury the plaintiff "was required, in the performance of his duties as switch brakeman, to set or fasten or to loosen the brakes of the cars which were being switched or moved in the said yard, and he was at the time and place aforesaid required to perform the said duty on the cars of the defendant, which were being switched and moved by the engine in which the said Bassett was engineer, and in the moving of cars it was his duty as brakeman to give signals to the said engineer, and of the said engineer to obey such signals; that, at the time and place aforesaid, and while this plaintiff, in the performance of his duties as brakeman as aforesaid, was upon the top of the freight car (part of a train) being removed in the said yard by the engine in which the said Bassett was engineer, and while the said Bassett had control of and was managing said engine, this plaintiff, as it was his duty to do, gave the said engineer a signal to move and 'back' the cars attached to the said switch engine the length of

a certain number of cars indicated by the signal. And the plaintiff, as he was in duty required to be, was standing on the top of the rear car so being moved backward; and before said cars had been moved backward the distance which they were intended to be removed, and the distance which the signal, given by this plaintiff, required them to be removed, the said engineer unskillfully, negligently, recklessly, and suddenly, and contrary to his duty, stopped and reversed the said switch engine and the cars attached thereto, and thereby threw the plaintiff off the rear car where he was standing, and where it was his duty to stand, to the ground; and thereupon the said engineer suddenly, negligently, recklessly, and violently and unskillfully, then and there, and before the plaintiff had time to or could move out of the reach of the cars or off the track, moved and pushed the said engine and cars backward upon said track and on to and over the plaintiff, and thereby greatly injured the plaintiff, and crushed and broke both of his legs, so that it then and there became and was necessary to amputate them, and they were then and there, on account of said injuries, amputated," etc.

The answer of the defendant alleged "That the said fall of the plaintiff and his said injuries resulting therefrom were solely caused, either by the negligence of the plaintiff himself, or by that of some one or more of the employés of the defendant engaged at work together with the plaintiff in the defendant's said yard at the time of the happening of the said injuries, and not by any negligence or fault on the part of the defendant."

The cause was tried by a jury, and resulted in a verdict and judgment for the plaintiff of $20,000 and costs. An appeal was taken from the district court to the supreme court of the Territory, where it was heard upon a record containing a statement on motion for a new trial, which it was stipulated might be treated as a bill of exceptions. It embodies all the evidence upon the trial, with the rulings of the court during its progress, and the charge of the court to the jury, with all the exceptions thereto noted. The judgment of the district court was affirmed. From that judgment the present writ of error is prosecuted.

Mr. **James McNaught,** for plaintiff in error:

The evidence of plaintiff shows negligence on his part, contributory to the injury.

Beach, Contrib. Neg. 432; Whart. Neg. § 426; Cooley, Torts, 678; Thomp. Neg. 1178, 24.

Whenever the plaintiff's case raises an inference of contributory negligence, the burden of proof is upon him to show absence of contributory negligence.

Whittaker's Smith, Neg. 383, note; Pierce R. R. 298, 299, 300; 2 Rorer R. R. 1023-1025; Addision Torts, § 586; 15 Western Jurist, 529; *Robinson* v. *Western Pac. R. R. Co.* 48 Cal. 426; *Nehrbas* v. *Central Pac. R. R. Co.* 14 Am. & Eng. R. R. Cas. 670, 678; *Kelley* v. *Chicago & N. W. R. Co.* 60 Wis. 480; *Schultz* v. *Chicago & N. W. R. Co.* 67 Wis. 616; *Hoth* v. *Peters*, 55 Wis. 411, 412; *Prideaux* v. *Mineral Point*, 28 Am. Rep. 558; *S. C.* 43 Wis. 513; *Texas etc R. Co.* v. *Murphy*, 46 Tex. 356; *Houston & J. C. R. Co.* v. *Cowser*, 57 Tex. 293; *New Jersey Express Co.* v. *Nichols*, 33 N. J. L. 434; *Moore* v. *Central R. R. Co.* 24 N. J. L. 268; *Lincoln* v. *Walker*, 18 Neb. 244; *Kansas Pac. R. Co.* v. *Pointer*, 14 Kan. 37; *Baltimore & O. R. R. Co.* v. *Whitacre*, 35 Ohio St. 627; *Robison* v. *Gary*, 28 Ohio St. 241; *Street R. R. Co.* v. *Nolthenius*, 19 Am. & Eng. R. R. Cas. 191; *S. C.* 40 Ohio St. 376; *Paducah & M. R. R. Co.* v. *Hoehl*, 12 Bush, 44 *Cassidy* v. *Angell*, 34 Am. Rep. 690; *S. C.* 12 R. I. 447; *Hays* v. *Gallagher*, 72 Pa. 140; *Beatty* v. *Gilmore*, 16 Pa. 463; *Hocum* v. *Weitherick*, 22 Minn. 152; *Winship* v. *Enfield*, 42 N. H. 197; *Denver, S. P. & P. R. R. Co.* v. *Pickard*, 8 Col. 163; *Northern Cent. R. Co.* v. *State*, 31 Md. 357; *Miller* v. *St. Louis R. R. Co.* 5 Mo. App. 471; *Buesching* v. *St. Louis Gaslight Co.* 73 Mo. 219; *S. C.* 39 Am. Rep. 503; *Daub* v. *Northern Pac. R. Co.* 18 Fed. Rep. 625; *Dunmead* v. *American Min. & S. Co.* 4 McCrary, 244; *Holland* v. *Chicago, M. & St. P. R. Co.* 5 McCrary, 549; *Schofield* v. *Chicago, M. & St. P. R. Co.* 8 Fed. Rep. 488; *Collins* v. *Davidson*, 19 Fed. Rep. 88; *Gravelle* v. *Minneapolis & St. L. R. Co.* 10 Fed. Rep. 711; *Delger* v. *St. Paul*, 14 Fed. Rep. 567; *Washington & G. R. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401 (21: 114); *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291 (23: 898).

Plaintiff, by unnecessarily assuming a dangerous position, was guilty of contributory negligence.

Pierce, R. R. 379; *Baltimore & P. R. R. Co.* v. *Jones*, 95 U. S. 439 (24: 506); *Davis* v. *Detroit & M. R. R. Co.* 4 Am. Rep. 364; *Hayden* v. *Smithville Mfg. Co.* 29 Conn. 559; *Mad River & L. E. R. R. Co.* v. *Barber*, 5 Ohio St. 563-5; *Leary* v. *Boston & A. R. R. Co.* 139 Mass. 580.

Plaintiff, by remaining in the employment of the Railroad Company, with knowledge that Bassett was incompetent, without complaint, assumed the risks arising from such cause.

Schultz v. *Chicago & N. W. R. R. Co.* 67 Wis. 616; *Hughes* v. *Winona & St. P. R. R. Co.* 27 Minn. 137; *Ferguson* v. *Central Iowa R. Co.* 58 Iowa, 293.

The law will not permit the employer to be saddled with the consequences of negligence on the part of his employé.

Columbus, C. & I. C. R. Co. v. *Troesch*, 57 Ill. 155; *Baltimore & P. R. R. Co.* v. *Jones*, *supra*.

The employé assumes the risks and negligence of his employer in selecting fellow servants, known to employé.

Laning v. *N. Y. Cent. R. R. Co.* 49 N. Y. 521; *S. C.* 10 Am. Rep. 417; 3 Wood, R. R. Law, 1454-1456, 1481, 1508, 1509; *Philadelphia W. & B. R. R. Co.* v. *Stebbing*, 19 Am. & Eng. R. R. Cas. 36; *Chicago & A. R. R. Co.* v. *Robinson*, 106 Ill. 142; Beach, Contrib. Neg. 191, 192, 195; *Schofield* v. *Chicago, M. & St. P. R. R. Co.* 2 McCrary, 268; *Chicago, R. I. & P. R. R. Co.* v. *Houston*, 95 U. S. 697 (24: 542).

Whenever an employé discovers anything affecting the safety of the machinery or the fitness and competence of the servants, he cannot be silent and escape the consequences.

Beach, Contrib. Neg. 372 and notes 1 and 2; *Jackson* v. *Kansas City, L. & S. K. R. R. Co.* 31 Kan. 761.

It is not sufficient that the plaintiff report the carelessness and recklessness of the coemployé. There must be a promise to discharge.

Clark v. *St. Paul & S. C. R. R. Co.* 28 Minn. 128.

The servant is under no less obligation to provide for his own safety than the master is to provide it for him.

Rains v. *St. Louis, I. M. & S. R. Co.* 36 Am. Rep. 459; *Chicago, R. I. & P. R. Co.* v. *Clark*, 15 Am. & Eng. R. R. Cas. 261; *Umback* v. *Lake Shore & M. S. R. Co.* 8 Am. & Eng. R. R. Cas. 98; *Smith* v. *St. Louis, K. C. & N. R. Co.* 33 Am. Rep. 484.

When an employé, after having an opportunity to become acquainted with the risks of his situation, voluntarily accepts them, he cannot complain if he be subsequently injured by such exposure.

Smith v. *St. Louis, K. C. & N. R. Co.* and *Rains* v. *St. Louis, I. M. & S. R. Co. supra*, *Kelley* v. *Silver Spring Co.* 34 Am. Rep. 615; *Gibson* v. *Erie R. Co.* 63 N. Y. 449; *Michigan Cent. R. R. Co.* v. *Smithson*, 1 Am. & Eng. R. R. Cas. 108, note; *McGlynn* v. *Brodie*, 31 Cal. 377; *Stone* v. *Oregon City Mfg. Co.* 4 Oregon, 52; *Kansas Pac. R. R. Co.* v. *Peavy*, 29 Kan. 169; *Jackson* v. *Kansas City, L. & S. K. R. R. Co. supra; Day* v. *Toledo, C. S. & D. R. Co.* 2 Am. & Eng. R. R. Cas. 126; *Youll* v. *Sioux City & P. R. R. Co.* 21 Am. & Eng. R. R. Cas. 589.

Mr. **Thomas Wilson**, for defendant in error:

An error of the court in sustaining the challenge to the jurors would not be ground for reversal.

Northern Pac. R. R. Co. v. *Herbert*, 116 U. S. 642 (29: 755).

Evidence of the general reputation of an engineer is competent.

Pierce, R. R. 283; *Gilman* v. *Eastern R. R. Corp.* 10 Allen, 233; *Davis* v. *Detroit & M. R. R. Co.* 20 Mich. 105; *Frazier* v. *Pennsylvania R. R. Co.* 38 Pa. 104; Whart. Neg. 2d ed. § 237; 2 Thomp. Neg. 1053, 1054.

This court will not pass upon the weight and sufficiency of the evidence.

N. Y. Cent. & H. R. R. R. Co. v. *Fraloff*, 100 U. S. 31 (25: 534); *Mercantile Mut. Ins. Co.* v. *Folsom*, 85 U. S. 18 Wall. 248, 249 (21: 832, 833); *Barreda* v. *Silsbee*, 62 U. S. 21 How. 166, 167 (16: 92, 93); *Pennsylvania R. R. Co.* v. *Werner*, 89 Pa. 66.

It was competent for the jury to infer the absence of fault on part of plaintiff from general and known disposition of men to take care of themselves and keep out of the way of danger.

Northern Cent. R. Co. v. *State*, 29 Md. 438; *Weiss* v. *Pennsylvania R. R. Co.* 79 Pa. 390; *Pennsylvania R. R. Co.* v. *Weiss*, 87 Pa. 447.

If there had been strong evidence of concurring negligence on his part, the question would have been a matter for the jury and not for the court.

Hough v. *Texas & P. R. R. Co.* 100 U. S. 225 (25: 617); *Pennsylvania R. R. Co.* v. *Weiss, supra; Lawless* v. *Connecticut River R. R. Co.* 136 Mass. 1; *Snow* v. *Housatonic R. R. Co.* 8 Allen, 441; *Thomas* v. *Western Union Tel. Co.* 100 Mass. 156; *Looney* v. *McLean*, 129 Mass. 33, 36; *Dewire* v. *Bailey*, 131 Mass. 169; Pierce R. R. 314, 317–319; *Fernandes* v. *Sacramento City R. Co.* 52 Cal. 45; *Thompson* v. *North Eastern R. Co.* 2 Best & S. (110 Eng. C. L. 106); *Hawley* v. *Northern Cent. R. Co.* 82 N. Y. 370; *Webern* v. *N. Y. Cent. & H. R. R. R. Co.* 58 N. Y. 455; *Thurber* v. *Harlem Bridge, M. & F. R. R. Co.* 60 N. Y. 331; *Mayo* v. *Boston & M. R. R. Co.* 104 Mass. 137, 141, 142; *McCully* v. *Clarke*, 40 Pa. 399, 406; *Russell* v. *Minneapolis & St. L. R. Co.* 32 Minn. 230; *Stoddard* v. *St. Louis, K. C. & N. R. Co.* 65 Mo. 514, 520, 521; *Pennsylvania R. R. Co.* v. *Barnett*, 59 Pa. 264; *West Chester & P. R. R. Co.* v. *McElvee*, 67 Pa. 315; *Crissey* v. *Hestonville, M. & F. P. R. Co.* 75 Pa. 86.

If plaintiff knew Bassett, at times, to be careless or reckless, that would not have been absolutely conclusive of want of due care on plaintiff's part, or have justified the court in taking the case from the jury.

Hough v. *Texas & P. R. R. Co.*, *Lawless* v. *Connecticut River R. R. Co.*, *Looney* v. *McLean*, *Russell* v. *Minneapolis & St. L. R. R. Co. supra; Patterson* v. *Pittsburg & C. R. R. Co.* 76 Pa. 389; *Ford* v. *Fitchburgh R. R. Co.* 110 Mass. 261; *Sanborn* v. *Madera Flume & Trading Co.* 70 Cal. 261.

It is not allowable to assume as existing facts not proven, and to ask a direction to the jury upon such assumption.

Washington & G. R. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 409 (21: 116).

The servant has a right to understand that the master has taken reasonable care by associating him only with persons of ordinary skill and care.

Plaintiff had a right to assume that his master had done his duty and had used due care to employ fit servants.

Whittaker's Smith, Neg. 387; *Robinson* v. *Western Pac. R. R. Co.* 48 Cal. 421; Shearm. & Redf. Neg. § 31; *Reeves* v. *Delaware, L. & W. R. R. Co.* 30 Pa. 454, 460, 461; *Brown* v. *Lynn*, 31 Pa. 510; *Ernst* v. *Hudson River R. R. Co.* 35 N. Y. 28, 33, 35, 36, 40; *Porter* v. *Hannibal & St. J. R. R. Co.* 60 Mo. 160; *Conroy* v. *Vulcan Iron Works*, 62 Mo. 35; *Dale* v. *St. Louis, K. C. & N. R. Co.* 63 Mo. 455; Wood, Mast. & Serv. §§ 373, 385, 400; *Muldowney* v. *Illinois Cent. R. Co.* 36 Iowa, 462, 470, 471; *Ford* v. *Fitchburg R. R. Co.* 110 Mass. 260.

Due care is not merely such care as other railroad companies exercise.

Wabash R. Co. v. *McDaniels*, 107 U. S. 454 (27: 605); *Cayzer* v. *Taylor*, 10 Gray, 274.

The burden is on the defendant to show contributory negligence of plaintiff.

Indianapolis & St. L. R. R. Co. v. *Horst*, 93 U. S. 298 (23: 900). *Pennsylvania R. R. Co.* v. *Weber*, 76 Pa. 157.

The verdict in this suit was rendered June 29, 1883. On February 15, 1884, defendant's counsel, against the objection and exception of plaintiff's counsel, proposed numerous exceptions. Such exceptions cannot be considered.

St. Croix Lumber Co. v. *Pennington*, 2 Dak. 467; *Light* v. *Kennard*, 10 Neb. 330; *Roode* v. *Dunbar*, 9 Neb. 95; *Phœnix L. Ins. Co.* v. *Raddin*, 120 U. S. 183, 196 (30: 644, 648).

This court will presume nothing in favor of the party alleging error.

Carman v. *Pultz*, 21 N. Y. 547; *Grant* v. *Morse*, 22 N. Y. 324; *Briant* v. *Trimmer*, 47 N. Y. 96; *Allegheny City* v. *Nelson*, 25 Pa. 332.

The jury could not legally find that there was contributory negligence, unless that fact was shown by the evidence.

An employé is not bound to inquire as to latent defects.

Whart. Neg. § 214.

Mr. Justice **Matthews** delivered the opinion of the court:

It appears from the bill of exceptions that at the conclusion of the plaintiff's case counsel for the defendant moved for a nonsuit, which the court denied; and an exception was taken, which is still insisted on here. The defendant's counsel, however, offered evidence in support of the defense, and thereby waived this exception. *Accident Ins. Co* v. *Crandal*, 120 U. S. 527 [30:740]. When all the evidence had been submitted on both sides, the defendant by its counsel demurred to the evidence and moved the court to dismiss the action, which the court refused to do; and thereupon the defendant requested the court to direct the jury to find a verdict for the defendant, which request was refused, and an exception taken. The question raised by these rulings and the exceptions thereto is whether there was sufficient evidence to justify the court in submitting the cause to the jury.

There was certainly evidence tending to establish the following state of facts: that Bassett had been in the employ of the defendant as engineer in that yard before plaintiff was injured about a year; that during that time he had by his conduct frequently shown his negligence, recklessness, and unfitness for the place; that complaints had at different times been made of his negligent and reckless conduct to the defendant's representatives at Fargo; that, notwithstanding such complaints, he was retained in the same service, except during short intervals when he had been discharged two or three times for misconduct; that the plaintiff at the time of the injury had only been in the employ of the defendant about two weeks, and only about one week of that time with Bassett; that he worked as night brakeman; that on the night of the injury, and about fifteen or twenty minutes before the accident, the yard master called up the switching crew, who had been asleep for a short time, and ordered plaintiff to direct Bassett to move his engine so as to commence switching cars at the point named; that they were in haste to get ready for a train soon to come in from the East; that the plaintiff, as directed by the yard master, urged Bassett to move promptly, on account of which angry words passed between them; that thereafter, while under the direction of the yard master, they were backing some cars, and while he was standing on top of and near the rear end of the head car, which was the farthest from the engine, the plaintiff gave the signal to the engineer to back seven or eight car lengths; that it was the duty of the plaintiff to give such signals and of the engineer to obey them, and to continue backing until he was signaled to stop; that when he had backed about three car lengths he, without any warning to the plaintiff and without any reason or necessity therefor, very suddenly, recklessly, and negligently reversed his engine without shutting off the steam, giving the train so sudden and violent a jerk as to throw the plaintiff off and inflict the injuries complained of.

Clearly, this made a case for the plaintiff, unless overthrown by a successful defense.

It is claimed, however, by counsel for the defendant below, that there was evidence showing that the plaintiff was guilty of contributory negligence in two particulars: first, that he had knowledge of Bassett's incompetency, and ought, on that account, to have refused to serve with him; and, second, that he was standing too near the rear of the car without sufficiently guarding himself, by holding on or bracing himself against the effect of sudden changes of motion which were to be expected in the business of switching. But whether or not the plaintiff was in such fault as materially contributed to the injury in these particulars depended upon a consideration of all the circumstances of the case; and there was evidence sufficient to justify the jury in concluding, as they did, that the plaintiff was not guilty of negligence in these particulars.

At the request of the defendant the court gave to the jury the following instructions:

"In order to recover in this suit, the plaintiff must have established the following propositions, to wit: 1, that the plaintiff was hurt through the negligence or improper conduct of Arthur D. Bassett; 2, that the defendant neglected to use ordinary care in the selection of Bassett as the employé for running the switch engine mentioned in the evidence; 3, that the plaintiff was free from negligence on his part which contributed to the injury."

"If the jury believe that the plaintiff failed to use due care under all the circumstances in conducting himself while standing on top of the car referred to in the evidence, and that such want of care on his part contributed to produce his fall from the car, then the jury must find for the defendant."

"If the jury believe that the plaintiff failed to use due care, under all the circumstances, in conducting himself while standing on the car referred to in the evidence, and that such want of care on his part contributed to produce his fall from the car, in such case the jury must find for the defendant, although it is of opinion that Bassett was an unfit person to run the engine in question, and was guilty of actual negligence in running it on this occasion."

"In order to charge the defendant in this suit on the ground of Bassett having been an unfit man to run the engine in question, the unfitness must have been of a nature tending to make working with him and his engine unusually perilous."

The court also, among other things not excepted to, instructed the jury as follows:

"The employer is not liable for damages sustained by one employé caused by the negligence of another employé engaged in the same general business, unless the employer is guilty of negligence from which the injury resulted, and it is held that he who engages in the employment of another for the performance of specific duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. These are perils which the servant is likely to know, and against which he can as effectually guard as the employer; they are perils incident to the services, and which can be as distinctly foreseen and provided for in the rate of compensation as any other." Also:

"The duties and liabilities of employer and employé to each other are defined by the Code

or Statute of this Territory which must control this case, as follows: 'An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, or in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.'" And:

"But, gentlemen, if you find from the evidence that the defendant company was guilty of negligence in not providing a safe and fit man to run that engine, in consequence of which you also find the accident occurred, still, if the plaintiff failed to exercise that prudence, care and caution which a prudent man, under similar circumstances, ordinarily would exercise, which contributed to the injury, he is not entitled to recover."

The court also instructed the jury as follows:

"It is also true that if the plaintiff had full knowledge of the reckless and careless habits of the engineer Bassett, as complained of by him, or had reason to know of such recklessness and carelessness, he should either have quit the service or reported the facts to the officers of the Company having the power to discharge him, and a failure to do so might be negligence on his part; but, gentlemen, it is for you to say, from all the attending circumstances, whether he was neglectful in that regard.

"While this rule of law above stated is generally true, a reasonable view must be taken in its application here. The evidence tends to show that this plaintiff had been at work in this yard but a short time, and only a part of that time with or under this engineer Bassett. Now, had he such knowledge, or had he such an opportunity to know of the careless and reckless habits of Bassett that rendered it dangerous for him to work with him, and made it his duty to have refused to continue in such service, or have reported him to the officers of the Company?"

And also:

"The plaintiff must establish every material fact by a preponderance of evidence; and the defendant having alleged negligence on the part of the plaintiff, denominated contributory negligence, it must be established by a preponderance of evidence to warrant you in finding it; and upon this question you must decide."

The defendant requested the court to give the jury the following instruction:

"If the plaintiff knew, or had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, in that case it was the plaintiff's duty to refuse to work with him any longer, and his failure to do so would prevent him from recovering in this suit."

Which request to give said instruction the court refused, to which ruling the defendant duly excepted.

The defendant, by its counsel, thereupon requested the court to give to the jury the following instruction:

"The evidence adduced on behalf of the plaintiff tended to show that Bassett was guilty of negligence in running his engine during the same night on which the plaintiff was hurt, previous to the accident, and while the plaintiff was working with him. If the jury believe such to have been the fact, it must find for the defendant."

Which request to give said instruction the court refused, to which ruling the defendant, by its counsel, duly excepted.

At the plaintiff's request the court gave the jury the following instructions:

"This plaintiff, when he voluntarily entered into the employ of the defendant, took the risk of dangers ordinarily attending or incident to the business in which he was employed, including the perils arising from carelessness of his fellow servants."

To which the defendant, by its counsel, duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"But the above rule is subject to the following limitation or exception, viz: That the master or employer, whether a natural person or a corporate body, is legally bound to use due care not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master."

To this the defendant, by its counsel, duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That in this case, while the defendant did not guaranty to its servants, or to this plaintiff, that the engineer on the switch engine in its yard at Fargo should be careful or skillful or competent, yet it was bound to exercise proper care to get a person in all respects fit for the place; and if after defendant had employed such engineer it learned, or had reason to believe that he was careless, reckless, or incompetent, it was its duty to discharge him.

To this the defendant duly excepted."

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That if the defendant was careless, either in employing or retaining in its service a reckless, incompetent, or careless engineer on said engine, and on account of the recklessness, incompetence, or carelessness of such engineer the plaintiff was injured, without fault or negligence on his part, then, in such case, the Railroad Company is liable to him for the damage resulting from such injury."

To this the defendant duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That sound sense and public policy require that railroad companies should not be exempt from liability to their employés for injuries resulting from the incompetency, negligence, or carelessness of co-employés, when, by the exercise of proper diligence, such injuries might be avoided."

To which the defendant, by its counsel, duly excepted.

The court thereupon, at the request of the plaintiff's counsel, instructed the jury as follows:

"That the plaintiff had a right to suppose

and assume that the Railroad Company had used proper diligence and care in the employment and retention of an engineer."

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"That what will amount to proper care and diligence in the selection of a servant for a particular duty or in the retention of such servant will in part depend on the character and responsibility of that duty which said servant is to perform. The greater the danger from the negligence, incompetence, or carelessness, the greater the care should be in his selection or retention; for instance, the same degree of diligence or care which is required in the employment of a locomotive engineer would not be required in the employment of a fireman."

To this the defendant duly excepted.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"If Bassett, the engineer in the yard at Fargo, was careless, reckless, or incompetent, and if such carelessness, incompetency, or recklessness caused the injury to the plaintiff, then if the agents or servants of this defendant, whose duty it was at that time to employ and discharge him if unfit, did not exercise due care in the employment of Bassett, or if after he was employed they in fact knew that he was careless, reckless, or incompetent, or if by the exercise of due care they would have discovered that he was careless, reckless, or incompetent, then the Railroad Company is liable to the plaintiff for any injury he may have suffered from such carelessness, recklessness, or incompentency of Bassett, if the plaintiff himself was not guilty of any negligence which contributed to that injury."

To this the defendant duly excepted.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"Ordinary care or due care in such cases is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless. Ordinary care in the selection or retention of servants in such cases implies that degree of diligence and precaution which the exigencies of the particular service reasonably require—that is, such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered."

To this the defendant, by its counsel, duly excepted.

The court thereupon, at the request of plaintiff's counsel, instructed the jury as follows:

"The jury have not legally a right to find that the plaintiff Mares was guilty of negligence which contributed to his injury unless the jury finds that that fact is shown by a proponderance of evidence."

And to this the defendant duly excepted.

We think the court was clearly right in refusing to give the peremptory instructions asked for by the defendant, that if the plaintiff knew or even had the opportunity of knowing, before his fall from the car in question, that Bassett was an unfit or unsafe man to run the engine in question, it was the plaintiff's duty absolutely to refuse to work with him any longer, and that his failure to do so would prevent him from recovering in this suit. The duty of the plaintiff under such circumstances is not to be determined by the single fact of his knowledge of the danger he incurred by continuing to serve with a coemployé known by him to be an unfit and incompetent person. It was enough for the court to say, as it did, that a failure on the part of the plaintiff to refuse to work, in view of that knowledge on his part, might be negligence on his part. The qualification was correct, that it was for the jury to say from all the attending circumstances whether his failure to do so was in fact contributory negligence. A suitable judgment on that question can only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskillfulness of his coemployé, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of his principal. Many cases might be conceived in which the latter course might even increase the danger to the plaintiff himself and entail great injury and loss to others.

Counsel for the plaintiff in error criticises the language of the court in its instruction to the jury, given at the request of the plaintiff's counsel, "that the plaintiff had a right to suppose and assume that the Railroad Company had used proper diligence and care in the employment and retention of an engineer," on the ground of vagueness and want of distinctness as to what diligence and care under the circumstances would be proper; but no explanation of the charge was asked for by the counsel for the defendant, nor was any exception taken to the instruction as given.

Objection is also taken to that portion of the charge which says: "And the defendant, having alleged negligence on the part of the plaintiff denominated contributory negligence, it must be established by preponderance of evidence to warrant you in finding it." The objection, as we understand it, is that it was calculated to mislead the jury by not only putting the burden of proof of the fact on the defendant, but also in assuming that they must look for that proof only to the testimony adduced by the defendant. We do not, however, think it possible that any jury could be misled in that way. The whole effect of the charge is that the fact in question must be established, from the whole testimony, by a preponderance of evidence in its favor. Where the burden of proof rested was immaterial at that stage of the cause when all the evidence was in; and the jury certainly could not suppose that they were confined, in their examination of that question, to the testimony adduced only on the part of the defendant.

On the whole case it abundantly and satisfactorily appears that the cause was submitted to the jury, upon the charge of the court, fairly, and with an accurate statement of the law applicable to the relation between the parties.

We find no error in the record; the judgment is, accordingly, affirmed.

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY, *Plf. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 722-724.)

Tax on railroad company.

A railroad company is not liable, under the Act of July 14, 1870, chap. 255, § 15, 16 Stat. at L. 260, for a tax of 2½ per centum on its profits for 1871, not divided, but used for construction during that year.

[No. 99.]

Argued Dec. 6, 1887. Decided Dec. 19, 1887.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan. *Reversed.*

The facts are stated in the opinion.

Mr. **W. P. Healy,** for plaintiff in error:

Net earnings expended in construction were not liable to the tax.

Laws 1864, chap. 173, § 122; 1866, chap. 184, § 9; 1870, chap. 255, § 15. *Michigan Cent. R. R. Co.* v. *Slack*, 100 U. S. 595 (25: 647); *Stockdale* v. *Atlantic Ins. Co.* 87 U. S. 20 Wall. 323, 330, 332 (22: 348, 350, 351); *State* v. *Wilson*, 43 N. H. 419.

If a revising statute embraces all the provisions of antecedent laws, such statute virtually repeals the statutes revised.

Bartlet v. *King*, 12 Mass. 545; *Illinois & M. Canal Co.* v. *Chicago*, 14 Ill. 334; *Ellis* v. *Paige*, 1 Pick. 43; *Rutland* v. *Mendon*, 1 Pick. 154; *Blackburn* v. *Walpole*, 9 Pick. 97; *Towle* v. *Marrett*, 3 Me. 22; *Woods* v. *Jackson Iron Mfg. Co.* 1 Holmes, 385.

If the new law is intended to prescribe the only rules, the old law is repealed by implication.

Dexter & L. Plank Road Co. v. *Allen*, 16 Barb. 18; *U. S.* v. *Tynen*, 78 U. S. 11 Wall. 92 (20: 154); *New London N. R. R. Co.* v. *Boston & A. R. R. Co.* 102 Mass. 389.

The parts omitted are not to be revived by construction. *Ellis* v. *Paige*, 1 Pick. 45.

Statutes which levy a tax or excise must be construed strictly.

Sewall v. *Jones*, 9 Pick. 414; *Green* v. *Holway*, 101 Mass. 243, 248; *U. S.* v. *Wigglesworth*, 2 Story, 369; *Adams* v. *Bancroft*, 3 Sumn. 384; *Wroghton* v. *Turtle*, 11 Mees. & W. 567.

Expenditures for station, buildings, shops, etc., are charges that may properly be made against earnings.

Union Pacific R. R. Co. v. *U. S.* 99 U. S. 422 (25: 288).

Mr. **G. A. Jenks,** *Solicitor-General*, for defendant in error:

No assessment other than that made by the statute is necessary.

Dollar Sav. Bank v. *U. S.* 86 U. S. 19 Wall. 227, 240 (22: 80, 82).

The assessment of the tax is not conclusive on the United States.

U. S. v. *Tilden*, 9 Ben. 368–394.

The Statute of Limitations is not a bar.

U. S. v. *Kirkpatrick*, 22 U. S. 9 Wheat. 735 (6: 203); *Gaussen* v. *U. S.* 97 U. S. 590 (24: 1009).

A fund which is the result of the net earnings applied to or used for new purchases, or new construction, during the year 1871, is subject to the internal revenue tax of 2½ per cent, under section 15 of the Act of July 14, 1870, 16 Stat. at L. 260.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The single question in this case is whether a railroad company is liable, under the Act of July 14, 1870, chap. 255, § 15, 16 Stat. at L. 260, for a tax of 2½ per centum on its profits for 1871, not divided, but used for construction during that year.

The section referred to, so far as material, is as follows:

"That there shall be levied and collected for and during the year 1871 a tax of 2½ per centum * * on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other fund."

The railroad company of which the Marquette, Houghton and Ontonagon Company is the successor, and for whose debts it is liable, earned, in 1871, $102,728.30, as profits, which were not divided, but were used during the year in the construction of new works and in creating new facilities for business. This amount was never in fact placed to the account of any particular fund, but it was taken from the money in the treasury to pay for the new structures and additions as they were made.

The Act of 1870 was entitled "An Act to Reduce Internal Taxes, and for Other Purposes." It is proper, therefore, to construe this particular provision in connection with the provisions of like character in the statutes imposing internal taxes which preceded that of 1870.

By the Act of July 1, 1862, chap. 119, 12 Stat. at L. 432, which was the first of the series of internal revenue statutes, with which that of 1870 was directly connected, railroad companies were required to pay a tax of 3 per centum on all payments of interest on their bonded debt, and on all dividends declared due or payable to stockholders "as part of the earnings, profits, or gains of said companies." Sec. 81, p. 469. And by section 82, p. 470, of the same Act, banks, trust companies, savings institutions and insurance companies were required to pay the same tax on all dividends "declared due, or paid to stockholders, to policy holders, or to depositors, as part of the earnings, profits, or gains of said * * * companies, and on all sums added to their surplus or contingent funds."

Following this was the Act of June 30, 1864, chap. 173, 13 Stat. at L. 223, which provided (§ 120, p. 283) for a tax of 5 per centum on the dividends of banks, trust companies, savings institutions, and insurance companies as in the Act of 1862, and "on all undistributed sums, or sums made or added during the year to their surplus or contingent funds." As to railroad companies, it was provided (§ 122, p. 284) that they should pay the same tax on the amount of the interest on their bonded debt, on dividends to stockholders "as part of the earnings, profits, income, or gains of such company, and on all profits of such company carried to the account of any fund, *or used for construction.*" Secs. 120 and 122 were amended in some respects by the

Act of July 13, 1866, chap. 184, 14 Stat. at L. 138; but these particular provisions were retained in substantially the same language.

That the tax here levied was not necessarily a tax on all the profits of these companies, but only on such as were used or disposed of in the ways specified, is shown by section 121 of the Act of 1864, 13 Stat. at L. 284, which provided that if any bank legally authorized to issue notes as circulation neglected to "make dividends or additions to its surplus or contingent fund as often as once in six months" the tax should be on "the amount of profits which have accrued or been earned or received by said bank during the six months next preceding the first days of January and July." And that profits "used for construction" were not looked upon as profits "carried to the account of any fund," or "added to any surplus or contingent or other fund," is evident from the fact that it was thought necessary when the taxes were increased in 1864 to make special mention of them as something more than had been already provided for, that is to say, in "profits carried to the account of any fund." When, therefore, profits "used for construction" were left out in the Act of 1870, it is evident to our minds that Congress intended to reduce the tax on railroad corporations to that extent. The question is not what would have been the meaning of "profits carried to the account of any fund," or "added to any surplus, contingent, or other fund," if this special provision in respect to profits "used for construction" had never been made, but what the meaning is with that provision left off after it had once been added. This is to be ascertained, not by inquiry into the manner of keeping railroad accounts, but by interpreting the language used by Congress at different times to give expression to its will; not by determing whether as matter of bookkeeping it is usual to carry undivided profits used for construction to a construction fund, but by studying the several statutes to see if it was intended that, if so used, they should be taxed under the Act of 1870. In our opinion it was not, and consequently the current earnings of the Company for the year 1871, used as earned in new construction, were not taxable as profits of that year.

The judgment of the Circuit Court is reversed, and the cause remanded with instructions to enter a judgment in favor of the Railroad Company on the facts found.

TEXAS AND PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

HENRY S. MARLOR.

(See S. C. Reporter's ed. 687-702.)

Railway bonds—interest how payable—demand—election, when exercised.

1. Where bonds of a railway company contain a promise to pay interest, on a day certain in each year, and the further provision, that if the net earnings of the company in any year shall not be sufficient to enable the company to pay the interest, then scrip may, at the option of the company, be issued for the interest, *held*, that the option of the company to issue the scrip must be exercised at the time when, but for the insufficiency of the net earnings, it would be required to pay the interest in money; and that the scrip so issued should draw interest from the day on which the interest, which it takes the place of, was due.

2. *Held, further*, that in the absence of an exercise of the option, on the day the interest was due, to pay it in scrip, the bondholder had an immediate right of action for the interest money.

3. No demand by the bondholder was necessary to entitle him to the payment of the interest in money, on the failure of the company to exercise its option, on the day the interest fell due, to issue scrip therefor.

4. If the contract be that the promisor shall do one of two things by a certain day, at his election, he cannot exercise his election after the day has passed.

[No. 97.]

Argued Dec. 5, 6, 1887. Decided Dec. 19, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

Reported below, 22 Blatchf. 464.

The facts are stated in the opinion.

Messrs. **John F. Dillon** and **W. S. Pierce, Jr.**, for plaintiff in error:

A purchaser of bonds which refer to the mortgage securing them is bound by any statements contained in the mortgage affecting the security.

Jones, R. R. Securities, § 203; *Caylus* v. *New York, K. & S. R. R. Co.* 10 Hun. 295.

Where two or more instruments are executed at the same time, relate to the same subject matter, and one refers to the other, they are to be construed as one instrument.

Vaugine v. *Taylor*, 18 Ark. 65; *Dillingham* v. *Estill*, 3 Dana, 23; *Adams* v. *Hill*, 16 Me. 215; *Rorabacher* v. *Lee*, 16 Mich. 169; *Rogers* v. *Kneeland*, 13 Wend. 114; *Spangler* v. *Springer*, 23 Pa. 454.

The word *provided*, as well as the whole clause in which it stands, is intended to qualify the covenant to pay interest.

Wayman v. *Southard*, 23 U. S. 10 Wheat. 1, 30 (6: 253, 260); *Voorhees* v. *Jackson*, 35 U. S. 10 Pet. 471 (9: 499); *Minis* v. *U. S.* 40 U. S. 15 Pet. 445 (10: 799).

The bond imposes no present liability for interest if sufficient net earnings have not been acquired.

The Company's obligation has been uniformly construed by the Company and by its bondholders to be of an income character.

Dan. Neg. Inst. 3d ed. 60 *et seq.* and cases cited; 1 Pars. Bills & N. 45; *Lawrence* v. *Dougherty*, 5 Yerg. 435; *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50. (19: 594); *Price* v. *Evans*, 26 Mo. 30.

The railway company is not in default until a demand by the plaintiff.

Barker v. *Jones*, 8 N. H. 418; *Wood* v. *Sheehan*, 68 N. Y. 365; *Moore* v. *Hudson River R. R. Co.* 12 Barb. 156; *Manvel* v. *Holdredge*, 45 N. Y. 151; 2 Pars. Cont. 661.

The rule invoked by plaintiffs and adopted by the circuit court, as to the measure of damages, was erroneously applied to this case.

Stuart v. *Binsse*, 10 Bosw. 445.

Upon obligations for a sum certain payable in the notes of a particular bank, in the bonds of a particular State, in railroad stock, in railroad scrip, or in short, in any paper capable of numerical valuation, the measure of damages, on default in payment, is the value of the paper at the time it should have been paid.

Noonan v. *Ilsley*, 17 Wis. 314; *Anderson* v. *Ewing*, 8 Litt. 245; *Gordon* v. *Parker*, 2 Smedes & M. 485; 1 Sedg. Dam. 511; *Phelps* v. *Riley*, 3 Conn. 266; *Wilson* v. *Jones*, 8 Ala. 536; *Marr* v. *Prather*, 3 Met. (Ky.) 196; *Sirlott* v. *Tandy*, 3 Dana, 142; *Williams* v. *Jones*, 12 Ind. 561; *Pierce* v. *Spader*, 13 Ind. 458; *Powe* v. *Powe*, 42 Ala. 113; *Doak* v. *Snapp*, 1 Cold. 180; *Parks* v. *Marshall*, 10 Ind. 20; *Porter* v. *Buckfield Branch R. R. Co.* 32 Me. 539; *Alexander* v. *Macauley*, 6 Md. 360; *Orange & A. R. R. Co.* v. *Fulvey*, 17 Gratt. 366; *Moore* v. *Hudson River R. R. Co.* 12 Barb. 156; *Rives* v. *Duke*, 105 U. S. 132 (26: 1031); *Thorington* v. *Smith*, 75 U. S. 8 Wall. 1 (19: 361); *The Confederate Note Case*, 86 U. S. 19 Wall. 548 (22: 196); *Wilmington & W. R. R. Co.* v. *King*, 91 U. S. 3 (23: 186); *Robinson* v. *Noble*, 33 U. S. 8 Pet. 181 (8: 910).

Mr. **John R. Dos Passos,** for defendant in error:

The present obligation is not an income bond. The bonds in suit are fixed and absolute promises to pay interest in money or scrip on July 1 of each year.

Boardman v. *Lake Shore & M. S. R. Co.* 84 N. Y. 157.

By the bond in question the Railroad Company becomes a debtor of each of the bondholders. The mortgage is only an additional security.

Philadelphia & S. R. R. Co. v. *Lewis*, 33 Pa. 33; *Philadelphia & B. C. R. R. Co.* v. *Johnson*, 54 Pa. 127; *Florida* v. *Anderson*, 91 U. S. 667 (23: 290).

The plaintiff is entitled to recover the interest in cash.

Whart. Cont. § 619; Story, Cont. § 1328; Chitty, Cont. 660, 11 ed. Addison, Cont. 1187, 1188; 2 Pars. Cont. 651; *McNitt* v. *Clark*, 7 Johns. 465; *Stephens* v. *Howe*, 2 Jones & S. 133; *Stewart* v. *Donelly*, 4 Yerg. 177; *Lawrence* v. *Dougherty*, 5 Yerg. 435; *Miller* v. *McClain*, 10 Yerg. 245; *Butcher* v. *Carlile*, 12 Gratt. 520; *Plowman* v. *Riddle*, 7 Ala. 775; *Mettler* v. *Moore*, 1 Blackf. 342; *McRae* v. *Raser*, 9 Port. (Ala.) 122; *Trowbridge* v. *Holcomb*, 4 Ohio St. 38; *Perry* v. *Smith*, 22 Vt. 301; *Smith* v. *Smith*, 2 Johns. 235; *Crandal* v. *Bradley*, 7 Wend. 311; *Saxton* v. *Johnson*, 10 Johns. 418.

No demand on the part of the plaintiff was necessary to entitle him to the money.

Savannah & M. R. R. Co v. *Lancaster*, 62 Ala. 555; *Philadelphia & B. C. R. R. Co.* v. *Johnson*, 54 Pa. 127.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, brought by the Texas and Pacific Railway Company, a corporation organized and existing under Acts of the Congress of the United States, to review a judgment entered against it by that Court on the 17th of September, 1884, in favor of Henry S. Marlor, for the sum of $23,204.99.

The suit was commenced in a court of the State of New York, in November, 1883, and was removed into the circuit court by the defendant. It was tried by that court, on filing a written waiver of a jury, on an agreed statement of facts, and on the depositions of witnesses. The material facts of the case, as found by the circuit court, are as follows: Prior to the first of July, 1883, the plaintiff became the owner of 150 bonds issued by the defendant, and entitled to the interest due thereon on the first days of July in the years 1882 and 1883, according to the terms and conditions of the bonds. Each bond was in the following form:

"The United States of America.

No. —. $1,000.

The Texas and Pacific Railway Company.

Chartered by Act of Congress.

Seven Per Cent Income and Land Grant Bond on the Eastern Division.

"The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to ——— ———, of —— ———, or assigns, in the sum of one thousand dollars, lawful money of the United States of America; which sum the said company promises to pay the said ——— ———, or assigns, at the office of the Company, in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned.

"This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas and Pacific Railway Company, by the State of Texas, or in which said Company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said Company in constructing its lines of road east of Fort Worth, under or by virtue of the Acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and enactments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies, or either of them, or to the Texas and Pacific Railway Company, the total quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres. This bond has also, as security for the interest, a mortgage lien upon the net income of the said Texas and Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles; and in case such net earnings shall not in any one year be sufficient to enable the Company to pay 7 per cent interest on the outstanding bonds, then scrip may, at the option of the Company, be issued for the interest, such scrip to be received at par and interest, the same as money, in payment for any of the Company's lands acquired as aforesaid in Texas,

at the ordinary schedule price, or it may be converted into capital stock of the Company, when presented in amounts of $100 or its multiple. The holder of this bond is entitled to the benefit of the additional security of the sinking fund provided for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to their redemption, as provided in the mortgage aforesaid. This bond will also be received by the Company at par and accrued interest, in payment or exchange for any of its lands covered by the mortgage aforesaid, at the current cash price of the same as fixed from time to time.

"In witness whereof, the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by the proper signatures of its president or vice-president and secretary, this 15th day of May, A. D. 1875.

Frark Bond, Vice President.
Attest: C. E. Satterlee, Secretary."

Upon each bond was a certificate signed by the trustees in the mortgage mentioned in the bond, in the following form:

"*Certificate of Trustees.*

This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, bearing 7 per cent interest per annum, payable yearly, said bonds being numbered consecutively from number one to number eight thousand nine hundred and eight. The said bonds are secured by a first mortgage upon all the lands of the Texas and Pacific Railway Company in the State of Texas, granted in aid of the construction of its lines east of Fort Worth, and also upon the net income of said lines of railway, after deducting current expenses, reconstruction and repairs, and the interest upon the first and second mortgages on said lines of railway; and they are also receivable, the same as money, in payment or exchange for such lands, at the current price of the same as fixed from time to time.

W. T. Walters,
George D. Krumbhaar,
Trustees."

The complaint alleged that the defendant did not exercise the option given to it by the bonds to pay the plaintiff the interest in scrip upon the 150 bonds, which became due and payable on July 1, 1882, or that which became due and payable on July 1, 1883, and demanded judgment for the interest in money, with accrued interest from those days, respectively.

There was no formal presentment by the plaintiff of the bonds in suit for the payment of interest on July 1, 1882, or on July 1, 1883, or at any other time. Shortly after each of those days, the treasurer of the defendant, at the defendant's office, notified the holders of the bonds, that it was not prepared to pay interest, as the earnings of the Railway were not sufficient; and no action was taken by it in reference to the issue of scrip. Before the commencement of this suit, and induced by the suggestion that suits were about to be brought to recover the interest on the bonds, and on or about October 12, 1883, the executive committee of the defendant's board of directors adopted a resolution providing for the payment of the interest in question in scrip. Notice of this action on the part of the defendant was given to the plaintiff and to the bondholders generally, by publication, before this suit was brought, and the defendant notified the plaintiff of its willingness to deliver to him his scrip for the interest in suit, and tendered it to him at the trial, but he refused to receive it.

On the 29th of March, 1875, the defendant had outstanding 9,252 land-grant bonds, secured by a first mortgage upon all the lands in the State of Texas which it had acquired, or might thereafter acquire, by virtue of its consolidation with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, or by virtue of its consolidation with, or purchase of, any other railroad company in the State of Texas, under the authority of the Acts of Congress of March 3, 1871, and May 2, 1872; also, certain construction bonds, secured by a first mortgage upon its lines of railway and their appurtenances east of Fort Worth in the State of Texas. These land-grant bonds and construction bonds were fixed obligations, with coupons for semi-annual interest, and the mortgages which secured them contained provisions for foreclosure, in case of default in the payment of such interest. On the 29th of March, 1875, the road of the defendant was only partially completed to Fort Worth, about 325 miles of it being then built and in operation. The defendant had made default in paying the interest on the bonds above mentioned. On that day the stockholders met and passed the following resolution: "*Resolved*, That the board of directors shall be, and they are hereby, requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land-grant bonds, each for the sum of one thousand dollars, bearing 7 per cent interest, the interest and the principal of said bonds to be payable in United States currency, and said bonds to mature in forty years from their date, and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this Company, or in which this Company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railroad Company, or to be acquired by said Company, in constructing its lines of road east of Fort Worth, under or by virtue of the Acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements or amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies, or either of them, or to the Texas and Pacific Railway Company, the total quantity of land so to be acquired, in constructing said lines of railway, being estimated at about 7,600,000 acres; and said mortgage or deed of trust shall also include the net income of the Company from the operating of its lines east of Fort Worth, after providing for the operating ex

penses, the current repairs and reconstructions, and the interest on the first and second mortgages hereinbefore provided for; and there shall be included in said mortgage or deed of trust a provision for a sinking fund out of the net proceeds of sales of land, and by the receiving of said bonds in payment for purchases of lands covered by the mortgage. The bonds thus provided for shall be exchangeable for outstanding land-grant bonds and used in purchase of material and supplies and for construction work, or may be applied toward the payment of any of the Company's indebtedness or obligations."

In pursuance of the authority thus conferred, the board of directors of the defendant issued 8,857 income and land-grant bonds, in the form of the one above set forth, and executed a mortgage to secure them, dated May 15, 1875, and a supplemental mortgage dated March 23, 1876, each to Walters and Krumbhaar, as trustees. The mortgage of May 15, 1875, recites the foregoing resolution, and sets out a form of the bond and of the certificate of the trustees, and then states that, in order to secure the payment of the principal and interest of the 8,908 bonds, according to the tenor thereof, the Company conveys to the trustees "all the lands heretofore granted to this Company, or in which this Company in the State of Texas is in any manner interested, being all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railway Company, or to be acquired by said Company, in constructing its lines of road east of Fort Worth, in the State of Texas, under or by virtue of the Acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies or either of them, or to the Texas and Pacific Railway Company, the total quantity of lands so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres of land; also all the net income of the lines of railway and appurtenances of the said The Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being 524 miles of railroad nearly completed, after deducting the expenses of operating and maintaining the same, and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and Pacific Railway Company's lines of railway, constructed and to be constructed, from the state line between Louisiana and Texas, westward, through Marshall and Dallas, to Fort Worth, in the State of Texas, and from Texarkana, on the state line between Texas and Arkansas, to a point of junction, via Clarksville, Paris, Bonham and Sherman, with the line aforesaid at or near Fort Worth, and from Marshall aforesaid, through the Town of Jefferson, to a point of junction, at or near Texarkana, with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the use and operation of said lines of railway, including, also, all the net income arising from the leasehold interest of said Company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company at the state line between Louisiana and Texas."

The mortgage further provided that no bonds should be issued until at least $2,254,000 of the outstanding land grant bonds theretofore issued should be deposited with the trustees and registered in their names, to be held as additional security for the bonds to be issued under the mortgage, until all the land grant bonds should have been so deposited or retired by the Company, and the mortgage under which they were issued satisfied of record, the holders of any outstanding land grant bonds to have the right, until January 1, 1876, to exchange their bonds, with accrued interest, at par, for the bonds issued under the new mortgage, the bonds so received in exchange to be registered and held by the trustees as additional security, as before provided, and, after January 1, 1876, the remainder of the bonds under the new mortgage to be disposed of as the board of directors might determine. The mortgage also provided for giving to the trustees lists and maps of the lands mortgaged, with minimum prices of sale, to be approved by both parties; and it contained sundry provisions for the sale of the lands, the purchase money to be received by the trustees, subject to the right of purchasers to pay for the lands with the bonds issued under the mortgage. Out of the proceeds of the sales of the lands, the expenses of the land department and compensation for the services and expenses of the trustees were to be paid, and the balance was to be appropriated to a sinking fund to redeem the bonds. Provision was made for applying the sinking fund yearly to purchasing the bonds at or less than par, or, if that could not be done, to redeeming bonds designated by lot; also, for the sale of the lands to pay the principal of the bonds, and for the termination of the trust on the payment in full of the bonds and interest. The supplemental mortgage of the 23d of March, 1876, conveyed to the trustees, subject to the trust created by the mortgage of May 15, 1875, "the lines of railway and appurtenances of the said Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being 524 miles of railroad nearly completed, after deducting the expenses of operating and maintaining the same, and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and Pacific Railway Company's lines of railway, constructed and to be constructed, from the state line between Louisiana and Texas, westward, through Marshall and Dallas, to Fort Worth, in the State of Texas, and from Texarkana, on the state line between Texas and Arkansas, to a point of junction, via Clarksville, Paris, Bonham, and Sherman, with the line aforesaid at or near Fort Worth, and from Marshall aforesaid, through the Town of Jefferson, to a point of junction, at or near Texarkana, with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the

use and operation of said lines of railway; including, also, all the net income arising from the leasehold interest of said Company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company, at the state line between Louisiana and Texas, under and subject, nevertheless, to the lien and charge of prior incumbrances thereon, and subject to all the trusts, limitations, conditions, and provisions of every kind mentioned and set forth in the deed of trust dated May 15th, 1875, whereto this instrument of writing is supplementary."

Subsequently to January 1, 1876, as of which date the first installment of the income and land-grant bonds was issued, and in the years or interest periods ending respectively on the first days of July, 1877, 1878, and 1879, the net earnings of the Company, as defined in the bonds and mortgage, were insufficient to enable it to pay the interest on the bonds outstanding at those dates, and, throughout those years or interest periods, no interest was paid upon the bonds nor any scrip issued for the interest or any part of it. On the 16th of February, 1880, in pursuance of a resolution of the board of directors, the defendant issued scrip for the interest accumulated during the entire period included between the first of January, 1876, and the first of July, 1879. The net earnings of the road having been insufficient to enable the defendant to pay the interest on the bonds for the years ending July 1, 1880, and July 1, 1881, it issued scrip for the interest for those years, respectively. For the year ending July 1, 1882, there was a deficit of $195,076.17 in the earnings of the road; and for the year ending July 1, 1883, there were surplus earnings of $131,867.90; thus showing a net deficit, for the operations of those two years, of $63,208.27. The fact that the net earnings of those two years were insufficient to enable the defendant to pay the interest on the income and land-grant bonds as provided therein was promptly made known and declared by it to its bondholders, and the plaintiff had due notice thereof.

The income and land-grant bonds are registered obligations. Interest on them is payable only to registered holders or their assignees, by duly executed and acknowledged or authenticated order or assignment, at the office of the defendant, and upon the delivery by such holders, or such assignees, of receipts for the interest, or, in case scrip is issued, of receipts for the scrip. By uniform practice, from the first issue of scrip, the bonds, or such orders or assignments, are presented by the payee or registered holder, or such assignee, at the office of the defendant, for scrip. When scrip is delivered, no indorsement is made on the bond, but the receipt or voucher for the scrip is signed by the person receiving it, and the defendant cannot know to whom to issue or deliver scrip, or who is entitled thereto, or who will receive the same, until the bonds, or such assignments or orders, are presented at its office and scrip demanded, or unless the registered holder, properly identified, presents himself at the office of the defendant and demands the issue of the scrip. The plaintiff, in respect of the interest sued for in this suit, never presented the bonds and demanded the issue of the scrip for the years 1882 and 1883.

On the foregoing facts the circuit court found, as conclusions of law, that the defendant failed to exercise its option to pay the plaintiff the interest in scrip due on the first of July, 1882, and that due on the first of July, 1883, on the 150 bonds; and that the plaintiff was entitled to judgment for the two sums of $10,500 each, with interest on one from the first of July, 1882, and interest on the other from the first of July, 1883.

The opinion of the circuit court, which accompanies the record, and is reported in 22 Blatchford, 464, proceeded upon the view that there was nothing in the language of the mortgage which controlled or qualified the absolute promise in the bond to pay interest in money or in scrip; that the bond contained a promise to pay interest annually; that there was nothing in it to show that the owner was not to have his interest, or scrip instead, at the election of the defendant, if the net earnings of the Railway were not sufficient to pay the interest; that the plaintiff was entitled to his money, or the scrip as its substitute, on the day on which, by the terms of the bond, the defendant was to pay the interest or exercise the alternative; that there was no reservation, in terms or by implication, of a right in the defendant to exercise the option after the day of payment; that, that day having elapsed without an election by the defendant, the bondholder was entitled to be paid his interest in money; and that it was not incumbent on the plaintiff to present the bonds for the payment of interest on the day it fell due, or to then demand the payment of interest, as a prerequisite to his right of action to recover the interest money.

It is contended for the defendant that the bond in question is an income bond, in the sense that the interest on it is not payable in money on the first day of July in each year, unless net earnings, as defined in the bond and mortgage, have been made; that, if sufficient net earnings, as thus defined, have not been acquired during the year, then, unless the Company exercises its option to issue scrip, the interest accumulates until it is earned, or until it is paid out of the sinking fund created by the sale of the mortgaged lands, or until the bond with its accrued interest becomes due; that the effect of a failure to exercise the option on the interest day is not to create a present fixed obligation to pay the interest in money; that in any event the option to pay in scrip need not be exercised on or by the interest day, but it is sufficient if the scrip is ready for the bondholder when he demands it; and that the effect of any default to pay in scrip is not to make the defendant liable for the full amount of the interest, but only for the value of the scrip at the time of default.

We are of opinion, however, that the circuit court was correct in its construction of the contract between the parties. Much stress is laid by the defendant upon the fact that the bond, on its face, is called a 7 per cent income and land-grant bond; and from this the argument is deduced that the interest is payable only out of income. But, the expression income and land-grant bond is sufficiently justified and sat-

isfied by the fact that the mortgage states that the principal and interest of the bonds is secured by a mortgage upon the land acquired or to be acquired by the Company, under the statutes specified in the mortgage, and upon the net income of the lines of its railway east of Fort Worth. The mortgage states that it is given to secure 8,908 income and land-grant bonds, each for $1,000, bearing 7 per cent interest, the interest and the principal of the bonds to be payable in United States currency, as distinguished from two other classes of bonds authorized at the same time, which were to be payable in gold coin. The resolution of the stockholders authorizing the issuing of the bonds was to the same effect. The option to pay the interest in scrip was not expressed in the resolution of the stockholders, but the mortgage states that the principal and interest of the bonds is to be paid "according to the tenor thereof." The bond contains a promise to pay the $1,000 on the first of January, 1915, in lawful money of the United States, "with interest thereon at the rate of 7 per cent per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned." The words "as provided in the mortgage hereinafter mentioned" refer to the payment of the principal as well as the interest.

There is thus far an absolute obligation and promise to pay the interest on the first day of July in each year. How is that promise qualified subsequently in the bond? Only by the provision that, in case the net earnings derived from operating the lines of railway east of Fort Worth shall not in any one year be sufficient to enable the Company to pay 7 per cent interest on the outstanding bonds, then scrip may, at the option of the Company, be issued for the interest. The only alternative to the payment of the interest in money on the day named is that if the net earnings in the year shall not be sufficient to enable the Company to pay the interest on the outstanding bonds, it may elect to issue scrip for the interest; but the scrip is to be issued, if issued, as and for the unpaid interest; and it is plain that the option of the Company to issue the scrip must be exercised at the time when, but for the insufficiency of the net earnings, it would be required to pay the interest in money. If the option be thus exercised, reasonable time may be allowed to prepare the scrip and issue and deliver it; but as the scrip is to be received at par and interest, the same as money, in payment for the lands, or for conversion into the capital stock of the Company, it is necessarily to draw interest from the day on which the interest which it takes the place of was payable.

In the absence of an exercise of the option, on the day the interest was due, to pay it in scrip, the bondholder had an immediate right of action for the interest money. The security given by the mortgage upon the lands and upon the net income is entirely separate and apart from the obligation of the Company to pay the interest in money or in scrip. This last provision is one for the benefit of the Company, to enable it to retain in its treasury the net earnings derived from operating its lines east of Fort Worth, if such earnings do not amount in the year to enough to enable it to pay the full interest on the outstanding bonds; but, in such case, it must exercise its option, by the day the interest falls due, to give to its bondholders, for such interest, scrip for the full amount thereof. The contract cannot be construed so as to make it possible for the Company to retain all its net earnings, however little under 7 per cent on the amount of the outstanding bonds, and yet withhold from the bondholders the scrip, as the representative of the full interest promised to be paid. We do not, however, mean to suggest that the Company may not pay the net earnings in money for part of the interest, and pay the rest in scrip.

By the mortgage, all the net income from the lines east of Fort Worth was pledged to secure the payment of the principal and interest of the bonds "according to the tenor thereof;" and the bond states that it is secured by a mortgage lien upon such net income, "as security for the interest." The fact that the bond also states, on its face, that it will be received by the Company "at par and accrued interest," in payment or exchange for any lands covered by the mortgage, serves to confirm the construction above given. So, also, the certificate of the trustees on each bond states that the bonds bear 7 per cent interest per annum, payable yearly.

It is contended for the defendant, that it cannot ascertain by the interest day whether the net earnings for the year are sufficient to pay the interest in money, and that hence it cannot exercise its option, by the interest day, to pay the interest in scrip. It is a sufficient answer to this position to say that the contract it has made is that it will exercise the option by that day. Furthermore, it is found that the fact that the net earnings of the two years ending July 1, 1882, and July 1, 1883, were insufficient to enable the defendant to pay the interest, was promptly made known by it to the bondholders; and it is not found that it could not have sufficiently ascertained such fact by the interest day to enable it to exercise the reserved option.

It is urged for the defendant that, because it did not pay interest or issue scrip therefor, for the interest periods ending July 1, 1877, 1878 and 1879, but issued scrip in February, 1880, for the interest accumulated for the period between January 1, 1876, and July 1, 1879, a practical construction was put by the bondholders upon the contract, which cannot be regarded as merely a forbearance, or a waiver for the time being, of their rights under the contract. But it is also found as a fact, by the circuit court, that the net earnings of the road having been insufficient to enable the Company to pay the interest on the bonds for the years ending July 1, 1880, and July 1, 1881, it issued scrip for the interest for those years respectively. We see nothing, in all these facts, which amounts to a waiver which can affect or prejudice the right asserted by the present plaintiff in this suit.

We are also of opinion that no demand by the plaintiff was necessary, to entitle him to the payment of the interest in money, on the failure of the defendant to exercise its option, on the day the interest fell due, to issue scrip therefor. It is stated in the findings of the circuit court, that, shortly after the first of July,

1882, and shortly after the first of July, 1883, the treasurer of the defendant, at its office, notified the holders of its bonds that it was not prepared to pay the interest, as the earnings of the Railway were not sufficient; and no action was taken by it in reference to the issue of scrip. This shows that it did not on the proper days elect to issue scrip. The bond states that the scrip, if issued, is to be issued "for the interest," that is, in place of the interest, and, under the terms of the bond, the company was bound to pay the interest on the day it was due, or else to issue the scrip, on the failure of a sufficiency of net earnings to pay the full interest. There was, therefore, no obligation on the part of the bondholder to demand his interest in money, in order to perfect his right to recover it, in the absence of the exercise of an option by the Company, on the day the interest fell due, to pay it in scrip. He had no right, by the terms of the contract, to demand the scrip. It was for the Company to announce its election to pay in scrip, or, as it did, take no action in reference to the issue of scrip. In the absence of an election by the Company, on the day the interest fell due, to issue the scrip, the right of action of the plaintiff immediately came into existence, without any demand on his part, to recover the full amount of the interest mentioned in the bond.

The cases cited by the defendant on the question of damages do not apply to an alternative contract like that in the present case. It falls within those cases in which, if the contract be that the promisor shall do one of two things by a certain day, at his election, he cannot exercise his election after the day has passed. This is familiar law, and needs no citation of authorities.

The judgment of the Circuit Court is affirmed.

A. M. HEFNER ET AL., *Piffs. in Err.*,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 747–757.)

Tax deed, when barred—lien for taxes—effect of tax deed—multifariousness—decree as to tax title—effect of.

1. The title set up by the defendants in this action, under the deed executed by the county treasurer to Callanan in 1874, pursuant to a sale in 1871, for nonpayment of taxes assessed in 1870, is barred by the decree rendered for the plaintiff in 1877, upon a bill in equity to foreclose the mortgage dated Aug. 23, 1870, to which bill Callanan had been made a party, and upon which he had been defaulted.

2. By the Statutes of Iowa the State or the county has a lien on the land for the amount of the taxes from the time of their assessment; and upon the sale of the land for nonpayment of the taxes, the lien passes to the purchaser; but the title, subject to the lien, remains in the former owner until the execution of the tax deed; and if that deed is for any reason invalid the lien is the only interest in the land that the purchaser has.

3. If the tax deed is valid, it clothes the purchaser, from the time of its delivery, not only with the title of the person assessed for the taxes but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them.

4. Multifariousness as to subjects or parties, with-

in the jurisdiction of a court of equity, cannot be taken advantage of by defendant, except by demurrer, plea or answer to the bill; it does not render a decree void, so that it can be treated as a nullity in a collateral action.

5. Where the whole title in the land was in the mortgagor, at the date of the mortgage, and the title under the tax deed, if valid, was subsequent in time, although paramount in right, to the title acquired under the mortgage and under the decree of foreclosure, it was within the jurisdiction and authority of the court, upon a bill in equity for the foreclosure of the mortgage, to determine the validity or invalidity of the tax title; and the owner of such title was a proper, if not a necessary, party to the bill.

6. A decree in such action, taken by confession, against the owner of the tax title, adjudging that he had no valid title nor lien, as against the plaintiff as mortgagee and as purchaser at the sale under the decree of foreclosure, is conclusive against the owner of the tax title, and cannot be collaterally impeached, but estops him and his grantees from setting up such title, in a subsequent action.

[No. 54.]

Argued Nov. 7, 8, 1887. Decided Dec. 19, 1887.

IN ERROR to the Circuit Court of the United States for the Southern District of Iowa. *Affirmed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an action at law, in the nature of ejectment, to recover possession of a tract of land, brought on July 5, 1883, in the Circuit Court of the United States for the Northern District of Iowa, against Hefner and wife and Babcock and wife, by the Northwestern Mutual Life Insurance Company, stating its title in substance as follows:

On October 31, 1876, it filed a bill on the equity side of that court against Bates, Callanan and others, to foreclose a mortgage of the same, and other lands, executed to the plaintiff on August 23, 1870, by Bates, then the owner, containing the usual allegations of such a bill; also alleging that Callanan "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to set out;" and praying that each and all of said defendants be made parties to the bill, and for a writ of subpena against all of them, and for judgment against Bates for the sums due on the mortgage, and for "a decree of foreclosure against the premises hereinbefore described against all of the before named defendants, and that the right, title and interest of each and every of the said defendants be by decree of this court forever barred and foreclosed, and that the master in chancery of this court be authorized to make sale of said premises, or sufficient thereof to satisfy the said several sums of money, with interest thereon, and the costs of this suit; and all and singular such relief as your orator is equitably entitled to receive."

Upon that bill, a writ of subpena was issued against and served upon all the defendants named therein, including Callanan.

On May 21, 1877, a final decree was entered in that suit, reciting a hearing of the plaintiff and of Bates, and a default of the other defendants, confirming that default, ascertaining the sums due on the mortgage, and adjudging that the mortgage "is a lien upon the mortgaged premises, prior and paramount to the lien of each and every of the said defendants;" that Bates pay those sums, with interest and costs, to the plaintiff on or before September 1, 1877; that, in default of such payment, a sale and

conveyance of the mortgaged premises, or of so much thereof as might be necessary to satisfy those sums, be made by a master; "and that the right, title and equity of redemption of each and every of the defendants in this suit be, by a sale of the said mortgaged premises hereunder, forever barred and foreclosed, and the purchaser at such sale shall take the premises sold by title absolute, and such title shall relate back to the date of the execution of the mortgage to the complainant, to wit, the 23d day of August, 1870."

On October 5, 1877, pursuant to that decree, the master sold the mortgaged premises by auction, for less than those sums, to the plaintiff, and executed a deed thereof accordingly.

In the present action the plaintiff further alleged that the defendants, Hefner and others, were in actual possession, claiming a right acquired from Callanan since the beginning of the suit for foreclosure, and had no right to possession against the plaintiff, and that Callanan claimed some interest in the premises under and by virtue of a pretended tax deed.

The defendants filed an answer to this action, alleging that, the land in question being subject to taxes lawfully assessed thereon for 1870 and remaining due and unpaid, the county treasurer, at a tax sale on November 15, 1871, in conformity with law, sold the land to Callanan, and, there being no redemption from the sale, executed to Callanan on December 1, 1874, a tax deed thereof, which was duly recorded two days after, and a copy of which was annexed to the answer; and that the right and title created by the tax sale and deed, and no other, was owned by Callanan at the time of the proceedings for foreclosure and of the decree therein, and had since been conveyed by him to the defendants. A demurrer to this answer was sustained, and judgment rendered for the plaintiff; and the defendants sued out this writ of error.

Messrs. **C. H. Gatch** and **Wm. Connor,** for plaintiffs in error:

A tax title, under the provision of the Iowa Statutes, is not a derivative one but a new and independent title, derived from the sovereign power under which the tax is levied, paramount to all previous interests, and freed from all incumbrances.

Crum v. *Cotting*, 22 Iowa, 411.

A decree must be founded on and sustained by both the allegations and the proofs in the cause; and it cannot be based on a fact not put in issue by the pleadings.

2 Dan. Ch. Pr. 1008, n. 6; 1 Dan. Ch. Pr. 531, 853, note. *Windsor* v. *McVeigh*, 93 U. S. 283 (23:917); *Graham* v. *La Crosse & M. R. R. Co.* 70 U. S. 3 Wall. 712(18:251); *Lanum* v. *Steel*, 10 Humph. 280.

In the foreclosure suit, the mortgagor's title was the only one which could be barred or foreclosed. The decree is necessarily limited in its effect to the parties who have some relation to the mortgagor's title, junior and subject to the lien of the complainant's mortgage.

McComb v. *Spangler*, 71 Cal. 418; *Graham* v. *La Crosse & M. R. R. Co.* 70 U. S. 3 Wall. 704 (18: 247); *Rathbone* v. *Hooney*, 58 N. Y. 467; *San Francisco* v. *Lawton*, 18 Cal. 474.

In *Peters* v. *Bowman*, 98 U. S. 56 (25: 91), the court says that upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the purchase money, and when there has been no fraud and no eviction, actual or constructive, no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit; such a bill would be multifarious and there would be a misjoinder of parties.

Citing *Noonan* v. *Lee*, 67 U. S. 2 Black, 499 (17:278); *Dial* v. *Reynolds*, 96 U. S. 340 (24:644); *Roberts* v. *Wood*, 38 Wis. 60; *Strobe* v. *Downer*, 18 Wis. 10; *Pelton* v. *Farmin*, 18 Wis. 222; *Summers* v. *Bromley*, 28 Mich. 125.

The proper purpose and scope of a foreclosure suit is to bar interest in the equity of redemption; and the decree does not affect rights paramount to those of the mortgagor or mortgagee.

Rathbone v. *Hooney*, 58 N. Y. 463; *Short* v. *Nooner*, 16 Kan. 220; *Eagle Fire Co.* v. *Lent*, 6 Paige, 635; *Corning* v. *Smith*, 6 N. Y. 82; *McDonald* v. *Mobile L. Ins. Co.* 56 Ala. 468.

In *Winham* v. *Crutcher*, 8 Tenn. Ch. 666, it is held that a decree *pro confesso* can only be taken upon the facts stated in the bill.

Windsor v. *McVeigh*, 93 U. S. 274 (23:914); *Bigelow* v. *Forrest*, 76 U. S. 9 Wall. 351 (19:700); *Day* v. *Micou*, 85 U. S. 18 Wall. 156 (21: 860); *Ex parte Lange*, 85 U. S. 18 Wall. 163 (21:872).

Mr. **B. F. Kauffman,** for defendant in error:

At the time of the execution of the mortgage the taxes in question had not been levied, and were, of course, no lien upon the property. The mortgage was the first and paramount lien; therefore whatever interest Callanan may have acquired, by virtue of the proceedings thereafter had, such interest was acquired subsequent to the execution of the mortgage to the company.

He became subrogated to the rights of the State and County as to the lien for taxes, if any, paid by him.

Everett v. *Beebe*, 37 Iowa, 452; *Light* v. *West*, 42 Iowa, 138; *Besore* v. *Dosh*, 43 Iowa, 211; *Sexton* v. *Henderson*, 45 Iowa, 160; *Miller* v. *Corbin*, 46 Iowa, 150; *Springer* v. *Bartle*, 46 Iowa, 688; *Claussen* v. *Rayburn*, 14 Iowa, 136.

The interest of the tax purchaser, prior to the execution of a deed, is that of a lien holder only.

Revision of 1860, § 779; Code 1873, § 890; *Williams* v. *Heath*, 22 Iowa, 519; *Eldridge* v. *Kuehl*, 27 Iowa, 160, 174; *Lake* v. *Gray*, 35 Iowa, 44; *Mallory* v. *French*, 38 Iowa, 431.

The court had the right to pass upon the character of the interest held by Callanan, in the foreclosure proceeding.

Kelsey v. *Abbott*, 13 Cal. 616; *Sargent* v. *Wilson*, 5 Cal. 505; *Marks* v. *Marsh*, 9 Cal. 96; *Chase* v. *Abbott*, 20 Iowa, 154; *Larson* v. *Reynolds*, 18 Iowa, 579; *Lee* v. *Kingsbury*, 13 Tex. 68; *Baxter* v. *Dear*, 24 Tex. 17.

If the court undertakes to determine claims hostile to the title of the mortgagor, its decree is not void. On the contrary, it is valid until reversed, and is not subject to any collateral attack.

Sargent v. *Wilson*, *Marks* v. *Marsh*, *Chase* v. *Abbott*, *Larson* v. *Reynolds*, *Lee* v. *Kingsbury*, and *Baxter* v. *Dear*, *supra*.

The failure to plead matters of defense which might have been pleaded is a waiver of them forever.

Dewey v. *Peck*, 33 Iowa, 242; *Lawrence Sav. Bank* v. *Stevens*, 46 Iowa, 429; *Murrell* v. *Smith*, 51 Ala. 301; *Kelly* v. *Donlin*, 70 Ill. 378; *Gaines* v. *Kennedy*, 53 Miss. 108; *Covington & C. Bridge Co.* v. *Sargent*, 27 Ohio St. 233.

The judgment and decree of the court upon this question, it having jurisdiction of the person of Callanan, and of the whole of the property, and therefore of the parties and subject matter, was not *coram non judice*, and it cannot be collaterally assailed; and the purchaser took title absolute under this decree according to its very terms.

Cromwell v. *Sac Co.* 94 U. S. 357 (24:199); *Harris* v. *Harris*, 36 Barb. 88; *Lee* v. *Kingsbury*, 18 Tex. 68; Bigelow, Estoppel, note, p. 46; *Tuska* v. *O'Brien*, 68 N. Y. 448; *Petersine* v. *Thomas*, 28 Ohio St. 596; *Bates* v. *Spooner*, 45 Ind. 489; *Campbell* v. *Ayers*, 1 Iowa, 257; *Voorhees* v. *U. S. Bank*, 25 U. S. 10 Pet. 469 (9:490).

Certain classes of adverse titles should not be litigated in a foreclosure suit.

Peters v. *Bowman*, 98 U. S. 56 (25: 91). *Dial* v. *Reynolds*, 96 U. S. 340 (24:644).

Mr. Justice **Gray** delivered the opinion of the court:

The question presented by the record is whether the title now set up by the defendants under the deed executed by the county treasurer to Callanan in 1874, pursuant to a sale in 1871 for nonpayment of taxes assessed in 1870, is barred by the decree rendered for the plaintiff in 1877, upon a bill in equity to foreclose a mortgage dated August 28, 1870, to which bill Callanan had been made a party, and upon which he had been defaulted.

By the Statutes of Iowa, taxes upon real estate are assessed to the owner in September of each year. In real estate mortgaged the mortgagor retains the legal title; and it is listed by and taxed to him, unless it is listed by the mortgagee. As between vendor and purchaser, the taxes become a lien on the land on the first day of November ensuing. If the owner neglects to pay them before the first day of the following February, they may be collected by distress and sale of his personal property, and also become a perpetual lien on the land against all persons except the United States and the State. The county treasurer may collect them by sale of the land, and if the owner does not redeem from that sale within three years, the treasurer executes a deed to the purchaser, which vests in him "all the title of the former owner, as well as of the State and county." Iowa R. S. 1860, §§ 710, 714, 734, 746, 756, 759, 763-784, 2217; Stats. May 27, 1861, chap. 24, § 2; April 7, 1872, chap. 110; Code of 1873, §§ 796, 803, 823, 839, 853, 857, 865, 871-897, 1938.

The effect of these statutes, as declared by the supreme court of the State, is that from the time of the assessment of the taxes the State or the county has a lien on the land for the amount thereof; that upon the sale of the land for nonpayment of the taxes that lien passes to the purchaser; but the title, subject to the lien, remains in the former owner until the execution of the tax deed; and that if that deed is for any reason invalid, the lien is the only interest that the purchaser has in the land. *Williams* v. *Heath*, 22 Iowa, 519; *Eldridge* v. *Kuehl*, 27 Iowa, 160; *Everett* v. *Beebe*, 37 Iowa, 452; *Sexton* v. *Henderson*, 45 Iowa, 160; *Springer* v. *Bartle*, 46 Iowa, 688.

But if the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them. *Orum* v. *Cotting*, 22 Iowa, 411; *Turner* v. *Smith*, 81 U. S. 14 Wall. 558 [20:724].

It is contended in behalf of the defendants that the only proper object of the suit to foreclose the mortgage was to sell the title of the mortgagor, and to cut off the equity of redemption of all persons claiming under him any title, lien or interest inferior or subject to the mortgage; and that the title under the tax deed, being adverse and paramount to the rights both of the mortgagor and of the mortgagee, could not be contested in that suit and was not barred by the decree therein. But the authorities cited fall short of supporting that contention.

Multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant, except by demurrer, plea or answer to the bill, although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed. *Oliver* v. *Piatt*, 44 U. S. 3 How. 333, 412 [11: 622, 658]; *Nelson* v. *Hill*, 46 U. S. 5 How. 127, 132 [12:81, 83]. *A fortiori* it does not render a decree void, so that it can be treated as a nullity in a collateral action.

As a general rule, a court of equity, in a suit to foreclose a mortgage, will not undertake to determine the validity of a title prior to the mortgage and adverse to both mortgagor and mortgagee; because such a controversy is independent of the controversy between the mortgagor and the mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious.

Upon that ground it has been held by this court, as well as by the Courts of New York, California and Michigan, on appeals from decrees for foreclosure of mortgages, that the holders of a prior adverse title were not proper parties; and judges have sometimes used such strong expressions as that the mortgagee "cannot make them parties," or that their title "cannot be litigated," in a suit for foreclosure. *Dial* v. *Reynolds*, 96 U. S. 340 [24:644]; *Peters* v. *Bowman*, 98 U. S. 56, 60 [25:91, 92]; *Eagle Fire Co.* v. *Lent*, 1 Edw. Ch. 301; *S. C.* 6 Paige, 635; *Banks* v. *Walker*, 2 Sandf. Ch. 344; *S. C.* 3 Barb. Ch. 438; *Corning* v. *Smith*, 6 N. Y. 82; *San Francisco* v. *Lawton*, 18 Cal. 465; *Summers* v. *Bromley*, 28 Mich. 125.

But in none of the cases just cited was any question presented or adjudged of the effect that a decree of foreclosure, rendered in a suit in which such adverse claimants were made parties and their claims were directly put in issue and determined, might have against them in a subsequent action.

The cases of *Strobe* v. *Downer*, 13 Wis. 10, and *Palmer* v. *Yager*, 20 Wis. 91, were also appeals from decrees of foreclosure; and in a later case

in Wisconsin the court summed up the law thus: "It is freely admitted that a foreclosure suit is not an appropriate proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor; and that if such rights be so litigated, and be determined upon pleadings and proofs, the decree will be erroneous, and will be reversed. But whether, until reversed, such decree is *coram non judice* and void, so that it may be collaterally impeached, is quite another question. The conclusion would seem to follow, from all of the decisions, that it is not." *Iowa County* v. *Mineral Point R. R. Co.* 24 Wis. 93, 121.

There are indeed two cases in the Court of Appeals of New York, in which a common decree of foreclosure *pro confesso* was held to be no bar to a subsequent action at law by the owner of a title prior and paramount to the mortgage. But the decision in either case turned on the form in which the plaintiff at law had been made a defendant to the bill of foreclosure.

In the one case, a widow was held not to be barred of her dower by a decree of foreclosure, obtained after the death of her husband, of a mortgage executed by him alone during the coverture, on a bill against her and others as executors and devisees under his will, alleging that she and the other defendants "have or claim to have some interest in the aforesaid mortgaged premises, as subsequent purchasers, or incumbrancers, or otherwise, but what particular interest your orator is not informed," and praying that they might be foreclosed "of and from all equity of redemption and claim of, in and to' the mortgaged premises. The ground of the decision was that under the statutes and rules of court the allegations and decree were limited to rights subsequent and subject to the mortgage; and *Judge* Denio, in delivering judgment, said: "It is not intended to decide that if a party claiming a title prior to the mortgage should be made a party to the suit, and should answer and litigate the question, and should have a decree against him, it would not conclude him in a collateral action." *Lewis* v. *Smith*, 9 N. Y. 502, 516.

In the other case, a testator having devised land to his granddaughter in trust for his daughter for life, with remainder to the granddaughter in fee, the two afterwards executed a mortgage, the granddaughter not executing it as trustee, and having no power by law to execute it as such. The bill and decree of foreclosure were against them as individuals, and therefore the title of the granddaughter as trustee was held not to be barred by the decree, the court saying: "Her interest in remainder was subordinate to the prior estate for life in trust, created by the will; and she was not bound to set up her claim as trustee, when made a party to the foreclosure, in the absence of any averment in the complaint in respect to that interest, or claim that it was subject to the mortgage." *Rathbone* v. *Hooney*, 58 N. Y. 463, 467.

So in a recent case in California, not yet published in the official reports, in which a decree, upon a bill against husband and wife, foreclosing a mortgage, executed by the wife alone, of land held by them in community, was held not to bar a subsequent action of ejectment by the husband, the bill to foreclose contained no averment that the husband had or asserted any claim adverse to the title of the mortgagor, and the decree in terms only barred the equity of redemption. *McComb* v. *Spangler* [71 Cal. 418].

To a bill in equity to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet, at least when he holds the legal title, and his debt is due and payable, he may—and, when the property is ordered to be sold free of all incumbrances, must—be made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage. *Finley* v. *Bank of U. S.* 24 U. S. 11 Wheat. 304 [6: 480]; *Hagan* v. *Walker*, 55 U. S. 14 How. 29, 37 [14: 312, 316]; *Jerome* v. *McCarter*, 94 U. S. 734 [24: 136]; *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 307 [27: 117, 125]; *Woodworth* v. *Blair*, 112 U. S. 8 [28: 615]; *Haines* v. *Beach*, 3 Johns. Ch. 459; *Hudnit* v. *Nash*, 16 N. J. Eq. 550.

In all the cases heretofore referred to, the adverse title was prior to the mortgage foreclosed. But in the case at bar, the tax title, though adverse to the mortgage title, was not prior to it. The whole title in the land was in the mortgagor at the date of the mortgage; and the title under the tax deed, if valid, was subsequent in time, although paramount in right, to the title acquired under the mortgage and the decree of foreclosure.

Upon the question whether the validity of a tax title subsequent in date to the mortgage may properly be litigated and determined in a suit for foreclosure, there has been a difference of opinion in the courts of the States. The Courts of California and of Michigan have held that it may. *Kelsey* v. *Abbott*, 13 Cal. 609; *Horton* v. *Ingersoll*, 18 Mich. 409; *Wilkinson* v. *Green*, 34 Mich. 221, 223. Those of Wisconsin and of Kansas have decided that it should not. *Pelton* v. *Farmin*, 18 Wis. 222; *Roberts* v. *Wood*, 38 Wis. 60; *Short* v. *Nooner*, 16 Kan. 220. But the question in each of these cases arose upon appeal from the decree of foreclosure; and there is no case, so far as we are informed, in which a decree upon apt allegations in a bill to foreclose a mortgage, adjudging a subsequent tax title to be invalid, has been allowed to be collaterally impeached by the holder of that title in a subsequent action.

Upon principle, it was within the jurisdiction and authority of the court, upon a bill in equity for the foreclosure of the plaintiff's mortgage, to determine the validity or invalidity of Callanan's tax title; and he was a proper, if not a necessary, party to such a bill.

If the mortgagor or the mortgagee had made a conveyance or assignment after the date of the mortgage, the purchaser or assignee would have been a necessary party to the bill to foreclose. Story, Eq. Pl. §§ 198, 199, 201; *Terrell* v. *Allison*, 88 U. S. 21 Wall. 289 [22: 634]. And in *Stevenson* v. *Texas & P. R. Co.* 105 U. S. 703 [26: 1215], the circuit court, and this court on appeal, upon a bill in equity to foreclose a mortgage, tried the validity of an adverse title un-

der a sale on execution against the mortgagor upon judgments recovered since the mortgage was made, and adjudged that title to be valid, because the judgments were recovered before the mortgage was recorded.

At the date of the plaintiff's mortgage, the entire estate in the land was in the mortgagor, and was included in the mortgage. The subsequent assessment of the taxes created a lien upon that estate, which, upon the sale for nonpayment of the taxes, passed to Callanan; but the mortgagor, so long as his right of redemption from that sale existed, still held the legal title, subject first to the lien for taxes, and then to the mortgage. The deed afterwards executed by the county treasurer to Callanan, if valid, conveyed to him all the rights and interests, both of the mortgagor and of the mortgagee, and vested in him a complete title; so that the mortgagor had no title and no equity of redemption, and the mortgagee no lien and no right of foreclosure. There would seem to be no less reason for making Callanan a party to the bill than if he had claimed under a conveyance from or judgment against the mortgagor or the mortgagee since the date of the mortgage. But if Callanan was not a necessary party to the bill to foreclose the mortgage, clearly the mortgagor, if not the mortgagee, might have filed a bill in equity against him to redeem the land from the tax sale, alleging that he had a lien only, and not an absolute title; and by such a bill the issue whether he had or had not such a title would have been directly presented. The question whether that issue should be determined in the suit to foreclose the mortgage, or in a separate suit, was a question of multifariousness or of convenience, affecting the discretion only, and not the jurisdiction, of the court. By determining, before finally decreeing a foreclosure and sale, the question whether Callanan had a good title under the tax deed, the probability of obtaining a fair price at a sale under the decree of foreclosure would be increased, the rights of all the parties secured, and further litigation avoided. As was said by *Lord Chancellor* Talbot, and repeated by *Chief Justice* Marshall: "The court of equity in all cases delights to do complete justice, and not by halves." *Knight* v. *Knight*, 3 P. Wms. 331, 334; *Corbet* v. *Johnson*, 1 Brock. 77, 81.

In the absence of any statute or rule of court, restricting the natural meaning of the words, the allegation in the bill to foreclose, that Callanan "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to set out," was sufficient to include Callanan's interest, whether it was a mere lien for the amount of the taxes, as it would have been if the right of redemption from the sale for taxes had not expired, or if the treasurer's deed was void for any reason, or was a perfect title in fee, as it would be if that right had expired and there was no defect in the tax deed. The prayer of the bill was, not only for a subpena and a decree of foreclosure against all the defendants named in the bill, but also that the right, title and interest of each and every of them be forever barred and foreclosed by the decree, and that a sale of the premises be made by a master and for further relief.

Callanan, by the service of the subpena, had due notice of the allegations and prayer of the bill. By the decree reciting and confirming his default, the bill was taken for confessed against him; and any final decree, warranted by the allegations of the bill, bound him to the same extent as if he had appeared in the suit, and demurred to or contested those allegations. *Thomson* v. *Wooster*, 114 U. S. 104, 111 [29:105, 107].

The decree not only adjudges, in the usual form, that the mortgage "is a lien upon the mortgaged premises, prior and paramount to the lien of each and every of the said defendants;" and that, in default of payment by the mortgagor of the sums found due on the mortgage, "the right, title and equity of redemption of each and every of the defendants in this suit be" by a sale under the decree "forever barred and foreclosed." But it further declares that "The purchaser at such sale shall take the premises sold by title absolute," and that "Such title shall relate back to the date of the execution of the mortgage," specifying that date.

That decree is a conclusive adjudication, which cannot be collaterally impeached by Callanan or those claiming under him, that he had no valid title or lien of any kind against the plaintiff as mortgagee of the land in question, and as purchaser at the sale under the decree of foreclosure; and was rightly held to estop the grantees of Callanan to set up his tax title in the present action.

Judgment affirmed.

F. P. TALKINGTON ET AL., *Appts.*,
v.
HENRY M. DUMBLETON.

(See S. C. Reporter's ed. 745-747.)

Jurisdiction as to amount—affidavits, when proper.

In an action to set aside a deed of land, for false representations, where the value of the land was in issue in the court below, and the court found that it did not exceed $5,000, affidavits, showing that the value thus found was not the true value, are not admissible for the purpose of establishing the jurisdiction of this court; and where the court found such value to be not more than $5,000, *held*, that the appeal must be dismissed.

[No. 968.]

Submitted Dec. 15, 1887. Decided Dec. 19, 1887.

APPEAL from the Circuit Court of the United States for the District of Oregon.

On motion to dismiss. *Granted.*

The action was brought to set aside a conveyance of land, made in exchange for other property, on the ground that the exchange was brought about by false representation of defendant as to the value of the property taken by plaintiff in exchange.

Plaintiff alleged that the value of the land was $7,000. Defendant alleged that it was only $4,000. The decree found that the value of the land was $5,000 and no more, and directed a reconveyance to plaintiff; defendant appealed to this court. Plaintiff now moves to dismiss because the value of the matter in

dispute does not exceed $5,000. The defendant presented affidavits, showing that such value was sufficient for the jurisdiction of this court.

Mr. **Frank V. Drake,** for appellee, in support of the motion:

As to defendant there has not been, nor is there now, a controversy in amount or value exceeding $5,000.

Merrill v. *Petty*, 88 U. S. 16 Wall. 338 (21: 499); *Hilton* v. *Dickinson*, 108 U. S. 165 (27:688); *Walker* v. *U. S.* 71 U. S. 4 Wall. 163 (18: 319); *Thompson* v. *Butler*, 95 U. S. 695 (24:541); *Gordon* v. *Ogden*, 28 U. S. 3 Pet. 33 (7:592); *Knapp* v. *Banks*, 43 U. S. 2 How. 73 (11:184); *Lamar* v. *Micou*, 104 U. S. 465 (26: 774); *Gray* v. *Blanchard*, 97 U. S. 564 (24: 1108); *Tinstman* v. *First Nat. Bank*, 100 U. S. 6 (25: 530); *Jenness* v. *Citizens Nat. Bank*, 110 U. S. 52 (28: 67); *Dows* v. *Johnson*, 110 U. S. 223 (28: 128).

The amount in controversy as to the co-appellants Marx and Jorgensen is measured by their mortgage, which is but for the sum of $890.

Gibson v. *Shufeldt*, 122 U. S. 29 (30:1084); *Farmers Bank* v. *Hooff*, 32 U. S. 7 Pet. 168 (8: 646).

Several defendants cannot join in an appeal, and thereby increase the amount in controversy.

Russell v. *Stansell*, 105 U. S. 303 (26: 989).

The record is conclusive as to jurisdictional amount.

Richmond v. *Milwaukee*, 62 U. S. 21 How. 391 (16: 60); *U. S.* v. *The Union*, 8 U. S. 4 Cranch, 216 (2: 600); *Gray* v. *Blanchard*, *supra*.

Contradictory affidavits are inadmissible.

Webster v. *Buffalo Ins. Co.* 110 U. S. 386 (28: 172); *Richmond* v. *Milwaukee*, *Gray* v. *Blanchard*, and *Thompson* v. *Butler*, *supra*; *Lee* v. *Watson*, 68 U. S. 1 Wall. 337 (17: 557).

Neither subsequent increase of value, accrued interest nor costs can enter into the computation in determining the jurisdictional amount.

Merrill v. *Petty*, *Thompson* v. *Butler*, *Walker* v. *U. S.*, and *Knapp* v. *Banks*, *supra*; *West. Union Tel. Co.* v. *Rogers*, 93 U. S. 565 (23: 977).

Costs and damages should be awarded.

Whitney v. *Cook*, 99 U. S. 607 (25: 446). Rules 6 and 23 of this court; R. S. §§ 1010, 1012.

Mr. **John H. Mitchell,** for appellants, in opposition:

The amount in controversy, or value of the matter in dispute, both here and in the court below, is the value of the land in controversy at the date of the judgment.

Hilton v. *Dickinson*, 108 U. S. 165 (27: 688); *Gordon* v. *Ogden*, 28 U. S. 3 Pet. 33 (7: 592).

The finding of the court below as to value is not conclusive on this court.

Tinstman v. *First Nat. Bank*, 100 U. S. 6 (25: 530); *Gray* v. *Blanchard*, 95 U. S. 564 (24:1108); *Dows* v. *Johnson*, 110 U. S. 223 (28:128); *U. S.* v. *The Union*, 8 U. S. 4 Cranch, 216 (2:600); *Youngstown Bank* v. *Hughes*, 106 U. S. 524 (27; 269); *Elgin* v. *Marshall*, Id. 580 (27: 249); *Williamson* v. *Kincaid*, 4 U. S. 4 Dall. 20 (1: 723); *Course* v. *Stead*, 4 U. S. 4 Dall. 22 (1: 724); *Gage* v. *Pumpelly*, 108 U. S. 164 (27: 668).

The appeal as to Marx and Jorgensen should not be dismissed, provided the value of the land in dispute is of a sufficient amount to entitle the defendant Talkington to an appeal. This is not a motion to dismiss the appeal of Marx and Jorgensen, nor is it a motion to dismiss the appeal as to them. It is simply a motion to dismiss the appeal.

The Rio Grande, 86 U. S. 19 Wall. 189 (22: 61); *Tupper* v. *Wise*, 110 U. S. 398 (28: 189); *Lynch* v. *Bailey*, 110 U. S. 400 (28: 190); *Friend* v. *Wise*, 112 U. S. 797 (28: 602).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought on the 10th of April, 1886, by Henry M. Dumbleton, the appellee, to set aside a conveyance of lands made by him to F. P. Talkington, one of the appellants, on the 23d of February, 1885, in exchange for the interest of Talkington in a saloon, on the ground that the exchange was brought about and the conveyance obtained by the false and fraudulent representations of Talkington as to the value of his property. In his bill Dumbleton alleged that the value of the land was $7,000, and that Talkington represented to him that the value of the property to be given in exchange therefor was of equal amount, or more.

In his answer, which was filed May 14, 1886, Talkington denied that the land, "or complainant's interest therein, was on February 15, 1884, or at any time since, has been of the value of $7,000, or of any greater value than $4,000," and he averred that at the time of the exchange "The said saloon, stock in trade, and the good-will thereof was of the value of at least $4,000." Upon the issue thus presented testimony was taken by both parties, that for Dumbleton tending to prove that the value was $7,000, and that for Talkington that it was less than $4,000. A decree was entered November 8, 1886, finding that the value of the land "was and still is $5,000, and no more," and directing Talkington to reconvey on the payment to him of the sum of $812.

From that decree Talkington and his codefendants, who claim under him, took this appeal, which Dumbleton moves to dismiss because the value of the matter in dispute does not exceed $5,000, that being the amount now required for our jurisdiction on appeals and writs of error from the supreme courts of the Territories in cases like this. 23 Stat. at L. 443, Act of March 3, 1885, chap. 355. To overcome the effect of the finding of the court upon the question of value, the appellants present here the affidavits of sundry persons, tending to show that the actual value of the land at the time of the decree was sufficient for our jurisdiction; and they ask that these affidavits may be considered upon this motion.

Inasmuch as the appellants sought in the court below to establish as part of their defense the fact that the land was not worth $7000, but only $4,000, and succeeded so far as to get the court to find that it did not exceed $5,000, we are not inclined to allow the same parties, for the purpose of establishing our jurisdiction, to show by affidavits that the answer of Talkington, the principal defendant, and sworn to by him, was erroneous in that particular, even if, under any circumstances, it would be permissible to show by affidavits that the value appearing in the record was not the true value, which we by no means admit. In *Zeigler* v. *Hopkins*, 117 U. S. 683, 689 [29: 1019, 1021],

where affidavits were submitted, the finding of the court below as to value was not a material question in the case upon its merits, but was more in the nature of an inquiry for the purpose of determining whether an appeal should be allowed, as in *Wilson* v. *Blair*, 119 U. S. 387 [30: 441]. Here, however, the value of the property was one of the questions in the case and necessarily involved in its determination.

As the value of the matter in dispute is, according to the finding of the Court below, not more than $5,000, the motion to dismiss is granted.

ÆTNA LIFE INSURANCE COMPANY, *Piff. in Err.*, v. ADA DAVEY.

(See S. C. Reporter's ed. 739-745.)

Construction of policy—condition as to intemperance—use of alcoholic stimulants—question for jury.

1. In an action on a policy of life insurance, where the application contained the question, "Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulant or opium, or does he use any of them often or daily," and the answer was "No," held, that an instruction to the jury was correct, that they could not find the answer to be untrue unless the insured had, prior to the issuing of the policy, been addicted to excessive or intemperate use of alcoholic stimulants or opium or at the time of the application habitually used some of them often or daily.

2. Where the policy contained the condition that it should become null and void if the insured "shall become so far intemperate as to impair his health," an instruction to the jury, to the effect that such condition was not broken unless intemperance became the habit or rule of life of the insured after the policy was issued, was erroneous.

3. If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words, "so far intemperate as to impair his health," although he may not have had *delirium tremens*, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether death was so caused is a matter to be determined by the jury under all the evidence.

[No. 78.]

Argued Nov. 23, 1887. Decided Dec. 19, 1887.

IN ERROR to the Circuit Court of the United States for the District of New Jersey. *Reversed.*

Action upon a policy of insurance. Plaintiff recovered judgment; defendant brought error.

The facts are further stated in the opinion.

Mr. **Theron G. Strong,** for plaintiff in error:

The physician's certificate of death furnished to the Company by the plaintiff below was evidence of the facts stated in it.

Goldschmidt v. *Mutual L. Ins. Co.* 8 Cent. Rep. 645, 102 N. Y. 491; *Covenant Mut. Ben. Asso.* v. *Hoffman*, 110 Ill. 608; *Conn. Mut. L. Ins. Co.* v. *Schwenk*, 94 U. S. 593 (24: 294); *Mutual Ben. L. Ins. Co.* v. *Higginbotham*, 95 U. S. 380 (24: 499); *N. Y. Cent. Ins. Co.* v. *Watson*, 23 Mich. 486; *Day* v. *Mutual Ben. L. Ins. Co.* 1 MacAr. 598; *Walther* v. *Mutual L. Ins. Co.* 65 Cal. 417; *Conn. Mut. Ins. Co.* v. *Siegel*, 9 Bush, 452.

Statements in proofs of loss furnished by the insured, showing a violation of the policy, are not only evidence but amount to an estoppel.

Mutual Ben. L. Ins. Co. v. *Newton*, 89 U. S. 22 Wall. 32 (22: 793); *Campbell* v. *Charter Oak F. & M. Ins. Co.* 10 Allen, 213; *Irving* v. *Excelsior F. Ins. Co.* 1 Bosw. 507; *N. Y. Cent. Ins. Co.* v. *Watson*, 23 Mich. 486.

The error was clearly prejudicial to the defendant below.

Deery v. *Cray*, 72 U. S. 5 Wall. 807 (18: 657); *Smith* v. *Shoemaker*, 84 U. S. 17 Wall. 630 (21: 717); *Moores* v. *Citizens Nat. Bank*, 104 U. S. 625 (26: 870); *Gilmer* v. *Higley*, 110 U. S. 50 (28: 63).

Individuals become so far intemperate as to impair health or induce delirium tremens, without having contracted the habit of, or being injuriously addicted to the use of alcoholic liquors.

Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 350 (26: 1055).

The true test of the condition, so far intemperate as to impair his health, is whether or not there was an impairment of health; and if so, was intemperance in any degree the cause?

Odd Fellows Mut. L. Ins. Co. v. *Rohkopp*, 94 Pa. 59; *North Western L. Ins. Co.* v. *Muskegon Nat. Bank*, 122 U. S. 501 (30: 1100).

Mr. **John Linn,** for defendant in error:

A party is always at liberty to contradict his own witness.

1 Whart. Ev. § 549; 1 Greenl. Ev. § 443.

The occasional use of intoxicating liquors did not render the insured a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him.

Knickerbocker L. Ins. Co. v. *Foley*, 105 U. S. 354 (26: 1056).

Mr. Justice **Harlan** delivered the opinion of the court:

By its policy, issued July 16, 1878, the Ætna Life Insurance Company insured the life of William A. Davey in the sum of $10,000, payable to his wife, the present defendant in error, within ninety days after due notice and proof of the death of the insured, during the continuance of the policy. Among the questions in the application for the policy were the following: "5. Are the habits of the party sober and temperate? 6. Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily?" To the first question the answer was "Yes;" to the second, "No." The application, which by agreement was made the basis of the contract, contained a warranty of the truth of the answers to the above and other questions, and that the policy should be void if they were in any respect false or fraudulent.

The policy was issued and accepted upon the following among other conditions: 1, that the answers, statements, representations, and declarations contained in or indorsed upon the application, made part of the contract, are warranted to be true in all respects, and that the policy should be absolutely null and void if obtained by or through any fraud, misrepresentation, concealment, or false statement; 2, that if the insured "shall become so far intemperate as to impair his health or induce *delirium tremens*,

or if his death shall result from injuries received while under the influence of alcoholic liquor," the policy should be null and void, except as provided in the eighth section of the conditions. The latter section is in these words: "In every case when the policy shall cease, be or become void (except by fraud, misrepresentation, concealment, or any false statement), if the premiums for three entire years shall have been paid, the amount which by the seventh section of these conditions would be applied to the purchase of a paid up policy shall not be forfeited to the said Company, but the same shall be due and payable in ninety days after due notice and proof of death of the said insured."

The insured died August 6, 1881, while on a visit at Alexandria Bay. The Company having received due notice and proof of his death, and having refused to pay the amount named in the policy, this action was brought by his widow. The Company, besides pleading the general issue, made these special defenses: that, contrary to the statements made in his application, the insured, for a long time prior to the issuing of the policy, was addicted to the excessive and intemperate use of alcoholic stimulants, and had used them often and daily; and that, in violation of one of the conditions of the contract, he became, *after the issuing of the policy*, so far intemperate as greatly to impair his health and to induce *delirium tremens*.

At the trial, evidence was introduced tending to establish both of these special defenses. But there was also evidence tending to show that the insured was not, prior to the issuing of the policy, addicted to the excessive or intemperate use of alcoholic stimulants, and that he did not, after that date, become so far intemperate as to impair his health or induce *delirium tremens*.

There was a verdict and judgment for the plaintiff for the sum named in the policy, with damages to the amount of $1,419.82.

Upon the issue as to the truth or falsity of the answer to the sixth question in the application for the policy, the court instructed the jury, in substance, that they could not find the answer to be untrue, unless the insured had, prior to the issuing of the policy, been *addicted* to the excessive or intemperate use of alcoholic stimulants or opium, or at the time of the application *habitually* used some of them often or daily. The charge, upon this point, followed almost the identical words of the question propounded to the insured, and is unobjectionable, unless, as is contended, the court erred in using the word "habitually;" implying thereby that the answer of "No" was a fair and true one, if the use by the insured of stimulants, at the time the policy was issued, was not so frequent or to such an extent as to indicate, in that respect, a fixed, settled course or habit of life. We are of opinion that the question put to the insured was properly interpreted by the court. The inquiry as to whether the insured had ever been addicted to the excessive or intemperate use of alcoholic stimulants, and whether at the time of the application he used alcoholic stimulants "often or daily" was, in effect, an inquiry as to his habit in that regard; not whether he used such stimulants or opium at all, but whether he used any of them habitually. If he was addicted to the excessive use of them, he was habitually intemperate; and to use them often or daily is, according to the ordinary acceptation of those words, to use them habitually. That this is the correct interpretation of the words is partly shown by the fifth question: "Are the habits of the party sober and temperate?"

But we are of opinion that the court below erred in its interpretation of the words in the policy which refer to the use of strong drinks by the insured after he obtained it. Having secured his agreement and warranty that he was not at that time, nor ever had been, habitually intemperate, the Company sought to protect itself against an improper use by him, in the future, of alcoholic stimulants, by the provision that the policy should become null and void "if he shall become so far intemperate as to impair health or induce *delirium tremens*." The court instructed the jury: "The impairment of health contemplated by this condition of the policy is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch; but it is the development of disease or the impairment of constitutional vigor by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance."

The defendant then asked the court to say to the jury that the words in the policy, "become so far intemperate as to impair health," do not necessarily imply habitual intemperance, and that an act of intemperance, producing impairment of health, was within the conditions of the policy, and rendered it null and void, except as provided where the premiums for three entire years had been paid, and the policy had ceased upon other grounds than fraud, misrepresentation, concealment, or false statement of the insured. The court declined to so instruct the jury, and said: "The words of the condition are to be expounded according to the common and popular acceptation of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance; but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence." The effect of these and other instructions was that the condition that the policy should be void if the insured became so far intemperate as to impair his health, was not broken unless intemperance became the habit or rule of his life after the policy was issued. The jury may have believed—and there was some, we do not say conclusive, evidence, to justify them in so believing—that the efficient, controlling cause of the death of the insured was an excessive and continuous use of strong drinks for several days and nights immediately preceding his death; yet they were not at liberty, under the instructions, to find that he became so far intemperate as to impair his health, unless it further appeared that his intemperance in the use of alcoholic stimulants covered such a period of time as to constitute the habit of his life. This construction of the contract is, in our judgment, erroneous. If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intem-

perance, within the meaning of the words "so far intemperate as to impair his health," although he may not have had *delirium tremens*, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether death was so caused is a matter to be determined by the jury under all the evidence.

It is supposed by the plaintiff that the instructions of the court are sustained by *North Western L. Ins. Co.* v. *Muskegon Nat. Bank*, 122 U. S. 502 [30:1101]. In that case the insured answered "Yes, occasionally," to the question whether he then was or had ever been "in the habit of using alcoholic beverages or other stimulants;" and stipulated, in the application, that he was not then, and would not become, "habitually intemperate." The policy contained a provision, not fully set out in the report of the case, that it should be null and void if the insured "shall become either habitually intemperate *or* so far intemperate as to impair health or induce *delirium tremens*." No question was made or could have been made in this court in respect to the meaning of the words, "so far intemperate as to impair health," because the jury were instructed, at the request of the company, that if the insured, Comstock, became so far intemperate as to impair his health, they must find for the defendant. The contest in this court was as to what constituted habitual intemperance, and as to the rulings in the court below upon that point. Indeed, it was assumed at the trial of that case, as well as in this court, that there was, or might be a difference between habitual intemperance and intemperance that impaired health. There was, consequently, no occasion for this court, in that case, to decide what construction was to be put upon the words "so far intemperate as to impair health," when standing alone in a policy. The jury having found, under proper instructions, that the insured had not become so far intemperate as to impair his health, that finding was not open to review here. It is clear, therefore, that there is nothing in *North Western L. Ins. Co.* v. *Muskegon Nat. Bank* that concludes the present case, or that militates against our interpretation of the policy here in suit.

Other questions have been discussed by counsel; but, as they may not arise upon another trial, or in the precise form in which they are now presented, we will not consider them.

For the reasons stated, the judgment must be reversed, with directions for another trial in accordance with the principles of this opinion. It is so ordered.

END OF VOL. 123.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1887.

Vol. 124.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1887,

AND REPORTED HEREIN;

VOL. 124,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 124 U. S.	Title.	Here in.
1–2	Lawther *v.* Hamilton	325
2–5	" "	326
5–8	" "	327
8–11	" "	328
11	" "	329
12	Hunniston *v.* Wood	354
13–14	" "	355
14–17	" "	356
17–20	" "	357
20	Norton *v.* Hood	364
20–22	" "	365
22–25	" "	366
25–28	" "	367
28–30	" "	368
30–32	" "	369
32–33	Dryfoos *v.* Wiese	362
33–36	" "	363
36–38	" "	364
38	Hinchman *v.* Lincoln	337
40	" "	338
40–43	" "	339
43–46	" "	340
46–49	" "	341
49–52	" "	342
52–55	" "	343
55–56	" "	344
56	Beeson *v.* Johns	360
56–59	" "	361
59–60	" "	362
60	Dreyfus *v.* Searle	352
60–62	" "	353
62–64	" "	354
64	Roberts *v.* Benjamin	334
66–68	" "	335
68–72	" "	336
72–74	" "	337
74–78	Langdon *v.* Sherwood	344
78–81	" "	345
81–84	" "	346
84–85	" "	347
86–87	United States, *ex rel.* McLean, *v.* Vilas	329
87–89	" "	330
89–93	United States, *ex rel.*, McLean *v.* Vilas	331
93–96	" "	332
96–97	" "	333
98	Boyd *v.* Wyly	369
98–100	" "	370
100–101	" "	371
102–104	" "	372
104–107	" "	373
107	" "	374
108–109	Lawson *v.* Floyd	347
109–112	" "	348
112–115	" "	349
115–118	" "	350
118–121	" "	351
121–122	Inland & Seaboard Coasting Co. *v.* Hall	369
123–124	Glen *v.* Fant	352
124	New Orleans Pac. R. Co. *v.* United States	383
125–127	" "	384
127–130	" "	385
130–131	" "	386
131–132	Gumbel *v.* Pitkin	374
132–136	" "	375
136–139	" "	376
143–145	" "	378
146–149	" "	379
149–151	" "	380
151–154	" "	381
154–157	" "	382
157	Dundee Mortgage & Trust Investment Co. *v.* Hughes	357
158–160	" "	359
160	" "	360
161–164	Woodman *v.* Missionary Society of M. E. Church	352
165	Baltimore & O. R. R. Co. *v.* Burns	333
165–166	" "	334
167	Baker *v.* Power	382
169	" "	383
169–171	Vetterlein *v.* Barnes	400

Off. Rep. 24 U. S.	Title.	Here in.
171–173	Vetterlein v. Barnes	401
173	" " "	403
173	Union Railroad Co. v. Dull	417
174–176	" " "	418
176–178	" " "	419
179–182	" " "	420
182–183	" " "	421
183	Richards v. Mackall	506
183–185	" " "	508
185–188	" " "	509
188–189	" " "	510
189	Whitney v. Robertson	586
193–198	" " "	587
195–196	" " "	588
196–197	Kelly v. Hedden	589
197	Searl v. School District No. 9	415
197–199	" " "	416
199–200	" " "	417
200–202	*In Re* Sawyer	403
202–205	" " "	403
205–208	" " "	404
208–210	" " "	405
210–213	" " "	406
213–216	" " "	407
216–219	" " "	408
219–222	" " "	409
222–225	" " "	410
225–228	Bissell v. Spring Valley Township	411
228–229	" " "	412
229–231	" " "	413
231–234	" " "	414
234–236	" " "	415
236–238	United States v. Johnston	589
238–241	" " "	590
241–244	" " "	591
244–246	" " "	592
246–248	" " "	594
248–250	" " "	595
250–253	" " "	596
253–255	United States v. Gleason	421
255–259	" " "	422
259–260	" " "	423
261–262	Sabariego v. Maverick	430
262–265	" " "	431
265–268	" " "	432
268–272	" " "	433
272–275	" " "	434
275–278	" " "	435
278–279	" " "	437
279–283	" " "	438
283–285	" " "	439
285–288	" " "	440
288–291	" " "	441
291–295	" " "	442
295–296	" " "	443
296–299	" " "	444
299–301	" " "	445
301	United States v. Bonsal	473
302–303	" " "	474
303	United States v. Mosaic	460
305–308	" " "	464
308	" " "	465
309–313	United States v. Hendee	465
313–315	" " "	466
315–317	United States v. Frerichs	471
317–320	" " "	472
320	District of Columbia v. McBlair	449
321–324	" " "	450
324–327	" " "	451
327–329	" " "	452
330–331	" " "	453

Off. Rep. 124 U. S.	Title.	Here in.
331–333	District of Columbia v. McBlair	454
333	State National Bank v. Dodge	458
335–336	" " "	459
336–339	" " "	460
339–342	" " "	461
342–345	" " "	462
345–347	" " "	463
347	Matthews v. Ironclad Mfg. Co.	177
"	" " "	178
348–350	" " "	179
351	Shields v. Schiff	445
352–353	" " "	446
353–356	" " "	447
356–359	" " "	448
359	" " "	449
360	Chapin v. Streeter	475
"	" " "	476
360–362	" " "	477
363–364	" " "	477
364–369	*In Re* Sherman	428
369–370	Union Mut. Life Ins. Co. v. Wo-	
	men	474
370–374	*In Re* Craft	449
374	Iron Silver Mining Co. v. Reynolds	466
375–378	" " "	467
378–380	" " "	468
380	" " "	469
380–383	" " "	470
383–384	" " "	471
385	Florence Mining Co. v. Brown	434
385–387	" " "	435
387–390	" " "	436
390–391	" " "	437
391–393	Marshall v. United States	476
394	Brooks v. Missouri	454
394–396	" " "	455
396–399	" " "	457
399–400	" " "	459
400	Widdicombe v. Childers	437
401–402	" " "	439
402–404	" " "	439
404–405	" " "	440
405	Union Insurance Co. v. Smith	497
406–408	" " "	499
408–411	" " "	500
411–414	" " "	501
414–416	" " "	503
416–419	" " "	503
419–422	" " "	504
422–425	" " "	506
425–428	" " "	509
428–429	" " "	507
429–430	Porter v. Beard	490
430–432	" " "	491
432	" " "	492
434	Worthington v. Abbott	494
434–436	" " "	495
437–438	Beard v. Porter	492
438–441	" " "	493
441–444	" " "	493
444–445	Western Union Tel. Co. v. Hall	479
445–448	" " "	480
448–450	" " "	481
450	" " "	482
450–456	" " "	485
456–458	" " "	484
459–460	King Iron Bridge & Mfg. Co. v.	
	Otoe County	514
460–462	" " "	515
462–464	" " "	516
465–468	Smith v. Alabama	508
468–470	" " "	509

Off. Rep. 124 U. S.	Title.	Here in.
473–474	Smith v. Alabama	510
474–476	" "	511
476–479	" "	512
479–482	" "	513
482–486	" "	514
486–494	United States v. Hess	516
494–496	" "	517
496–499	" "	518
499	Brown v. McConnell	495
499–501	" "	496
501–503	" "	497
503–504	Stewart v. Masterson	507
505	Strauss v. Schofield	484
505–506	" "	487
506–507	" "	498
507–508	" "	499
508–509		500
509–510	District of Columbia v. Gallaher	526
510–511	" " "	527
511–511	Hopkins v. Orr	529
511–513	" "	524
513–515	" "	525
515	" "	526
515	Trask v. Jacksonville, P. & M. R. R. Co.	521
515–516	" "	522
516–519	" "	523
519	Fayville v. Texas & Pac. R. R. Co.	535
520	" "	534
524	French v. Hopkins	506
524–525	" "	517
525–526	United States v. Smith	534
526–531	" "	535
531–533	" "	536
534	Ætna Life Ins. Co. v. Middleport	537
534–539	" " "	538
539–540	" " "	540
540–543	" " "	541
543–551	" " "	542
551		543
551	Ætna Life Ins. Co. v. Belmont	543
551	Ætna Life Ins. Co. v. Milford	542
553	Knight v. Paxton	518
553–558	" "	519
558–559	" "	520
559–566	" "	521
566	The Strathairly	580
566–567	"	581
567–570	"	582
570–573	"	583
573–576	"	584
576–579	"	585
579–581	"	586
581	Great Falls Mfg. Co. v. Attorney-General	527
581–585	" " "	528
585–588	" " "	529
588–591	" " "	530
591–593	" " "	531
593–597	" " "	532
597–600	" " "	533
601	Munson v. New York City	586
601–604	" " "	587
604–605	" " "	588
605	Phillips v. Mound City Land & Water Asso.	588
605–610	" " "	589
610–612	" " "	591
612–615	Thornton v. Schreiber	577
615–616	" "	578
616–619	" "	579
619–621	" "	580
621	United States v. Jung Ah Lung	591
622–624	" "	592
624–626	" "	593
626–625	" "	596
625–628	" "	597
628–629	" "	598
629	Handley's Admrs. v. San Francisco	523
640	" " "	554
640–643	" " "	555
643–646	" " "	556
646	" " "	557
647–648	United States v. Morant	565
648	Crawford v. Halsey	572
649–650	" "	573
650–652	" "	574
652	Dow v. Memphis & L. R. R. Co.	563
652–656	" " " "	562
656	" " " "	567
656–659	Holsken v. Pennsylvania R. R. Co.	
	" v. Schmidt	
	" v. Hamburgh-American Steam Packet Co.	
	" v. North German Lloyd Steamship Co.	543
659–662	" " "	544
662–664	" " "	545
664–666	" " "	546
676–680	" " "	548
680–683	" " "	549
683–686	" " "	550
686–689	" " "	551
689–692	" " "	553
692–694	" " "	555
694	Andrews v. Hovey	537
700–703	" "	558
703–706	" "	559
706–709	" "	560
709–712	" "	561
712–715	" "	562
715–718	" "	563
718–719	" "	564
721	Pacific National Bank v. Mixter	
	" " v. Whitney	
	" " v. Dennison	
	Butler v. Coleman	567
721–722	" "	569
726–726	" "	570
726–729	" "	571
729–730	" "	572
730	Shoecraft v. Bloxham	574
731–732	" "	575
732–735	" "	576
735–736	" "	577

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1887.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are enclosed in brackets.]

ALFRED B. LAWTHER, *Appt.*,
v.
CHARLES S. HAMILTON *et al.*

(See S. C. Reporter's ed. 1-11.)

Patent for treating oleaginous seeds—specification, effect of—purchase of instrument.

1. The patent granted to Alfred B. Lawther, Sept. 28, 1875, for certain improvements in processes of treating oleaginous seeds, is valid, as a patent for a process; and the discovery thereby patented is patentable; and the patent sufficiently describes the operation to be performed.
2. The specification of a patent is to be construed in the light of that knowledge which existed in the art at the time of its date.
3. The process, patented by the above mentioned patent, is to be limited, by the clear terms of the specification, to the use of the kind of instrumentality described, namely: in the first part of the process, to the use of powerful revolving rollers for crushing the seeds between them under pressure; and, so limited, the patent is sustainable.
4. The purchase of a set of these rollers, by defendant, with the knowledge and consent of the patentee, does not confer consent upon defendant to use the patented process.

[No. 39.]

Argued Oct. 28, 31, 1887. Decided Jan. 9, 1888.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin. *Reversed.*

Action for infringing a patent. The circuit court dismissed the action. The plaintiff appealed to this court.

The facts and case are fully stated in the opinion.

Messrs. **John W. Munday** and *Edmund Adcock*, for appellant:

The subject matter of the patent sued upon is a process and patentable.

Cochrane v. *Deener*, 94 U. S. 780 (24: 139); *Tilgham* v. *Proctor*, 102 U. S. 708 (26: 279); *Russell* v. *Cowley*, 1 Web. Pat. Cas. 467.

The claim in the patent precisely covers the improvement made by Lawther, and no more.

A claim for a combination of several steps or elements is always to be construed as covering equivalents.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *S. C.* 2 Whitm. Pat. Cas. 292; *Gould* v. *Rees*, 82 U. S. 15 Wall. 187 (21: 89); *S. C.* 2 Whitm. Pat. Cas. 442; *Goodyear* v. *N. J. Cent. R. R. Co.* 2 Wall. Jr. 356; *S. C.* 1 Fish. Pat. Cas. 631.

The patent is for an entire process, made up of several constituents. The patentee does not claim to have been the inventor of the constituents. The exclusive use of them singly is not secured to him. What is secured is their use when arranged in the process.

Mowry v. *Whitney*, 2 Whitm. Pat. Cas. 436; *Ryan* v. *Goodwin*, 3 Sumn. 514; *Lee* v. *Blandy*, 2 Fish. Pat. Cas. 93; *Gould* v. *Rees*, 2 Whitm. Pat. Cas. 439; *Howe* v. *Morton*, 1 Fish. Pat. Cas. 586; *Many* v. *Sizer*, 1 Fish. Pat. Cas. 17.

Mr. **Charles E. Shepard**, for appellees:

The appellant's process is not a novel and patentable invention.

It is not a process within the sense of the patent law.

Corning v. *Burden*, 56 U. S. 15 How. 252 (14: 683); *MacKay* v. *Jackman*, 12 Fed. Rep. 615; *Goss* v. *Cameron*, 14 Fed. Rep. 576; Walker, Patents, §§ 3–14; *Eachus* v. *Broomall*, 115 U. S. 429 (29: 419); *Western Electric Mfg. Co.* v. *Ansonia Brass & C. Co.* 114 U. S. 447 (29: 210); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *King* v. *Gallun*, 109 U. S. 99 (27: 870); *Pearce* v. *Mulford*, 102 U. S. 112 (26: 93); *Vinton* v. *Hamilton*, 104 U. S. 485 (26: 807).

Mr. Justice **Bradley** delivered the opinion of the court:

The appellant, Alfred B. Lawther, filed his bill in the court below against the appellees, alleging that they were infringing a patent granted to him on the 28th of September, 1875, for certain improvements in processes of treating oleaginous seeds, and praying for an account of profits and damages, and an injunction. The circuit court, being of opinion that the patent could not be sustained as a patent for a process (which it was claimed to be) dis-

missed the bill. We are called upon to revise this decision.

In the specification of the patent the patentee states that the object of his invention is to improve the process of working flaxseed, linseed, and other oil seeds, in such a manner that a greater yield of oil is obtained at a considerable saving of time and power in the running of the crushing, mixing, and pressing machines, while also a cake of superior texture is produced.

The specification proceeds as follows: "Hitherto it has been the practice to crush the oil seeds between revolving rollers, and completing the imperfect crushing by passing them under heavy stones known as edge-runners or mullers, under addition of a quantity of water, the crushed and moistened seed being then taken from the muller stones and stirred in a heated steam jacketed reservoir preparatory to being placed into the presses for extracting the oil.

"This process has been found imperfect in regard to many points, but mainly on account of the over grinding of portions of the seed and the husks or bran when the seeds were exposed for too long a time to the action of the muller stones, so as to form a pasty mass and produce an absorption of oil by the fine particles of bran, while on the other hand the under grinding, by too short an action of the stones, rendered the presses incapable of extracting the full amount of oil from the seed. * * *

"My process is intended to remedy the defects of the one at present in use, and consists mainly in conveying the oil seeds through a vertical supply tube and feeding roller, at such degree of pressure to powerful revolving rollers that each seed is individually acted upon, and the oil cells fully crushed and disintegrated. They are then passed directly, without the use of muller stones, to the mixing machine to be stirred, moistened, and heated by the admission of small jets of water or steam to the mass, and then transferred to the presses.

"The oil seeds are by my new process first conveyed to a hopper and fluted seed roller at the top of an upright feed tube of the crushing machine, by which the seeds are fed, under suitable pressure, to revolving rollers of sufficient power, which run at a surface speed of about 150 to 200 feet per minute.

"The pressure on the seeds in the feed tube is necessary, as the oil seeds would otherwise not feed readily into rollers revolving under great pressure. The oil seeds are thereby compelled to pass evenly and steadily through the rollers, which have, therefore, a chance to act on all of them and break the oil cells uniformly without reducing any portion to a pasty condition. The bran is also left comparatively coarse, so that it shows the nature of the seed after pressing.

"The muller stones and their over or under grinding of any portion of the seeds are entirely done away with by this mode, which not only makes the machinery less expensive, but produces also a saving of power required in running the same. The crushed seeds are next placed in a steam jacketed reservoir of the mixing machine, where they are stirred, moistened, and heated by perforated revolving stirrer arms, which throw jets of water or steam into the mass so as to thoroughly permeate and mix the same. The crushed and moistened mass is transferred to the presses for the extraction of the oil, which operation requires less power on account of the uniformity of the mass, produces a greater yield of oil, and furnishes an improved quality of oil cake, or residue, of open grained, flaky nature, capable of being split in regular pieces at right angles to the direction of the pressure."

Having thus described his invention, the patentee states his claim to be the process of crushing oleaginous seeds and extracting the oil therefrom, consisting of the following successive steps, viz.: the crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and finally the expression of the oil from the seed by suitable pressure, as and for the purpose set forth.

The purpose and effect of the invention claimed by the patentee as a new process, and the argument against the validity of the patent as a patent for a process, cannot be better or more clearly stated than is done in the opinion of the court below, pronounced by *Judge* Dyer, 21 Fed. Rep. 811. We quote therefrom as follows: "The proofs show, and in fact it is undisputed, that formerly in the process of extracting oil from flaxseed, the seed was subjected to the crushing and disintegrating action of the muller stones, which consisted of two large and very heavy stone wheels, mounted on a short horizontal axis attached to a vertical shaft. By the rotation of this shaft the stones were caused to move on their edges shortly around in a circular path upon a stone bed plate, with a peculiar rolling and grinding action, upon a layer of flaxseed placed on the bed plate. This was the usual mechanical appliance in connection with the operating movement of the muller stones. By this means such portions of the seed as came in contact with the muller stones were reduced to a complete state of pulverization. To facilitate the disintegrating action of the muller stones, the seed was generally first more or less crushed by passing it through one or more pairs of rollers, thus better preparing it for the rubbing and grinding action of the muller stones. The further treatment of the seed required the application of heat and moisture, and this was accomplished in various ways. Sometimes the heat and moisture were applied by a steaming device before the seed was crushed by the muller stones; sometimes the seed was moistened when it was under the action of the muller stones by sprinkling water upon the layer of seed beneath the stones, the heat being applied afterwards by a separate operation. At other times both heat and moisture were applied after the seed had been run through the mullers, and was in the form of meal in the heater. As the last step in the process the seed thus crushed and disintegrated and, in moist and warm condition, was usually placed in haircloth mats or bags, and subjected to hydraulic pressure, by which means the oil was extracted. This was the state of the art, and this the usual process when the complainant obtained his patent."

The court then states the process set out in the appellants patent and, after some observations thereon, proceeds to say:

"The crushing of oleaginous seed, so that ultimately it may be in condition for the appli-

cation of hydraulic pressure, was always a step and, necessarily, the first step in the process of extracting the oil therefrom. As we have seen, that step was formerly accomplished by means of rollers and muller stones. The complainant ascertained, by practice, that in crushing the seed the tearing, pulverizing action of the muller stones was injurious, and so he dispensed with that mechanical operation in the crushing step of the process, and employed the rollers alone. He thereby simply omitted one of the instrumentalities previously used in the first stage of treatment of the seed. This was undoubtedly a useful improvement, but it was not the invention or discovery of a new process. Each step in the process existed and was known before, namely: crushing the seed, beating and moistening it, and finally the application of hydraulic pressure. What the complainant accomplished was a change in mechanical appliances and operation, by which an existing process and each step thereof were made more effective in its results. For this he may have been entitled to a mechanical patent. * * * He discovered that more advantageous results were attainable by dispensing with the use of muller stones; and that these results were also promoted by the improved construction of the rollers and other mechanical appliances for heating and moistening the seed is quite apparent. The discovery or invention was not of a new series of acts or steps constituting a process, but only of certain mechanical changes in carrying into effect the well known old steps of the process."

The view thus taken by the court below seems to us open to some criticism. If, as that court says, and we think rightly says, the omission of the muller stones is a real improvement in the process of obtaining the oil from the flaxseed, if it produces more oil and better oil cakes, and it is new, and was not used before, why is it not a patentable discovery? And why is not such new method of obtaining the oil and making the oil cakes a process? There is no new machinery. The rollers are an old instrument, the mixing machinery is old, the hydraulic press is old; the only thing that is new is the mode of using and applying these old instrumentalities. And what is that but a new process? This process consists of a series of acts done to the flaxseed. It is a mode of treatment. The first part of the process is to crush the seeds between rollers. Perhaps, as this is the only breaking and crushing of the seed which is done, the rollers are required to be stronger than before. But if so, it is no less a process.

The evidence shows that, although the crushing of the seed by two horizontal rollers, and then passing it, thus crushed, under the muller stones, was the old method commonly used, yet that, for several years before Lawther took out his patent, a more thorough crushing had been effected by the employment of four or five strong and heavy rollers arranged on top of one another in a stack, still using the muller stones to grind and moisten the crushed seed after it was passed through the rollers. The invention of Lawther consisted in discarding the muller stones and passing the crushed seed directly into a mixing machine to be stirred, moistened and heated by jets of steam or water, and then transferring the mass to the presses for the expression of the oil by hydraulic or other power.

The machinery and apparatus used by Lawther had all been used before. His only discovery was an improvement in the process. He found that by altogether omitting one of the steps of the former process, the grinding and mixing under the muller stones, and mixing in the mixing machine by means of steam, a great improvement was effected in the result.

Why should it be doubted that such a discovery is patentable? It is highly useful, and it is shown by the evidence to have been the result of careful and long continued experiments, and the application of much ingenuity.

By the omission of the mullers greater care may be necessary on the part of the workman in carrying on the operations, especially in watching the moistening and mixing process so as to produce the proper moisture and consistency of the mass before subjecting it to hydraulic pressure. But though it be true that the new process does require greater care, and even greater skill, on the part of the workman than was formerly required, this does not change its character as being that of a process, nor does it materially affect its utility.

The only question which, in our view, raises a doubt on the validity of the patent is whether it sufficiently describes the process to be followed in order to secure the beneficial results which it promises. The patentee, when on the witness stand, stated that the invention was perfected on the second day of June, 1874; that it was the result of a long series of experiments which were not entirely successful until that date. His account of it is thus elicited on his cross examination:

57. When did this invention, as you claim it, as you describe it in this patent, first take tangible and practical shape in your mind as a whole process?

A. Complete and perfect in 1874.

58. What time?

A. Between the 31st of May and the second of June.

59. What was the particular improvement that produced the change in results at that time?

A. It was the perfecting of all of the improvements, the harmonious working of all the changes that we had made in the matter; most of the changes had taught us something, and when we learned it all we knew it.

60. What particular thing brought about that change at that time?

A. I don't know that I could locate any particular thing of any importance or magnitude.

61. What did you do different on the first or second of June or thereafter from what you had done on the 30th of May or theretofore?

A. I have answered that before as near as I can. I only know it was the culmination of all previous efforts, our knowledge, and our apparatus.

62. Was the change caused by anything more than your men's increased practical skill and experience in working seed in that new way?

A. Added to the apparatus, yes, sir; that was just it exactly. We couldn't have done it without the proper appliances; and with the proper appliances we couldn't have done it without the knowledge; the two things come together. The whole thing was a series of infinitely small steps.

63. Wasn't the apparatus the same on the 30th of May and after the second of June?

A. I have no record of any experiment or change having been made during that time, nor do I recollect of any changes. It is possible that it was precisely similar.

64. Isn't that your best recollection, that it is similar?

A. I have no recollection about it one way or the other. One of our greatest difficulties was the uniform moistening of the seed. We changed the moistening apparatus in a great many different ways. Some of them involved the delay of a day, some of them an hour, some of them a few minutes. Some such changes as that might have been made in the time spoken of.

65. No change was made in the rolls in that time, was there?

A. Not that I know of.

66. Nor in the heater apparatus or in the presses at that time?

A. No; we didn't change the body of that heater; probably not the presses.

67. On the 30th day of May, and some time previously, didn't you crush the seed under rolls as the first step?

A. Yes.

68. And then moisten it?

A. Yes.

69. And then heat it?

A. Yes.

70. And then extract the oil by pressure in the presses?

A. Yes; some of it; all that we did extract.

71. Are not those the same steps in the process of making oil that you used on the second of June, and ever since?

A. That is the process today."

From this statement it is apparent that the beneficial result is due, not only to a proper degree of crushing of the seed in the rolls, but to a proper and uniform moistening of the crushed material in the heating machine before it is subjected to pressure. The question is whether the patent sufficiently describes the operation to be performed in order to accomplish these results.

After a careful consideration of the specification of the patent, and in view of the principle of law that it is to be construed in the light of that knowledge which existed in the art at the time of its date, we are satisfied that it does sufficiently describe the process to be followed. Every step of this process was already understood, although not connected in the manner pointed out in the patent. The following things were known and used before the granting of the patent, to wit: *first*, the crushing of the seed between powerful revolving rollers, fed thereto by a supply tube and feeding roller, so as to pass in a sheet of uniform thickness between the rollers; *second*, the moistening, mixing and heating of the crushed mass by means of steam and water in a mixing machine; *third*, the pressure of the material thus prepared, in molds, by means of hydraulic power. These several steps being well known in the art when the patent was applied for, required no particular explanation. The patentee had only to say to the oil manufacturers of the country what he did say, namely: crush your seed evenly and sufficiently between powerful rollers as heretofore; and, then, instead of passing it under the muller stones, as you have heretofore done, transfer it immediately to the well known, steam mixing machine, and moisten and mix it equably and sufficiently for pressing. Every oil manufacturer in the country would understand him. They would also understand that it might require additional care and skill to make the new process work successfully. It is evident that they did understand him, and that the manufacture of linseed oil, and oil cakes, has ever since been greatly improved and facilitated by the invention.

But whilst we are satisfied that the invention is that of a process, it is nevertheless limited by the clear terms of the specification, at least so far as the crushing of the seed is concerned, to the use of the kind of instrumentality described, namely: in the first part of the process, to the use of powerful revolving rollers for crushing the seed between them under pressure. The claim cannot have the broad generality which its terms, taken literally, might at first sight seem to imply. But limited as suggested, it seems to us sustainable in law.

It is true that the description also calls for the use of a vertical supply tube and feeding roller. The latter is probably essential as a means of distributing the flow of the seed in a sheet of even thickness to the rolls. But the vertical supply tube is evidently an incidental arrangement, suited to one position of the rollers, namely: where a pair of rollers are set side by side. Where they form a pile, on top of one another, a vertical tube would be inapplicable. In such case the equivalent would be a slanting tube, or inclined plane. The vertical tube is clearly not an essential part of the instrumentality used, and constitutes no limitation of the process.

The appellees also contend that they do not (in the words of the claim) "moisten the seeds by direct subjection to steam." It is proven, however, that they do moisten the seeds by a shower of spray in the mixing machine, produced by directing a jet of steam against a small stream of water. This is within the claim of the patent. The specification describes the process of moistening the seeds as follows: "They are then passed (after being crushed) directly, without the aid of muller stones, to the mixing machine to be stirred, moistened and heated by the admission of small jets of *water or steam* to the mass." Again: "The crushed seeds are next placed in a steam jacketed reservoir of the mixing machine, where they are stirred, moistened and heated by perforated revolving stirrer arms which throw jets of *water or steam* into the mass," etc. Then the claim is for three successive steps, viz.: the crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and the expression of the oil by suitable pressure. These words are to be read in the light of the explanations in the descriptive part; and thus read, it is apparent that the meaning of the claim is that the crushed seeds are to be moistened and heated by the use of steam, or steam and water, immediately after coming from the rollers, without any aid from muller stones. This is precisely what the appellees do.

One of the defenses set up is an implied

license. It seems that Lawther has another patent for some improvement in the stack of rollers now commonly used for crushing the seed, and supplies them to order through a foundryman by the name of McDonald. The appellees purchased a set of these rollers from McDonald, with the knowledge and consent of Lawther. These rollers were returned on account of some imperfection in the material; but the frame was retained, and the appellees procured similar rollers made elsewhere. They contend that by this transaction Lawther gave his consent to their use of his process. We do not think that there is sufficient evidence of any such consent. The use of the rollers did not necessarily involve the use of the process, and there is no proof that anything was said about the process.

Other points were raised which we do not deem it necessary to discuss. We cannot but think that Lawther discovered a new process of manufacturing oil from seeds, and that he was entitled to a patent therefor; and we are of opinion that the patent in suit, construed as we have suggested, is a good and valid patent. We are also of opinion that the appellees infringe the patent, and that they have not shown any legal defense to the suit. It follows that the appellant is entitled to a decree for an injunction and an account of profits and damages, as prayed in the bill.

The decree of the Circuit Court is therefore reversed, and the cause remanded, with instructions to enter a decree for the appellant, and take such further proceedings as may be in conformity with this opinion.

UNITED STATES, *ex rel.* J. K. McLEAN, *Plff. in Err.*,

v.

WILLIAM F. VILAS, *Postmaster-General.*

(See S. C. Reporter's ed. 86-97.)

Readjustment of postmasters' salaries—when made—basis of.

1. Under the statutes on the subject, the postmaster-general is not under legal obligation to readjust the salaries of postmasters oftener than once in two years.

2. The postmaster-general is expressly authorized, within his discretion, to make such readjustment, in special cases, upon satisfactory representation, as much oftener as he may deem expedient.

3. Such readjustment, when it takes place, can only establish the amount of the salary for two years thereafter; and no such readjustment can be made, unless there are quarterly returns for two years preceding such readjustment, on which it can be based.

[No. 1041.]

Argued Nov. 21, 22, 1887. Decided Jan. 9, 1888.

IN ERROR to the Supreme Court of the District of Columbia. *Affirmed.*

A judgment of the Supreme Court of the District of Columbia was rendered in favor of the Postmaster-General, in an action for a writ of *mandamus* to compel him to readjust the plaintiff's salary.

The facts and case are fully stated in the opinion.

Messrs. **S. F. Phillips** and **H. Spaulding,** for the relator:

The ministerial duty imposed upon the Postmaster-General by the Statutes of 1864, 1866 and 1883 required readjustment for cases like that of the relator from one quarter to another; each readjustment to be upon the basis of the quarter preceding, and to take effect for the quarter following. The Act of 1886 is without effect upon this case.

Messrs. **A. H. Garland,** *Atty-Gen.* **Robt. A. Howard,** *Asst. Atty-Gen.*, and **Edwin E. Bryant,** *Asst. Atty-Gen. P. O. Dept.*, for defendant in error:

The writ of *mandamus* can issue against the head of the department only to compel the performance of a simple ministerial duty, involving the exercise of no discretion.

Kendall v. *U. S.* 37 U. S. 12 Pet. 524 (9:1181); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 521 (10:571); *U. S.* v. *Guthrie*, 58 U. S. 17 How. 302 (15:105); *Hull* v. *Comr. of Patents*, 2 MacAr. 189; *Ex rel. Bigelow*, 2 MacAr. 24; *U. S.* v. *Edmunds*, 72 U. S. 5 Wall. 563 (18:692); *Cox* v. *U. S.* 76 U. S. 9 Wall. 312 (19:583); *U. S.* v. *Key*, 3 MacAr. 328; *U. S.* v. *McLean*, 95 U. S. 750 (24:579).

The courts will not send this writ to compel the head of a department to revise and overrule the judgment and action of his predecessor, even if that action and judgment be erroneous.

U. S. v. *Chandler*, 2 Mackey, 527; *U. S.* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 401 (10:788); 5 Ops. Attys-Gen. 29, 240; 9 Ops. Attys-Gen. 300 and 387; 12 Ops. Attys-Gen. 169, 356; 13 Ops. Attys-Gen. 33 and 226, 387, 457; 14 Ops. Attys-Gen. 275; *Ill.* v. *U. S.* 20 Ct. Cl. 342; *Jackson* v. *U. S.* 19 Ct. Cl. 505; *U. S.* v. *Stone*, 69 U. S. 2 Wall. 535 (17:767).

The Act of 1883 was an act of grace on the part of Congress. Postmasters who had lost their rights by laches could not sue in the Court of Claims, because a readjustment was first necessary.

U. S. v. *McLean*, 95 U. S. 750 (24:579); *U. S.* v. *Chandler*, 2 Mackey, 527; *De Groot* v. *U. S.* 72 U. S. 5 Wall. 419 (18:700); *Gordon* v. *U. S.* 74 U. S. 7 Wall. 188 (19:35); *Chorpenning* v. *U. S.* 94 U. S. 397 (24:126).

Mandamus is but an action at law.

Kendall v. *Stokes*, 44 U. S. 3 How. 100 (11:512); *Kentucky* v. *Dennison*, 65 U. S. 24 How. 97 (16:725).

The Act prohibiting the institution of this action took effect, by approval, August 4, 1886.

Matthews v. *Zane*, 20 U. S. 7 Wheat. 164, 211 (5:425,436); *Lapeyre* v. *U. S.* 84 U. S. 17 Wall. 198 (21:607); *U. S.* v. *Norton*, 97 U. S. 164 (24:907).

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the District of Columbia.

In the case of *U. S.* v. *McLean*, 95 U. S. 750 [24:579], will be found the report of the decision of this court in an action instituted by the present plaintiff in error against the United States. The appeal was taken from a judgment of the Court of Claims in favor of McLean for the sum of $569.50, for compensation as deputy postmaster at Florence, Kansas, from April 14, 1871, to July 1, 1872, which was rendered on the ground that he was entitled to a readjustment of his salary by the Postmaster-General

Off. Rep. 124 U. S.	Title.	Page no.
171–173	Vetterlein v. Barnes	401
173	" "	402
173	Union Railroad Co. v. Dull	417
174–176	"	418
176–179	" "	419
179–182	" "	420
182–183	" "	421
183	Hibbards v. Mackall	198
183–185	" "	398
185–188	" "	399
188–189	" "	400
189	Whitney v. Robertson	286
189–193	" "	287
193–195	" "	288
196–197	Kelly v. Holden	289
197	Searl v. School District No. 2	415
197–199	" " "	416
199–200	" " "	417
200–202	*In Re* Sawyer	403
202–205	" "	403
205–208	" "	404
208–210	" "	405
210–213	" "	406
213–216	" "	407
216–219	" "	408
219–222	" "	409
222–225	" "	410
225–228	Bissell v. Spring Valley Township	411
228–230	" " "	412
230–231	" " "	413
231–234	" " "	414
234–236	" " "	415
236–238	United States v. Johnston	389
238–241	" "	390
241–244	" "	391
244–246	" "	392
246–248	" "	394
249–253	" "	395
253–255	" "	396
255–257	United States v. Gleason	421
257–259	" "	422
259–260	" "	423
261–262	Sabariego v. Maverick	420
262–265	" "	421
265–268	" "	422
268–272	" "	423
272–275	" "	424
275–278	" "	425
278–279	" "	427
279–282	" "	428
282–285	" "	429
285–288	" "	440
288–291	" "	441
291–293	" "	442
293–296	" "	443
296–299	" "	444
299–301	" "	445
301	United States v. Bond	473
302–303	" "	474
303	United States v. Mouat	463
305–308	" "	464
308	" "	465
309–313	United States v. Hendee	465
313–315	" "	466
315–317	United States v. Frevichs	471
317–320	" "	472
320	District of Columbia v. McBlair	449
321–324	" "	450
324–327	" "	451
327–329	" "	452
330–331	" "	453

Off. Rep. 124 U. S.	Title.	Page no.
331–333	District of Columbia v. McBlair	454
333	State National Bank v. Dodge	458
333–336	" "	459
336–339	" "	460
339–342	" "	461
342–345	" "	462
345–347	" "	466
347	Matthews v. Ironclad Mfg. Co.	470
348–349	" "	470
349–351	" "	470
351	Shields v. Schiff	445
352–355	" "	446
355–356	" "	447
356–359	" "	448
359	" "	449
360	Chapin v. Streeter	420
360–362	" "	420
362–364	" "	477
364–369	*In Re* Sherman	433
369–370	Union Mut. Life Ins. Co. v. Wilcox	474
370–374	*In Re* Craft	439
374	Iron Silver Mining Co. v. Reynolds	466
375–378	" " "	467
378–380	" " "	468
380	" " "	469
380–382	" " "	470
382–383	" " "	471
383–384	Florence Mining Co. v. Brown	424
385–387	" " "	425
387–390	" " "	426
390–391	" " "	427
391–393	Marshall v. United States	475
394	Brooks v. Missouri	454
394–396	" "	456
396–399	" "	457
399–400	" "	465
400	Wildfiesake v. Childers	427
401–402	" "	428
402–404	" "	429
404–405	" "	430
405	Union Insurance Co. v. Smith	497
406–408	" " "	499
408–411	" " "	500
411–414	" " "	501
414–416	" " "	502
416–419	" " "	503
419–422	" " "	504
422–425	" " "	505
425–428	" " "	506
428–429	" " "	507
429–430	Porter v. Beard	440
430–433	" " "	441
433	" " "	442
434	Worthington v. Abbott	494
434–436	" " "	495
437–438	Beard v. Porter	442
438–441	" " "	443
441–444	" " "	444
444–445	Western Union Tel. Co. v. Hall	479
445–448	" " "	480
448–450	" " "	481
450	" " "	482
450–456	" " "	483
456–458	" " "	484
459–460	King Iron Bridge & Mfg. Co. v. Otoe County	514
460–463	" " "	515
463–464	" " "	516
465–468	Smith v. Alabama	508
468–470	" "	509

Off. Rep. 180 U. S.	Title.	Here in.
473–474	Smith v. Alabama	510
474–476	" "	511
476–479	" "	512
479–482	" "	513
482–483	" "	514
483–484	United States v. Hess	516
484–486	" "	517
486–489	" "	518
489	Brown v. McConnell	485
489–491	" "	486
491–493	" "	487
493–494	Stewart v. Masterson	507
495	Brazee v. Schofield	484
495–498	" "	487
498–501	" "	488
501–504	" "	489
504–505	" "	490
505–508	District of Columbia v. Gallaher	526
508–510	" " "	527
510–511	Hopkins v. Orr	523
511–513	" "	524
513–515	" "	525
515	" "	526
515	Trask v. Jacksonville, P. & M. R. R. Co.	521
516–518	" "	522
518–519	" " "	523
519	Fayolle v. Texas & Pac. R. R. Co.	523
520	" " "	524
524	French v. Hopkins	526
524–526	" "	527
526–530	United States v. Smith	534
530–531	" "	535
531–539	" "	536
544	Ætna Life Ins. Co. v. Middleport	537
544–536	" " "	539
536–545	" " "	540
545–548	" "	541
548–551	" " "	542
551	" " "	543
551	Ætna Life Ins. Co. v. Belmont	543
551	Ætna Life Ins. Co. v. Milford	543
552	Knight v. Paxton	516
552–553	" "	519
553–556	" "	520
556–558	" "	521
558	The Strathairly	580
558–567	"	581
567–570	"	582
570–573	"	583
573–576	"	584
576–579	"	585
579–581	"	586
581	Great Falls Mfg. Co. v. Attorney-General	527
583–585	" " "	528
585–588	" " "	529
588–591	" " "	530
594–595	" " "	531
595–597	" " "	532
597–600	" " "	533
601	Museum v. New York City	536
601–604	" " "	537
604–608	" " "	538

Off. Rep. 181 U. S.	Title.	Here in.
605	Phillips v. Mound City Land & Water Asso.	589
605–610	" " "	590
610–612	" " "	591
612–619	Thornton v. Schreiber	577
613–616	" "	578
616–619	" "	579
619–621	" "	580
631	United States v. Jung Ah Lung	591
633–634	" "	592
634–636	" "	593
636–638	" "	596
638–656	" "	597
638–660	" "	598
659	Hoadley's Admrs. v. San Francisco	552
660	" " "	554
660–643	" " "	555
643–646	" " "	556
646	" " "	557
647–648	United States v. Morant	568
648	Crawford v. Halsey	572
649–650	" "	573
650–652	" "	574
652	Dow v. Memphis & L. R. R. Co.	565
652–656	" " " "	566
656	" " " "	567
656–659	Hoboken v. Pennsylvania R. R. Co.	543
	" v. Schmidt	544
	" v. Hamburgh-American Steam Packet Co.	545
	" v. North German Lloyd Steamship Co.	546
659–662	" " "	547
662–664	" " "	548
664–666	" " "	549
666–668	" " "	550
668–669	" " "	551
669–692	" " "	552
692–694	" " "	553
694	Andrews v. Hovey	557
700–705	" "	558
705–706	" "	559
706–709	" "	560
709–712	" "	561
712–715	" "	562
715–718	" "	563
715–719	" "	564
721	Pacific National Bank v. Mixter	567
	" " v. Whitney	568
	" " v. Densmore	569
	Butler v. Coleman	569
721–723	" "	570
723–726	" "	571
726–729	" "	572
729–730	" "	574
730	Shoecraft v. Bloxham	575
730–732	" "	576
732–735	" "	577
735–736	" "	577

the salary allowed was 10 per centum less than it would have been upon the basis of commissions under the Act of 1854; such readjustments to be made in accordance with the mode presented in section 8 of the Act of June 12, 1866, and to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business, or quarterly returns, were made; *Provided*, That every readjustment of salary under this Act shall be upon a written application, signed by the postmaster or late postmaster, or legal representative, entitled to said readjustment; and that each payment made shall be by warrant or check on the Treasurer or some assistant treasurer of the United States, made payable to the order of said applicant, and forwarded by mail to him at the postoffice within whose delivery he resides, and which address shall be set forth in the application above provided for." 22 U. S. Stat. at L. 487.

With the answer of the Postmaster-General are presented as exhibits two opinions of Attorney-General Brewster, given in response to requests of the Postmaster-General; also an opinion by the Assistant Attorney-General for the Postoffice Department; and the opinion of Postmaster-General Gresham in a letter to the Hon. Frank Hatton, First Assistant Postmaster-General. All of these sustain the proposition already stated on behalf of the defendant.

These, with the argument of counsel, and the briefs now before us, cover the whole field of controversy. Many objections are taken by the counsel for the defendant which would be worthy of serious consideration if it were necessary to decide them; but as we agree with the Postmaster-General in such a construction of these statutes as shows that they imposed no obligation upon him to make the readjustment of salary claimed by the plaintiff, and as this goes to the merits of the controversy, we prefer to rest the case on this point without any consideration of the others.

Upon a very careful examination of these statutes we are forced to the conclusion that the Legislature in these enactments did not contemplate a readjustment of the salaries of any of these officers oftener than once in two years, as a legal duty or obligation upon the part of the Postmaster-General. It is true, undoubtedly, that many cases of hardship might arise for want of a more frequent adjustment. In towns where the population and business grew very rapidly an adjustment made at a time when the compensation would amount to $3 or $4 a quarter might be very inadequate, when, if readjusted according to the later returns, the salary might amount to $600 or $800 per annum, while the officer, if he served at all, would be compelled to serve at the inconsiderable compensation originally established.

The answer to this suggestion is that the Postmaster-General was expressly authorized, within his discretion, to make readjustments in special cases, upon satisfactory representations, as much oftener as he might deem expedient. The very fact that this discretion was left to him in these special cases, and the rule which should govern him in the exercise of that power was left to his sense of right and propriety, is an argument against the necessity of any more frequent readjustments than once in two years, as a positive duty arising from a proper construction of the statutes.

The Act of 1864, which abolished the system of compensation by a fixed commission on all the receipts at the postoffices, evidently adopted a principle of establishing a salary for two years, which was to be fixed by a relation in each of the five classes of postmasters, to the amount received at those offices. It enacts that the compensation of the postmasters of the several offices, except the office at New York, for the two consecutive years next preceding the first day of July, 1864, shall be the basis at which the salaries of those offices shall be fixed for the next two years. The second section declares that the Postmaster-General shall review once in two years, and, in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section and of the rates there fixed, the salary assigned by him to any office; and that any change made in such salary shall not take effect until the first day of the quarter next following such order.

Here is a very clear statement that the salaries of these offices are to be fixed once in two years, that this shall be done by the Postmaster-General, and that it shall be based upon the receipts at those offices for the two consecutive years next preceding the time when it is made. The manifest purpose of this statute is, first, to change the compensation of the postmaster from a mere fixed commission on the receipts of his office to a regular salary; second, that this salary shall be fixed for a period of two years prospectively; and third, that, owing to the varying amount of receipts at postoffices, which may rapidly grow, the Postmaster-General is required to make, on the basis already given, a readjustment once in two years. If, as already said, cases of great hardship, where there is a sudden increase of business, seem to demand a more frequent readjustment, the power to do this is left with the Postmaster-General, but rests entirely in his discretion.

The statutory provision on which it is asserted that a change of this rule rests, so that it is the duty of the Postmaster-General to make a readjustment at the end of any quarter where the return from an office shows that the salary allowed is 10 per cent less than it would be on the basis of the commissions under the Act of 1854, is the proviso found in section 8 of the Act of 1866, which reads as follows: "*Provided*, That when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is 10 per centum less than it would be on the basis of commissions under the Act of 1854 fixing compensation, then the Postmaster-General shall review and readjust under the provision of said section."

What quarterly returns are here meant, as showing that the salary is 10 per cent less than the commissions under the Act of 1854? The argument of counsel is that when any one quarterly return shall show this condition of affairs the Postmaster-General, on the request of the postmaster, must make a readjustment; but such is not the language of the statute. The expression used is "when the quarterly returns" shall show this; and, inasmuch as the law had already established that readjustments must be made on the basis of the quarterly re-

turns for two years, it is reasonable to suppose that that was the meaning of Congress in this proviso.

To require the Postmaster-General, who alone can make these readjustments, to act upon every case where the last quarterly return shows a case for a readjustment, would be imposing a duty which it would be impossible for one man to perform, and which in itself would be an inconvenience not justified by any benefit to the incumbents of such offices. This compensation might vacillate every quarter. A salary might be increased one quarter, and it might be proper to diminish it the next; so that, instead of having a salary, or yearly compensation, as we think the spirit of all the statutes requires, and as it must be prospective, it would be in the end paying a man for a future quarter a compensation which he had earned on a past quarter. The whole spirit of the statutes seems to imply that the returns for the past two years are to be taken as the best conjectural basis that can be obtained for fixing the salary for two years in the future. Before we can adopt such a construction, therefore, as is contended for by plaintiff's counsel, words imperatively declaring such a proposition should be found in the statutes.

The language which is used in the proviso, instead of declaring, as could easily have been done, that the return of every quarter shall be the basis upon which to determine the compensation of the officer for the next succeeding quarter, is "that when the quarterly returns of any postmaster" of the classes specified "show that the salary allowed is 10 per centum less than it would be on the basis of commissions under the Act of 1854, fixing compensation, then the Postmaster-General shall review and readjust the salary under the provisions of said section." The provisions of that section, as we have already seen, direct the Postmaster-General to review and readjust the salaries of postmasters, once in two years, except in special cases, upon the basis of the preceding section, namely: section 2 of the Act of 1864.

That basis of the preceding section is the returns for the two years consecutively preceding the readjustment; so that, taking the use of the plural, "quarterly returns," instead of the singular, "any quarterly return;" taking the reference to the second section of the Act of 1864, which is the basis of the whole system, as the provision under which the readjustment shall be made; and the clear statement of that section that the review shall be made once in two years, and shall be based on the provisions of section 1 of the same statute, which requires returns of two consecutive years,—we do not think that the proviso is fairly susceptible of the construction which counsel for plaintiff claim for it.

If that construction be a sound one, the salary for the first quarter under it might not be half as much as would be a proper compensation for the preceding quarter on the same basis, and the return of a postmaster for the quarter on which this basis may be made, while doing him no good, might produce a very exaggerated salary for the man who should succeed him at the end of the quarter. We see nothing in this construction which commends it to the wisdom of Congress, and we see nothing in the language used by Congress which requires it. It is in conflict with the opinions of the two able Postmasters-General who have had the question under consideration, as well as with those of the Attorney-General and his assistant; and it is also opposed to our own judgment of its fair meaning, taken in connection with the whole legislation on the subject.

As the record shows that there were not returns from the post office of the plaintiff for two years preceding the time when he demanded that a readjustment should take place, and also that a readjustment was made for the period from July 1, 1872, to July 1, 1874, it is obvious, according to this construction of the statutes, that there is no duty on the Postmaster-General to make the readjustment asked for.

The judgment of the Supreme Court of the District of Columbia is, therefore, affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY, *Plff. in Err.*, v. JOHN BURNS ET AL.

(See S. C. Reporter's ed. 165, 166

Removal of action—when to be done.

1. A petition for a removal of a cause from a state court must be filed at or before the term at which the cause could be first tried in the state court.
2. Where a cause is removed for trial from the state court of one county to the state court of another county a removal of the cause to the United States Court is too late, unless the petition for removal is filed at or before the term at which the cause could be first tried in the former county.

[No. 581.]

Submitted Dec. 15, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the District of Maryland, to review an order of that court remanding the suit to the State Court from which it had been removed. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John K. Cowen** and **Hugh L. Bond, Jr.**, for plaintiff in error:

The December Term was the trial term of this case, and not the September Term, as contended by defendants in error.

Pullman Palace Car Co. v. *Speck*, 118 U. S. 87 (28: 926).

Mr. **Albert Constable**, for defendants in error:

The September Term of the Circuit Court for Cecil County was the term at which plaintiff in error was bound to file its petition, if it wished the cause removed.

Gregory v. *Hartley*, 113 U. S. 745 (28: 1151); Act of March, 1875, chap. 137, § 3; *Babbitt* v. *Clark*, 103 U. S. 606 (26: 507).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This is a writ of error for the review of an order of the circuit court made March 5, 1886, remanding a suit which had been removed from a state court under the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470. The material facts are these:

The suit was begun in the Circuit Court of

Cecil County, Maryland, and it stood for trial at the December Term of that court in the year 1884. During that term the Railroad Company petitioned the court for the removal of the suit to the Circuit Court of Dorchester County for trial, and this was granted January 22, 1885. The cause was docketed in Dorchester County February 2, 1885, and on the 22d of April, 1885, the Railroad Company filed in that county its petition for the removal of the suit to the Circuit Court of the United States for the District of Maryland, on the ground that the plaintiffs, Burns and Nokes, were citizens of New Jersey and Pennsylvania respectively, and the Railroad Company, the defendant, a Maryland corporation, and in law a citizen of that State. A removal was ordered by the Dorchester Court April 27, 1885, which was at its April Term, 1885, and the cause entered in the Circuit Court of the United States May 16, 1885. A motion to remand was made November 2, 1885; and this motion was granted March 5, 1886, on the ground that the petition for removal was not in time.

In our opinion this order was properly made. According to the agreed facts the Circuit Court of Cecil County holds four terms in each year, commencing respectively on the third Monday of March, the third Monday of June, the third Monday of September, and the third Monday of December. It is conceded that the cause could have been forced to trial at the December Term, 1885, if it had remained in Cecil County. The terms in Dorchester County begin on the fourth Monday of the months of January, April and July, and on the second Monday of November in each year. Although the record from Cecil County was filed in Dorchester County on the second day of February, and the petition for removal filed on the 22d of April, it does not appear that it was brought to the attention of the court or any action taken thereon until the 27th of that month, which was the first day of the April Term. Under these circumstances it is clear that the petition for removal was not presented in time. The first term of the state court at which the cause could have been tried was the December Term in Cecil County. That term must have ended on or before the third Monday in March. The transfer was made to Dorchester County during the January Term of that court. That was another term of the state court from that in which the trial could first be had. Consequently, the time for removal had passed when the case got to Dorchester County. The Railroad Company had its election at the December Term in Cecil County to remove the suit to the Circuit Court of the United States or to transfer it to Dorchester County for trial. It chose the latter and thereby lost its right to the removal.

The order to remand is affirmed.

HENRY C. ROBERTS ET AL., *Plffs. in Err.*,
v.
HENRY M. BENJAMIN.

(See S. C. Reporter's ed. 64-74.)

Facts found by referee—market value — settlement—exception.

1. Where a judgment in the court below has been entered pursuant to the report of a referee, the facts found by him are conclusive in this court.

2. In an action for damages for nondelivery of goods sold, where it is not found as a fact by the referee that there was any advance in the market value of the goods between the time of the breach of the contract Sep. 1, 1879, and Nov. 7, 1879, and the market value of the goods is only found at the latter date, held, proper to take such market value, as found, to control the measure of damages.

3. Where a claim for shortage was made by plaintiff in good faith, and the defendants allowed the claim, and the plaintiff paid the balance of the account in full, and there is no evidence that the claim for shortage was false, held, that the defendants were concluded by the settlement, and that the account should not be reopened.

4. This court cannot, on this writ of error, review any of the exceptions taken to the admission or exclusion of evidence or to the findings of fact by the referee or any exceptions to his refusal to find facts as requested, the case not having been tried by the circuit court on the filing in writing of a waiver of a trial by jury.

[No. 120.]

Argued Dec. 22, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of New York, to review a judgment of a referee in favor of plaintiff for damages for the failure of defendants to deliver a quantity of iron contracted to be sold by them to the plaintiff. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **James Breck Perkins,** for plaintiffs in error:

The contract was void for uncertainty.

Pembroke Iron Co. v. *Parsons,* 5 Gray, 589; *Morris* v. *Levison,* L. R. 1 C. P. Div. 155; *Clark* v. *Baker,* 5 Met. 452.

The referee erred in taking the market price of iron in November as the measure of damages, instead of the market price in September, when the iron was to be delivered and when the breach of the contract occurred.

Shepherd v. *Hampton,* 16 U. S. 3 Wheat. 200 (4:369); *Hadley* v. *Baxendale,* 9 Exch. 341; *Messmore* v. *N. Y. Shot & L. Co.* 40 N. Y. 422; *McHose* v. *Fulmer,* 73 Pa. 365; *Baker* v. *Drake,* 53 N. Y. 211; *Norton* v. *Wales,* 1 Robt. 561; *Hewitt* v. *Miller,* 61 Barb. 567; *Sleuter* v. *Wallbaum,* 45 Ill. 43.

The referee erred in refusing to open the account between the parties, and to allow the defendants' claim for $1,926.77, wrongfully charged them by the plaintiff for shortages on coal, which had no existence.

Champion v. *Joslyn,* 44 N. Y. 653; *Hutchinson* v. *Market Bank,* 48 Barb. 302; *Manhattan Co.* v. *Lydig,* 4 Johns. 377; *Philips* v. *Belden,* 2 Edw. Ch. 1; *Anthony* v. *Day,* 52 How. Pr. 85.

Messrs. **Matthew Hale** and *Esek Cowen,* for defendant in error:

This case having been submitted to the decision of a referee, upon whose report judgment was rendered by the circuit court, the only question presented by the writ of error is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee.

Paine v. *Central Vermont R. R. Co.* 118 U. S. 152, 158 (30:198, 195); *Bond* v. *Dustin,* 112 U. S. 604, 606, 607 (28:835, 836), and cases cited; *Boogher* v. *N. Y. L. Ins. Co.* 103 U. S. 90 (26: 310); *Tyng* v. *Grinnell,* 92 U. S. 467 (23:733).

The correspondence constituted a complete and valid contract.

See *Taylor* v. *Merchants F. Ins. Co.* 50 U. S. 9 How. 398 (13:190); *Mactier* v. *Frith*, 6 Wend. 103.

The measure of damages is the difference between the contract price and the market value of the article at the time of the breach of the contract by defendants.

Benj. Sales, 2d Am. ed. edited by J. C. Perkins, § 870 and cases cited; 2 Sutherland, Damages, 372 and cases cited.

None of the exceptions of plaintiffs in error to the referee's findings of fact or to his refusal to find facts as requested present any question that can be considered by this court.

R. S. §§ 649, 700; *Miller* v. *Brooklyn L. Ins. Co.* 79 U. S. 12 Wall. 285, 300, 301 (20:398, 401); *Ryan* v. *Carter*, 93 U. S. 78, 81 (23:807, 808); *U. S.* v. *Dawson*, 101 U. S. 569 (25:791); *Stanley* v. *Albany County*, 121 U. S. 535, 547, 548 (30:1000, 1003).

None of the assignments of error are well made.

Ogle v. *Vane*, L. R. 2 Q. B. 275; *S. C.* affirmed, L. R. 3 Q. B. 272; *Hickman* v. *Haynes*, L. R. 10 C. P. 598; *Hill* v. *Smith*, 34 Vt. 535, 547; *Newton* v. *Wales*, 3 Robt. 453; *Douglass* v. *McAllister*, 7 U. S. 3 Cranch, 298 (2:445).

The evidence raised a presumption that the letter in question was mailed and received.

Howard v. *Daly*, 61 N. Y. 362; *Hetherington* v. *Kemp*, 4 Camp. 193; *Dana* v. *Kemble*, 19 Pick. 112.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Northern District of New York, by Henry M. Benjamin, a citizen of Wisconsin, against Henry C. Roberts and Archibald S. Clarke, citizens of New York, composing the firm of H. C. Roberts & Co., doing business at Rochester, New York, to recover damages for the alleged failure of the defendants to deliver to the plaintiff a quantity of iron, on a contract for its sale by the former to the latter.

The complaint alleged that at the time of the breach of the contract by the defendants the market value of iron of the kind and quality agreed to be sold was much greater than the contract price of the iron, and that, if the iron had been delivered pursuant to the contract, the plaintiff could have sold it at a large profit.

The defendants, in their answer, besides denying any liability to the plaintiff, set up by way of counterclaim: (1) that the plaintiff was indebted to them in the sum of $796.99, for coal and iron sold and delivered by them to him, and that, as a part of the contract for the sale of the iron upon which the action was brought, it was a condition that the plaintiff should pay to the defendants the $796.99, which he had not done; (2) that, on the sale and delivery to the plaintiff by the defendants of certain coal, the plaintiff had claimed various items of shortage in the coal, for which the defendants had allowed to him $1,926.73; that they had afterwards ascertained that the statements of the plaintiff as to the shortage were untrue, and that they were ready to deliver the iron upon the payment to them by the plaintiff of the $1,926.73.

The reply of the plaintiff admitted an indebtedness to the defendants of $112.73, on account of the item of $796.99 claimed in the answer; and in regard to the $1,926.73, it alleged that the items of shortage had been allowed and agreed to by the defendants.

After issue was joined, it was stipulated in writing by the parties, that the action be referred to a person named, "as sole referee, to hear, try and determine the issues therein." Upon this stipulation, an order was entered by the court that the action be referred to such person, "to determine the issues therein."

The referee filed his report as follows:

"I, the undersigned, the referee to whom were referred the issues in the action above entitled, do respectfully report that I have heard the allegations and proofs of the respective parties, and the arguments of counsel thereon, and, after due deliberation, report the following as my findings of facts:

"First. The plaintiff is a citizen of the State of Wisconsin, and resides in the City of Milwaukee, in said State; and the defendants, on and prior to the 17th day of July, 1879, were, have since then continued to be, and now are, citizens of the State of New York, residing at Rochester, in said State, and partners in business in said city, under the firm name of H. C. Roberts & Co.

"Second. On or about the 17th day of July, 1879, the plaintiff inquired of the said defendants, by telegraph, their lowest price for 400 tons of number 2 iron and 400 tons of number 1 iron, or one cargo of each, delivered afloat at Milwaukee; to which, on the 22d day of July, 1879, the said defendants replied by telegram, stating the price at $19.50 cash, per ton, for number 1 foundry iron delivered afloat at Milwaukee, and declining to put any price or to make any agreement for the sale of number 2 iron; and in a letter written on the following day promised and agreed to ship a cargo of the iron about the first day of September, 1879, if the plaintiff should accept the offer.

"On the 25th of July, 1879, the plaintiff, by letter, accepted the offer of a cargo of the iron, at $19.50 per ton afloat at Milwaukee, provided that the plaintiff should be allowed the deduction from the price per ton, if freight could be had for less than $1 per ton; and also provided that the terms should be, instead of cash, a credit of four months, with interest at the rate of 7 per cent per annum after thirty days.

"The defendants, by letter dated July 28th, 1879, accepted the modification of the terms and conditions of sale, and agreed to ship the iron about September 1, 1879, or as soon as they could manufacture it.

"Third. The term 'cargo,' employed in this correspondence, was understood by the plaintiff and the defendants to mean a cargo of 400 tons.

"Fourth. The contract for the delivery of the cargo of iron had no relation to or connection with any other dealings between the parties, and the performance thereof by the defendants was not conditioned upon the performance of any act on the part of the plaintiff other than as stated in the preceding findings.

"Fifth. The defendants did not deliver the iron or any part of it to the plaintiff on or about the time specified in their offer, nor did they deliver it as soon as they had manufactured the

required amount. They postponed the execution of the contract from time to time, and finally insisted, as a condition of the delivery of the iron, that the plaintiff should pay certain outstanding indebtedness on other dealings, which the defendants claimed to be due to them from the plaintiff; and also, as a further condition, that payment for the iron should be made upon delivery, that shipment should be by rail instead of by boat, and in installments of 100 tons per month, instead of one cargo of the full amount, and that the plaintiff should pay, in addition to the contract price, $1 per ton for extra freight. The plaintiff did not comply with these conditions, and the iron has never been delivered.

"Sixth. At the time when the letter containing these conditions was sent by the defendants to the plaintiff, November 7, 1879, the market value of number 1 foundry iron of the kind manufactured by the defendants was $34 per ton afloat in Milwaukee.

"Seventh. From May, 1878, to November, 1878, the defendants delivered to the plaintiff 435 tons of iron, of the value of $17 per ton, to be accounted for by the plaintiff to the defendants at that price. The plaintiff has accounted and paid for all of this iron except 6 $\frac{1}{2}\frac{7}{2}\frac{7}{2}$ tons, for which amount payment has not been made, nor has the iron been returned to the defendants. A statement of this account was submitted by the defendants to the plaintiff, showing that there was due and unpaid thereon $117.02, on the 18th day of June, 1879.

"Eighth. Between April 20, 1876, and October 5, 1878, the defendants sold and delivered to the plaintiff a quantity of coal, a statement of the weights and prices of which was rendered by the defendants to the plaintiff. Upon receipt of the cargoes at Milwaukee, the coal was weighed at the dock by the plaintiff, and thereafter he submitted to the defendants a statement of the weights and demanded a deduction on account of shortage in weight, which he claimed to exist. The defendants assented to and allowed the claim for shortage, and the plaintiff paid the balance of the account in full. The claim for shortage was made by the plaintiff in good faith, upon the basis of weights taken at his dock; and the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract upon which this action was brought.

"Ninth. In the months of October and November, 1878, the defendants sold and delivered to the plaintiff coal at certain prices, which, with the interest added to the day of the adjustment of the account, April 16, 1879, amounted to the sum of $20,804.71. Of this amount the plaintiff paid to the defendant sums of money from time to time, which, with interest to the said 16th day of April, 1879, amounted to $19,678.94. A statement of said account was made by the defendants to the plaintiff, showing a balance due from the latter to the former on said day, amounting to $625.77. This balance has not, nor has any part of it, been paid by the plaintiff to the defendants.

"Upon these facts I do respectfully report as my conclusions of law:

"First. The plaintiff is entitled to recover from the defendants the difference between the contract price of the 400 tons of iron which were to be delivered about the first of September, 1879, and the market value of the said iron afloat in Milwaukee, on the 7th day of November, 1879, when the contract was finally broken by the said defendants, amounting to the sum of $5,800, with interest from November 7, 1879, to the date of this report.

"Second. The plaintiff is indebted to the defendants in the sum of $117.02, with interest from June 18, 1879, for the 6 $\frac{1}{2}\frac{7}{2}\frac{7}{2}$ tons of iron as stated in the seventh finding of fact, amounting, at the date of this report, to the sum of $148.20; and they are entitled to have the said amount offset against the amount otherwise due from them to the plaintiff, as stated in the first conclusion of law.

"Third. The plaintiff is indebted to the defendants in the sum of $625.77, with interest from April 16, 1879, for the balance of the account for coal sold to the plaintiff, as stated in the ninth finding of facts, amounting, at the date of this report, to the sum of $799; and they are entitled to have the said amount offset against the amount otherwise due from them to the plaintiff, as stated in the first conclusion of law.

"Fourth. The defendants have not established their right to reopen the account between them and the plaintiff for coal delivered from April 20, 1876, and October 5, 1878, as stated in the eighth finding of facts; and they are therefore concluded by the settlement and adjustment made in that respect, and not entitled to the counterclaim in that behalf stated in their answer herein.

"Fifth. The plaintiff is entitled to judgment against the defendants for the sum of $6,264.12, with interest thereon from the date of this report, with the costs of this action, and judgment for that amount is accordingly directed."

The defendants moved the court for a new trial upon a case and exceptions, made according to the practice in the State of New York, in which they excepted to the first, fourth, and fifth conclusions of law found by the referee; but the motion was denied, and the court thereupon made an order denying it, and directing "that judgment be entered herein pursuant to the report of the referee, with costs." Thereupon, judgment was entered for the plaintiff for the $6,264.12, and $192.08 interest from the date of the report, and $399.70 costs, amounting in all to $6,855.90. The defendants have brought a writ of error to review the judgment.

The item of recovery allowed to the plaintiff by the referee was for 400 tons of iron at $14.50 per ton, being the difference between $19.50, the contract price, and $34, the market value on November 7, 1879.

The only questions open to review here are whether there was any error of law in the judgment rendered by the Circuit Court upon the facts found by the referee. The judgment having been entered "pursuant to the report of the referee," the facts found by him are conclusive in this court. *Thornton* v. *Carson*, 11 U. S. 7 Cranch, 596, 601 [3: 451, 452]; *Alexandria Canal Co.* v. *Swann*, 46 U. S. 5 How. 83 [12: 60]; *York & C. R. R. Co.* v. *Myers*, 59 U. S. 18 How. 246 [15: 380]; *Heckers* v. *Fowler*, 69 U. S. 2 Wall. 123 [17: 759]; *Bond* v. *Dustin*, 112 U. S. 604, 606, 607 [28: 835, 836]; *Paine* v. *Central*

Vermont R. R. Co. 118 U. S. 152, 158 [30: 198, 195].

The second and third findings of fact show that there was a complete, valid and binding contract made between the parties, which was not void for uncertainty, or for any other reason. It is expressly found that the term "cargo," employed in the correspondence between the parties by which the contract was entered into, was understood by both of them to mean a cargo of 400 tons. It is also expressly found that the contract for the delivery of the iron had no relation to or connection with any other dealings between the parties, and that the performance thereof by the defendants was not conditioned upon the performance of any act on the part of the plaintiff, other than as stated in the second and third findings of fact.

It is contended by the defendants that the referee erred in taking the $34 per ton, the market value of the iron on November, 7, 1879, as the measure of damages, instead of the market price in September, when the iron was to be delivered, and when, it is alleged, the breach of the contract occurred. But, although the defendants did not deliver any of the iron on or about September 1, 1879, nor as soon as they had manufactured the required amount, yet it appears from the findings of fact, considered together, that the breach of the contract did not take place until November 7, 1879. The statement in the findings, that the defendants "postponed the execution of the contract from time to time," and finally insisted upon certain requirements as conditions of the delivery of the iron, must be accepted as a statement that the postponement of the execution of the contract from time to time down to November 7, 1879, was with the assent of the plaintiff. From the fact that, as late as November 7, 1879, the defendants were naming conditions on which they would deliver the iron, it must be inferred that the question of delivery was still regarded by both parties as an open one, and that the mere failure to deliver the iron by the first of September, 1879, or even thereafter as soon as the required amount had been manufactured, was not regarded by either party as a breach of the contract. It was in the power of the defendants, instead of merely postponing the execution of the contract from time to time, to have absolutely refused to perform it, if they found that the price of iron was rising in the market, as is alleged in argument. But it is not found as a fact by the referee that there was any advance in the market value of the iron in question between September 1, 1879, or the time the iron was manufactured, and November 7, 1879, nor is the price of the iron in the market found as a fact, at any other date than November 7, 1879.

On the findings of fact, the rule of damages applied to this case was in accordance with the authorities. Benjamin, Sales, § 872; 2 Sedgwick, Damages, 7th ed. 184, note b; *Ogle* v. *Vane*, L. R. 2 Q. B. 275, and in the Exchequer Chamber, L. R. 3 Q. B. 272; *Hickman* v. *Haynes*, L. R. 10 C. P. 598; *Hill* v. *Smith*, 34 Vt. 535, 547; *Newton* v. *Wales*, 3 Robt. 458.

It is also alleged for error, that the referee erred in refusing to open the account between the parties and to allow the defendants' counterclaim for $1,926.73, as wrongfully charged to them by the plaintiff for shortages on coal. The finding of the referee is that the plaintiff, after weighing the coal, submitted to the defendants a statement of the weights and asked a deduction on account of shortage; that the defendants assented to and allowed the claim; that the plaintiff paid the balance of the account in full; that the claim for shortage was made by the plaintiff in good faith, upon the basis of weights taken at his dock; and that the defendants did not in any manner object to the plaintiff's claim until after he had insisted upon the performance of the contract on which this action was brought. On these facts the referee found as a conclusion of law that the defendants had not established their right to reopen the account for the coal in question; that they were concluded by the settlement and adjustment made in that respect; and that they were not entitled to the counterclaim in that behalf stated in their answer.

The answer alleged, in respect to such counterclaim, that the statements of the weight of the coal made by the plaintiff to the defendants were false, and were so known to be by the plaintiff, and that the amount which he had received from the defendants for shortage was obtained from them by his unlawful act. No facts in support of this allegation of the answer are found by the referee, and his conclusion of law was correct.

This case not having been tried by the circuit court on the filing of a waiver, in writing, of a trial by jury, this court cannot on this writ of error review any of the exceptions taken to the admission or exclusion of evidence, or any of the exceptions to the findings of fact by the referee, or to his refusal to find facts as requested. *Bond* v. *Dustin*, 112 U. S. 604, 606, 607 [28: 835, 836]; *Paine* v. *Central Vermont R. R. Co.* 118 U. S. 152, 158 [30: 198, 195].

The judgment of the Circuit Court is affirmed.

CHARLES S. HINCHMAN, *Plff. in Err.*,
v.
RUFUS P. LINCOLN.

(See S. C. Reporter's ed. 33-56.)

Statute of Frauds—receipt and acceptance—rescission of sale—vendee—effect of action.

1. It is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance, within the terms of the Statute of Frauds. But where the facts in relation to a contract of sale, alleged to be within the Statute of Frauds, are not in dispute, it belongs to the court to determine their legal effect.

2. To satisfy the Statute there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter with the intention of taking possession as owner; mere words are not sufficient to constitute a delivery and acceptance which will take a verbal contract of sale out of the Statute of Frauds.

3. Where the vendor made a written demand, upon one to whom he had delivered securities for the defendant, for the immediate return of the securities, on the ground that defendant had refused to fulfill the contract for their purchase, this act was inconsistent with the assertion that there had been, prior to that time, any delivery by plaintiff to defendant of the securities, and was a distinct rescission of the contract of sale.

4. In order that a receipt and acceptance shall be sufficient to take the case out of the prohibition of the statute, the acceptance by the vendee must be in the quality of vendee; and the act or acts relied on as constituting a receipt and acceptance must be such as definitely establish that the relation of vendor and vendee exists.

5. Where there was no transfer of possession of the securities to the defendant, and no agreement by the person holding the securities to hold them as his agent by consent of defendant as vendee, under a contract of sale with the plaintiff, the bringing of an action by the plaintiff to recover the consideration of the sale, is not a waiver of the condition of the previous payment of the consideration, nor an authorization to such person to deliver the securities to the defendant without performance of the contract on his part.

[No. 77.]

Argued Nov. 18, 21, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Reversed.*

Action to recover the agreed price of certain securities alleged to have been sold and delivered by the plaintiff to the defendant. A verdict was rendered in favor of plaintiff, on which judgment was entered; to reverse which this writ of error is prosecuted.

The facts are fully stated in the opinion.

Messrs. A. H. Wintersteen, **Wayne MacVeagh** and *Theo. F. H. Meyer,* for plaintiff in error:

Van Rensselaer was at best a special agent. His real authority is all that may be allowed to govern in the case.

Whart. Agency, § 125, note 6; *People's Bank* v. *Gayley,* 92 Pa. 528, 529.

Mere delivery without acceptance is insufficient.

Reed, Statute of Frauds, § 268; *Caulkins* v. *Hellman,* 47 N. Y. 449; *Heermance* v. *Taylor,* 14 Hun, 149; *Gorham* v. *Fisher,* 30 Vt. 428; *Shindler* v. *Houston,* 1 N. Y. 261, 269, 270; *Brand* v. *Focht,* 1 Abb. App. Dec. 185; *Rodgers* v. *Phillips,* 40 N. Y. 519; *Marsh* v. *Rouse,* 44 N. Y. 643, 647.

The receipt was in writing and it was the court's duty to construe it.

Foster v. *Berg,* 14 Pittsb. L. J. N. S. 188.

The instruction to Van Rensselaer not to deliver unless the purchase money was paid was fatal.

2 Add. Cont. 113-115, citing *Baldey* v. *Parker,* 2 Barn. & C. 37; *S. C.* 3 Dow. & Ry. 220.

A vendor, to satisfy the Statute, must surrender all right to stoppage *in transitu.*

Story, Sales, § 276, citing *Bushel* v. *Wheeler,* 15 Q. B. 442.

The delivery must be such as to put a complete end to all the rights of an unpaid vendor.

2 Add. Cont. § 554, 118, citing *Ousack* v. *Robinson,* 1 Best & S. 229; *Shindler* v. *Houston,* 1 N. Y. 261.

As long as something remains to be done to complete the delivery by the vendor or effectuate the receipt by the vendee, the statute is not satisfied.

1 Chitty, Cont. 555 and cases there cited; *Mechanics & T. Bank* v. *Farmers & M. Nat. Bank,* 60 N. Y. 40.

As there may be an acceptance without a receipt and a receipt without an acceptance, both must be proven.

Cross v. *O'Donnell,* 44 N. Y. 661; *Cooke* v. *Millard,* 65 N. Y. 354.

Mr. **Augustus C. Brown,** for defendant in error:

The question as to whom the credit was given was for the jury to decide.

Whart. Agency, § 490; *Pentz* v. *Stanton,* 10 Wend. 271.

The evidence sought by the first two questions was clearly incompetent; but whether so or not, no harm was done.

Gregg v. *Moss,* 81 U. S. 14 Wall. 564 (20: 740).

The verdict of the jury is conclusive.

Bassett v. *U. S.* 76 U. S. 9 Wall. 38 (19: 548); *Gregg* v. *Moss, supra; Taylor* v. *Angevine,* 8 Rep. 643.

When the judge had already charged substantially the same proposition, an exception to a refusal to charge as requested is unavailing.

Pakalinsky v. *N. Y. Cent. & H. R. R. Co.* 18 N. Y. Weekly Dig. 44; *Zabriskie* v. *Smith,* 13 N. Y. 322, 338; *Betz* v. *Conner,* 7 Daly, 550; *Walsh* v. *Kelly,* 40 N. Y. 556, 558; *Agrault* v. *Pacific Bank,* 47 N. Y. 570, 576; *Schile* v. *Brokhahus,* 80 N. Y. 614, 620.

It was clearly for the jury to say whether the circumstances proved, did or did not amount to an acceptance.

Pentz v. *Stanton,* 10 Wend. 271; *Garfield* v. *Paris,* 96 U. S. 557 (24: 821).

Acceptance, in a case where the contract is for a specific ascertained chattel, may precede receipt.

Cross v. *O'Donnell,* 44 N. Y. 661, 664; *Cooke Millard,* 65 N. Y. 354, 369.

It need not be at the time of the oral agreement.

Jackson v. *Tupper,* 2 Cent. Rep. 407, 101 N. Y. 515, 519.

The acceptance required by the statute is simply the identification and recognition of the goods.

Browne, Stat. of Frauds, 4th ed. § 316 b, 316 c, 321 a, 326 a; *Ousack* v. *Robinson,* 1 Best & S. 299; *Bog Lead Mining Co.* v. *Montague,* 10 C. B. N. S. 481.

A subsequent delivery is sufficient.

Sale v. *Darragh,* 2 Hilt. 184; *Boutwell* v. *O'Keefe,* 32 Barb. 434; *Woodford* v. *Patterson,* 32 Barb. 630; *McKnight* v. *Dunlop,* 5 N. Y. 537.

The verdict of the jury determines what the contract was, and that the receipt, if found, was under that contract.

Tomkinson v. *Staight,* 17 C. B. 697; *S. C.* 25 L. J. C. P. 85; Benjamin, Sales, § 170; *Dyer* v. *Forest,* 2 Abb. Pr. 282; *Wilcox S. P. Co.* v. *Green,* 72 N. Y. 17.

It is not necessary that the title actually pass at the time of delivery.

Pinkham v. *Mattox,* 53 N. H. 600; *Dodsley* v. *Varley,* 12 Ad. & El. 632.

Dealing with a commodity as if it was in one's possession is evidence of receipt.

Chaplin v. *Rogers,* 1 East, 192, 195; *Re Hoover,* 38 Hun, 553, 555; *Parker* v. *Wallis,* 5 El. & Bl. 21.

An acceptance sufficient to satisfy the statute may be constructive.

Garfield v. *Paris,* 96 U. S. 557, 563 (24: 821, 824).

Lapse of time connected with other circumstances may show an acceptance.

Bushel v. *Wheeler,* 15 Q. B. 442.

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action at law brought by Rufus P. Lincoln, a citizen of New York, against Charles S. Hinchman, a citizen of Pennsylvania, to recover $18,000 as the agreed price and value of certain securities, stocks and bonds alleged to have been sold and delivered by the plaintiff to the defendant. The sale is alleged to have taken place on July 8, 1882. It is set forth in the complaint that the plaintiff acquired title to the securities in question by purchase of one John R. Bothwell, subject to any claim Wells, Fargo & Company had upon the same for advances made by them to or for the account of the said Bothwell; "That thereafter this plaintiff paid to Wells, Fargo & Company the amount of their said advances and took possession of said securities, stocks and bonds, but stated to the above named defendant that he was willing and would pay over to the Stormont Silver Mining Company, which company was a large creditor of the said Bothwell, and in which company said defendant was very largely interested, any surplus which he derived in any way from said securities, stocks and bonds, after having reimbursed himself in the sum of about $26,000 and interest for advances theretofore made by him to and for the account of the said Bothwell."

The answer denied the alleged sale and delivery. The action was tried in the Circuit Court of the United States for the Southern District of New York by a jury. There was a verdict in favor of the plaintiff, on which judgment was rendered, to reverse which this writ of error is prosecuted.

A bill of exceptions sets out all the evidence in the cause, together with the charge of the court, and the exceptions taken to its rulings. At the close of the testimony, defendant's counsel, among other things, requested the court to charge the jury "That there is no evidence in the case of a completed sale of the securities to the defendant, and the plaintiff therefore cannot recover." This request was refused, and an exception taken by the defendant. This raises the general question whether there was sufficient evidence in support of the plaintiff's case to justify the court in submitting it to the jury. The defense rested upon two propositions: 1, that there was no evidence of any agreement between the parties for a sale and purchase; and 2, that, if there were, the agreement was not in writing, and there had been no receipt and acceptance of the subject of the sale or any part thereof by the defendant, and that consequently the agreement was within the prohibition of the Statute of Frauds in New York.

In regard to the first branch of the defense, we think there was sufficient evidence of a verbal agreement between the parties for the sale of the securities at the price named. It appeared in evidence that the plaintiff, having acquired title and possession to the securities previously belonging to Bothwell by paying off the advances due to Wells, Fargo & Company, agreed with the defendant, as representing the Stormont Silver Mining Company, to give to that company and other creditors of Clark and Bothwell the benefit of any surplus there might be after the payment of the amount due to the plaintiff. There is evidence tending to show that thereupon, a suggestion having been made that the defendant should purchase the securities from the plaintiff, it was agreed between them that the plaintiff would sell and the defendant would take them at the price of $18,000, and the next day at 3 o'clock was appointed as the time for a delivery. By way of explanation, and as having a bearing upon other items of evidence in the cause, it is proper to say that the defendant's testimony in denial of the fact of the agreement tends to the point that the proposed purchase by him was not in his individual capacity, but as the representative of the Stormont Silver Mining Company, of which he was one of the trustees, and was made conditional on his procuring the assent thereto of the other trustees. We assume, however, in the further consideration of the case, that the jury were warranted in finding the fact of a verbal agreement of sale as alleged by the plaintiff. The question as thus narrowed is whether there was sufficient evidence, to submit to the jury, of a receipt and acceptance by the defendant of the securities sold.

It appears that on July 8, 1882, in pursuance of the appointment made the day previously, the plaintiff handed the securities in question, at the office of the Stormont Silver Mining Company in New York, to Schuyler Van Rensselaer, who was the treasurer of that company, and took from him the following receipt:

"Office of Stormont Silver Mining Company,
No. 2 Nassau, cor. of Wall Street,
New York, July 8, 1882.
President: William S. Clark.
Secretary: John R. Bothwell.

Received of Dr. Rufus P. Lincoln the following certificates of stock on behalf of C. S. Hinchman, and to be delivered to him when he fulfills his contract with Dr. Lincoln to purchase said stocks for $18,000 for

28,400	shares	Stormont Silver M'g Co.
24,300	"	San Bruno Copper M'g Co
800	"	Eagle Silver M'g Co.
500	"	Hite Gold Quartz M'g Co.
1,819	"	Star Grove Silver M'g Co.
1,410	"	Menlo Gold Quartz Co., & order on Wells, Fargo & Co. for 45,000 shares.
600	"	Satemo Gold Quartz Co.
100	"	N. Y. & Sea Beach R. R. Co.

Also $9,500 in first mortgage bonds of the Battle Mn. & Lewis R. R. Co.

Schuyler Van Rensselaer.
Witness: M. W. Tyler."

The defendant was not present. The receipt, signed by Van Rensselaer, and which he gave to the plaintiff, was witnessed by M. W. Tyler, the plaintiff's attorney, and had been prepared by him. The securities mentioned therein are the same with those described in the complaint. For the purpose of proving the authority of Van Rensselaer to receive and receipt for the securities, some correspondence between the parties was put in evidence by the plaintiff, the material parts of which are as follows:

On July 21, 1882, Tyler, as attorney for the plaintiff, wrote to the defendant as follows:

"I was much disappointed in receiving your letter this afternoon, postponing your ap-

pointment with me *in re* Lincoln negotiation. When Dr. Lincoln accepted your offer of $18,000 for his position in reference to the Bothwell securities, he did so unqualifiedly, without even suggesting a modification of your offer, in the hope that in this way he would expedite a conclusion of the matter, and believing that nothing was open except the delivery of the securities, and the receipt of the price. This was on July 7th. On July 8th, learning from Mr. Van Rensselaer that you had left word with him to receive the securities, Dr. L. called on Mr. Van R. and left with him the securities just as he received them. Now, under these circumstances, Dr. L. feels as if there was nothing left to be done except the payment of the money, and that ought not to take very long. Now, I will do anything to accommodate you in this matter in the way of an appointment. If it is inconvenient for you to see me in New York, if you will appoint an early day I will meet you in Philadelphia. If you desire anything in particular should be signed or done by Dr. Lincoln in addition to what he has done already in delivering the securities to Mr. Van R., if you will write me what you request, I will prepare it and take it on with me for delivery to you."

On the same day the plaintiff wrote to the defendant as follows:

"Agreeable to a note from Col. Tyler, I went down this P. M., to meet you as per appointment and receive payment for Stormont and other stocks in accordance with your offer. I was especially disappointed, for I had promised to apply this money this week to cancel that which I borrowed when I took up the the stock. I hope nothing will prevent your carrying out our arrangement by Monday or Tuesday at the furthest, and I will esteem it a favor if, on receipt of this, you will telegraph me when I shall receive a check for the amount of the consideration."

In answer to this, the defendant wrote to the plaintiff from Philadelphia, July 22, 1882, as follows:

"Dear Sir: Your favor of the 21st, as well as Mr. Tyler's, duly received. I did not understand that the negotiation between us was finally concluded, but, as I explained to Mr. Tyler, there were some other questions which would have to be settled before I could act in the matter on account of my being a trustee. I told Mr. Van Rensselaer that he could receive the Stormont stock, held by you for joint account of yourself and Stormont, without requiring you to advance any more money, and that I would arrange with you about it; and he, knowing that I was in negotiation with you, took charge of the whole as handed to him by Mr. Tyler, your counsel. There are several questions which come up in regard to it, and I cannot give you any definite reply until I have conferred with counsel and my cotrustees on the subject. My advice to you is to exchange the Stormont stock for receipts, as a majority have already done, on receipt of this; and if you do so and not convenient for you to advance the contribution for additional stock, I will see that it is carried until we have an opportunity to fix up the whole matter."

It is further in evidence that, a short time after the date of Van Rensselaer's receipt, it was seen by the defendant, but he said or did nothing to repudiate it. Tyler also testifies that on July 20, 1882, he met the defendant, and had this conversation with him:

"I said to Mr. Hinchman that I had been looking for him for several days, and that I supposed he knew we had delivered the securities—the Bothwell securities—to Mr. Van Rensselaer, as he had directed; and he said, 'Yes, that was all right;' and I said, 'Well, now, when will you be able to close this matter?' 'Well,' he says, 'I am in a great hurry this morning, but I will come to your office certainly this afternoon or tomorrow afternoon, at 3 o'clock. You can rely upon my coming and seeing you upon one or the other of those days.' "

The plaintiff also testified that he had an accidental meeting with the defendant at Long Beach about the first of August, 1882. The defendant was in company with his attorney, Mr. Meyer. The interview is stated by the plaintiff as a witness as follows:

"I spoke to him. I do not know that he recognized me, for I was not well acquainted with him before, and he introduced me to Mr. Meyer, and he said, 'This is Dr. Lincoln, from whom I have the Bothwell securities;' and we had some conversation about it, but nothing very definite, although there came up during the conversation a statement that there was some controversy about it. I don't know whether I made the statement, or Mr. Meyer, or Mr. Hinchman. I remarked that there might be some difference—had heard something about some difference—of opinion about it, but that I had none; and I told Mr. Meyer that the idea of turning them over to the Stormont company was an afterthought of Mr. Hinchman; that I conceded nothing of the kind. I never had."

The following letter also is in evidence:

"Office of Stormont Mining Company of Utah,
No. 2 Nassau, cor. of Wall St.,
President: Charles S. Hinchman.
Secretary and Treasurer:
Schuyler Van Rensselaer.
NEW YORK, Aug. 24, 1882.

Schuyler Van Rensselaer, Esq.,
Sec'y and Treas. Stormont S. M. Co.,
No. 2 Nassau St., N. Y.

Dear Sir: Dr. Lincoln, through his attorney, Col. M. W. Tyler, having seen fit to disavow the understanding and agreement by which he obtained 'his position' in carrying the J. R. Bothwell securities in your hands left there by Col. Tyler, after conference with a majority of our trustees, I am instructed to notify you to retain possession of said securities until a court of competent jurisdiction shall direct you what to do with them, I claiming, as trustee, for the benefit of Stormont treasury, an equitable and *bona fide* interest therein. Please acknowledge safe receipt. Yours Truly,

Chas. S. Hinchman,
Prest. and Trustee S. S. M. Co."

There was some other correspondence between the parties not material to the present point, but nothing further was done until November 16, 1882, when a written demand was made by the plaintiff upon Van Rensselaer for the return of the securities. This demand was

read in evidence on the part of the plaintiff. The following is a copy of it:

"To Schuyler Van Rensselaer:

As Mr. Charles S. Hinchman refuses to fulfill his contract with Dr. Lincoln to purchase certain securities delivered to you on the 8th day of July, 1882, for Mr. Hinchman, I hereby demand the immediate return of the securities to me, to wit, certificates for

28,400	shares	of the	Stormont Co's stock, or its equivalent.
24,300	"	"	San Bruno Mining Co's stock.
800	"	"	Eagle Silver " "
500	"	"	Hite Gold Quartz " "
1,819	"	"	Star Grove Silver " "
46,410	"	"	Menlo Gold Quartz Co's "
600	"	"	Satemo " " "
100	"	"	N. Y. & Sea Beach R. R. Co's stock.

$9,500 in first mortgage bonds of the Battle Mountain & Lewis R. R. Co.

Dated New York, November 16, 1882.

Yours, etc., Rufus P. Lincoln,
By M. W. Tyler, Atty."

The reply to it by Van Rensselaer, as proven, is as follows:

"New York, November 20, 1882.

Dr. R. P. Lincoln.

Sir: In answer to the demand made upon me through Mr. M. W. Tyler, I beg to say that I hold the securities mentioned therein on behalf of yourself and Mr. C. S. Hinchman, and I have no interest in or claim upon them personally. I have been notified by Mr. Hinchman not to deliver them to you, and for that reason shall not be able to accede to your demand. Any arrangement agreed to by yourself and Mr. Hinchman shall have my prompt acquiescence. I am, etc., etc.,

S. Van Rensselaer,
per Nash & Kingsford, his attys."

Nothing further occurred until the bringing of this suit on November 25, 1882.

It is conceded by the counsel for the plaintiff that the delivery of the securities in question by the plaintiff to Van Rensselaer was according to the terms of the receipt taken from him at the time, and of itself was not sufficient evidence of a receipt and acceptance by the defendant to satisfy the Statute of Frauds. The jury were so instructed by the court. In speaking of it in his charge, the judge said:

"You will recollect that it recites that the property was to be delivered to Mr. Hinchman (I will simply state the language in substance) 'when he had performed his contract with Mr. Lincoln;' in other words, it attached a condition. If you find upon the evidence that that was all there was of this transaction, I think it my duty to say as matter of law that there was not such delivery as would take the case out of the Statute; because, if that were true, if he simply delivered the stock to Mr. Van Rensselaer, to be delivered to Mr. Hinchman, upon the payment of the sum by Mr. Hinchman, it would not be a receipt and acceptance by him, the possession would not be in him, he could exercise no dominion over it until he had performed the act which it was necessary for him to perform in order to obtain the title.

"To put it more plainly, perhaps the plaintiff would have in that event made Mr. Van Rensselaer his agent as well as the agent of the defendant."

The position of the plaintiff's counsel on this part of the case is stated by him in a printed brief, as follows:

"That receipt was put in evidence not as conclusive of a delivery to Hinchman, but as a fact to be taken into consideration, after the jury had determined the question of defendant's capacity, in connection with his admission that he had given Van Rensselaer some authority in the premises; his admission to Tyler after he saw the receipt that the delivery to Van Rensselaer was "all right;" his admission at Long Beach that he had the securities, and his direction to Van Rensselaer on August 24 not to surrender any of the securities. If the jury should find, as it actually did find, that Hinchman was acting in his individual capacity, and that his claim of a representative capacity, first intimated in his letter of July 22, was an afterthought and false, then the authority given by him to Van Rensselaer was not the limited authority he said it was, and in view of the admission to Tyler that the delivery was "all right," the admission at Long Beach of possession, and the subsequent assertion of dominion over the securities, it was a fair inference for the jury that Van Rensselaer's authority was a general one to receive the securities for Hinchman. If the jury should so find, then, under the terms of the receipt, the delivery to Van Rensselaer was a delivery to Hinchman and an acceptance by him sufficient to satisfy the statute, for nothing remained but for him to pay the purchase price."

In dealing with the question arising on this record we keep in view the general rule that it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance within the terms of the Statute of Frauds. *Bushel* v. *Wheeler*, 15 Q. B. 442; *Morton* v. *Tibbett*, 15 Q. B. 428; *Borrowscale* v. *Bosworth*, 99 Mass. 381; *Wartman* v. *Breed*, 117 Mass. 18. But where the facts in relation to a contract of sale alleged to be within the Statute of Frauds are not in dispute, it belongs to the court to determine their legal effect. *Shepherd* v. *Pressey*, 32 N. H. 56. And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance, and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence. Browne, Stat. Frauds, § 321; *Denny* v. *Williams*, 5 Allen, 5; *Howard* v. *Borden*, 13 Allen, 299; *Pinkham* v. *Mattox*, 58 N. H. 604.

In order to take the contract out of the operation of the statute, it was said by the New York Court of Appeals in *Marsh* v. *Rouse*, 44 N. Y. 643, that there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price." This is adopted in the text of Benjamin on Sales, § 179, Bennett's 4th Am. ed., as the language of the decisions in America. In *Shindler* v. *Houston*, 1 N. Y. 261, 49 Am. Dec. 316. Gardner, J., adopts the language of the court in *Phillips* v. *Bistoli*, 2 Barn. & C. 511, "That to satisfy the statute there must be a delivery by the vendor with an intention of vesting the right of posses-

sion in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner." And adds: "This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. *Bailey* v. *Ogden*, 3 Johns. 421, 3 Am. Dec. 509. * * * In a word, the statute of fraudulent conveyances and contracts pronounces these agreements, when made, void, unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance." In the same case Wright, *J.*, said: "The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. * * * Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. * * * I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract."

This case is regarded as a leading authority on the subject in the State of New York, and has been uniformly followed there, and is recognized and supported by the decisions of the highest courts in many other States, as will appear from the note to the case as reported in 49 Am. Dec. 816, where a large number of them are collected. So in *Remick* v. *Sandford*, 120 Mass. 309, 316, it was said by Devens, *J.*, speaking of the distinction between an acceptance which would satisfy the statute and an acceptance which would show that the goods corresponded with the warranty of the contract, that "If the buyer accepts the goods as those which he purchased, he may afterwards reject them if they were not what they were warranted to be, but the statute is satisfied. But while such an acceptance satisfies the statute, in order to have that effect it must be by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner. The sale must be perfected, and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with, although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. That there has been an acceptance of this character, or that the buyer has conducted himself, in regard to the goods, as owner is to be proved by the party setting up the contract."

Mr. Benjamin, in his treatise on Sales, § 187, says: "It will already have been perceived that in many of the cases, the test for determining whether there has been an actual receipt by the purchaser, has been to inquire whether the vendor has lost his lien. Receipt implies delivery, and it is plain that so long as vendor has not delivered, there can be no actual receipt by vendee. The subject was placed in a very clear light by Holroyd, *J*, in his decision in *Baldey* v. *Parker*, 2 Barn. & C., 37: 'Upon a sale of specific goods for a specific price, by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.' No exception is known in the whole series of decisions to the proposition here enunciated, and it is safe to assume as a general rule, that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note."

In accordance with this, the rule is stated in Browne on The Statute of Frauds, par. 317*a*, as follows: "Where, by the terms of the contract, the sale is to be for cash, or any other condition precedent to the buyer's acquiring title in the goods be imposed, or the goods be at the time of the alleged receipt not fitted for delivery according to the contract, or anything remain to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer. There must be first a delivery by the seller with intent to give possession of the goods to the buyer."

It is clear, and, as we have seen, is conceded, that the original delivery by the plaintiff to Van Rensselaer of the securities, according to the terms of the receipt taken at the time, was not a delivery to the defendant in the sense of the rule established by the authorities, and that consequently there was not and could not have been at that time a receipt and acceptance of them by the defendant to satisfy the Statute of Frauds. How far can it be claimed that that inchoate and incomplete delivery was made perfect by any subsequent act or conduct of the parties?

The first circumstance relied on by the plaintiff as material to that point is that, shortly after the receipt was given, the defendant was informed of it and made no objection to it; but certainly this is insignificant. It added nothing to the transaction stated in the receipt that the defendant assented to it. That assent was simply that the securities had been delivered to Van Rensselaer to be delivered to him when paid for. It did not alter the implied contract between Van Rensselaer and the plaintiff arising upon the the terms of the receipt that the subject of the sale should not be delivered to the defendant until he had paid the agreed price.

The next circumstance relied upon is the conversation testified to by Tyler as having taken place on July 20 between him and the defendant. In that conversation Tyler testifies that he said to the defendant that "I supposed he knew we

had delivered the securities—the Bothwell securities—to Van Rensselaer as he had directed, and he said, 'Yes, that was all right.'" Here certainly nothing was added to the transaction.

Both these circumstances are also fully met by the well established rule that mere words are not sufficient to constitute a delivery and acceptance which will take a verbal contract of sale out of the Statute of Frauds. *Shindler* v. *Houston*, *ubi supra*.

The next item of evidence in support of the plaintiff's contention is the conversation on August 1, 1882, at Long Beach, between the defendant and the plaintiff, in which the defendant, introducing Meyer to the plaintiff, said: "This is Doctor Lincoln, from whom I have the Bothwell securities." This declaration of the defendant is treated in the argument as an admission by him distinctly of the fact that he had at that time possession of the securities in question, which he could only have by a delivery from Van Rensselaer, either actual or constructive. This construction of the statement, however, in our opinion, is entirely inadmissible. The context plainly shows such not to have been its meaning, for, as appears by the testimony of the plaintiff relating it, the conversation immediately turned to the controversy between the parties as to whether the defendant had been negotiating for the securities in his individual capacity or as trustee for the Stormont Silver Mining Company. The expression testified to cannot fairly be extended beyond a casual reference to the transaction as it had taken place, and as it then stood upon the terms of the Van Rensselaer receipt. There is nothing whatever in the conversation to justify the inference that there had been a subsequent delivery by Van Rensselaer to the defendant, whereby the possession of the securities had been changed, or whereby the control and dominion over them had been given to the defendant by Van Rensselaer, contrary to the terms of his agreement with the plaintiff as contained in the receipt.

And such was and must have been the understanding of the plaintiff himself, for subsequently, on the 16th of November, he made the written demand upon Van Rensselaer for the immediate return of the securities to him on the ground that up to that time the defendant had refused to fulfill his contract for their purchase. This is certainly an unequivocal act on the part of the plaintiff, entirely inconsistent with the assertion that there had been, prior to that time, any delivery by him or by his authority, to the defendant, of the subject of the alleged sale. Its legal effect goes beyond that; it was a distinct rescission of the contract of sale; it was a notice to Van Rensselaer not to deliver to the defendant thereafter, even if he should offer to complete the contract by payment of the consideration; it put an end, by its own terms, to the relation between the parties of vendor and vendee; it made it unlawful in Van Rensselaer thereafter to deal with the securities, except by a return of them to the plaintiff as their owner. The refusal of Van Rensselaer to comply with the terms of the demand subjected him to an immediate action by the plaintiff for the recovery specifically if he could reach them by process, or otherwise, for damages for their conversion. This certainly is conclusive of the question of a prior delivery to the defendant, and a receipt and acceptance by him. *Taylor* v. *Wakefield*, 6 El. & Bl. 765; Benjamin on Sales, par. 171.

To meet this view, however, the letter of the defendant to Van Rensselaer on August 24 is relied on as evidence of a receipt and acceptance by the defendant at that time, being, as it is argued, the exercise of control and dominion over the securities by the defendant as owner. That letter, it will be observed, is addressed to Van Rensselaer as secretary and treasurer of the Stormont Silver Mining Company by the defendant, signing himself president and trustee of the same. It declares that the plaintiff had seen fit to disavow the understanding and agreement by which, as claimed by the defendant, he had obtained control of the securities in question which had been left in Van Rensselaer's hands; that after conference with a majority of the trustees of the company he had been instructed to notify Van Rensselaer to retain possession of them until a court of competent jurisdiction should direct him what to do with them, adding, "I claiming as a trustee, for the benefit of Stormont treasury, an equitable and *bona fide* interest therein." Clearly there is nothing in the sending of this document or in its contents which can have the effect contended for, whether considered alone or in connection with the subsequent refusal of Van Rensselaer to return the securities to the plaintiff in pursuance of his demand. Taken together, they do not constitute either the assertion or exercise of any right in respect to the securities under any contract of sale between the plaintiff and the defendant as individuals.

It is quite true, and the authorities so declare, that the receipt and acceptance by the vendee under a verbal agreement, otherwise void by the Statute of Frauds, may be complete, although the terms of the contract are in dispute. Receipt and acceptance by some unequivocal act, sufficiently proven to have taken place under some contract of sale, is sufficient to take the case out of the prohibition of the statute, leaving the jury to ascertain and find from the testimony what terms of sale were actually agreed on. *Marsh* v. *Hyde*, 3 Gray, 331; *Townsend* v. *Hargraves*, 118 Mass. 325; Benjamin, Sales, par. 170. But, as was said by Williams, *J.*, in *Tomkinson* v. *Staight*, 17 C. B. 697, the acceptance by the defendant must be in the quality of vendee. "The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee." The act or acts relied on as constituting a receipt and acceptance, to satisfy the statute, must be such as definitely establish that the relation of vendor and vendee exists. *Remick* v. *Sandford*, 120 Mass. 309.

In the present case the notice of the defendant, as president and trustee of the Stormont Company, to Van Rensselaer to retain possession of the securities, and Van Rensselaer's refusal to return the securities to the plaintiff on his demand in consequence thereof, certainly are not facts which tend to establish the existing relation of vendor and vendee between the plaintiff and the defendant. The defendant in his notice makes no claim as such, and certain-

ly no assent on the part of the plaintiff to his exercise of any such dominion is shown. It is clear beyond all controversy, so far as this record shows, that the plaintiff had never consented that Van Rensselaer should deliver the securities to the defendant except upon payment of the price; nor is there a particle of proof that Van Rensselaer has ever done so.

It is further and finally urged, however, by his counsel, that it was competent for the plaintiff to waive the condition of a previous payment of the consideration, and to authorize Van Rensselaer to deliver the securities to the defendant without performance of the contract on the part of the latter, and that the bringing of the present action was such a waiver. If, in point of fact, Van Rensselaer had transferred the manual possession of the securities to the defendant, or if, contrary to the terms of his original receipt, he had agreed with the defendant to hold the securities subject to his order as his agent, free from the conditions of the purchase, and as his absolute property, the plaintiff's assent to this new arrangement might be well implied from his bringing an action against the defendant to recover the consideration. But the premises on which this conclusion rests are not to be found in the present case. There was no transfer of possession from Van Rensselaer to the defendant, nor has there been any change in the relation of Van Rensselaer to his possession of the securities, whereby he has agreed, with the consent of the defendant, to hold them as agent for the latter as vendee under any contract of sale with the plaintiff.

On the whole, we are well satisfied that there was no evidence of a receipt and acceptance of the securities in question by the defendant to authorize a recovery against him upon the alleged contract of sale. It was error in the circuit court to refuse to charge the jury to that effect, as requested by the counsel for the defendant.

For that error the judgment is reversed and the cause remanded, with directions to grant a new trial.

ANTHONY J. LANGDON ET AL., *Plffs. in Err.*,
v.
WILLIS M. SHERWOOD.

(See S. C. Reporter's ed. 74–85.)

Mode of transferring real estate—Nebraska law—certificate of register or receiver—effect of—evidences of title.

1. The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the State in which the land lies, in cases where the title has passed from the Government of the United States, and is in controversy between private citizens.

2. Under section 429 of the Code of Nebraska, when a judgment or decree is rendered for a conveyance, release or acquittance, in any court of the State, and the parties against whom the judgment or decree is rendered do not comply therewith, within the time therein mentioned, such judgment or decree has the same operation and effect as if the conveyance, release or acquittance has been executed pursuant thereto.

3. A certificate of the register of the land office at Omaha of the location of a military land warrant, or a certificate of the receiver at the same place, acknowledging payment for the purchase of a lot of land, cannot be received in the Circuit Court of the United States as establishing the legal title in the holder of such certificate, notwithstanding section 411 of the Code of Civil Procedure of Nebraska.

4. The certificate only gives the holder of it an equitable right to demand a patent of the government; and until such patent is issued, the legal title remains in the United States.

5. It is for the United States to fix the dignity and character, in its own courts, of the evidences of title which issue from the government; and in such courts a recovery in ejectment can only be had upon the strict legal title; the courts of law do not enforce, in that manner, the equitable title, evidenced by such certificates.

[No. 1301.]

Submitted Dec. 12, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the District of Nebraska. *Reversed in part and remanded,* with instructions to render judgment against the plaintiff for part, and in his favor for the remainder, of the land.

Sherwood, plaintiff in the court below, recovered a judgment in an action of ejectment for several tracts of land; from which judgment the defendants below brought a writ of error to this court.

The facts of the case are stated in the opinion.

Mr. **J. M. Woolworth,** for plaintiffs in error:

The certificates of the register and receiver of the local land office were incompetent to show title in the plaintiff below.

Bagnell v. *Broderick,* 38 U. S. 13 Pet. 436 (10: 235); *Penn* v. *Holme,* 62 U. S. 21 How. 481 (16: 198); *Bennett* v. *Butterworth,* 52 U. S. 11 How. 669 (13: 859); *Hooper* v. *Scheimer,* 64 U. S. 23 How. 235 (16: 452); *Clagett* v. *Kilbourne,* 66 U. S. 1 Black, 346 (17: 213). See also *Foster* v. *Mora,* 98 U. S. 425 (25: 191), and *Simmons* v. *Ogle,* 105 U. S. 271 (26: 1087).

The decree of the Circuit Court for Nebraska was also incompetent for the same purpose.

Hickey v. *Stewart,* 44 U. S. 3 How. 750 (11: 814).

Mr. **John M. Thurston,** for defendant in error:

The decree perfected the legal title in Willis M. Sherwood.

Hickey v. *Stewart,* 44 U. S. 3 How. 750 (11: 814).

The record of a judgment constitutes a perfect link in a chain of title, and can be introduced in an action of law to prove title.

Freeman, Judgments, 2d ed. §§ 416, 420; *Fowler* v. *Savage,* 3 Conn. 90.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Nebraska.

The defendant in error brought in that court a suit in the nature of an action of ejectment to recover several tracts or parcels of land then in the possession of the plaintiffs in error. The case was first tried before a jury, and the verdict afterwards set aside. By a written agreement of the parties, it was then submitted to the court without a jury. That court made a general finding in favor of the plaintiff, Sherwood, and certain special findings, and upon both of these rendered a judgment for him, for all the land claimed in his petition. A bill of exceptions was taken, which related to the introduction of evidence and the findings of the court. On

this bill of exceptions and the special findings of fact the plaintiffs here assign two principal errors.

The first one of these, which affects all the land embraced in the suit, has reference to the introduction and effect of a decree in chancery, rendered in the Circuit Court of the United States for the District of Nebraska, April 9, 1883, in which Sherwood was complainant and the Sauntee Land and Ferry Company was defendant. The plaintiff in the action of ejectment, having given evidence which he asserted showed title to all the land in controversy in the Sauntee Land and Ferry Company, introduced the record of this suit in chancery to establish a transfer of the title by means of the proceedings in that suit from that company to himself. The bill of complaint set out that this company, while owner of the land, had made a verbal agreement with William A. Gwyer that the latter should take, have, and hold the real estate mentioned, as his own property, and as consideration for the same should pay off, settle, and discharge the indebtedness of the company.

The decree of the court established the fact that Sherwood had acquired the interest of Gwyer in the property, whereby he became the equitable owner of it all, and that he was entitled to have a conveyance of the legal title from the Sauntee Land and Ferry Company. The decree then proceeded in the following language:

"It is further ordered and decreed that the respondent, the Sauntee Land and Ferry Company, shall, within twenty days after the entry of this decree, execute, acknowledge, prove and record, in the manner provided by law, a good and sufficient deed of conveyance to the complainant of all said real estate, to vest the entire legal title thereof in the respondent, and to deliver said deed of conveyance, so executed, acknowledged, proved and recorded, to the complainant.

"It is further ordered and decreed that in case said respondent shall fail, neglect, or refuse to make, execute, acknowledge, prove, record and deliver to the complainant such deed of conveyance within the time hereinbefore fixed, then and in that case this decree shall stand and be a good, sufficient and complete conveyance from the respondent, the Sauntee Land and Ferry Company, to the complainant, Willis M. Sherwood, of all the right, title, and estate of said respondent in and to said real estate, and shall be taken and held as good, complete, and perfect a deed of conveyance as would be the deed of conveyance hereinbefore specified; and that the respondent, and all persons claiming through, from, or under it, be, and they are hereby, perpetually barred, restrained, and enjoined from asserting any right, title, ownership, or interest in or to said real estate adversely to the complainant, and from in any manner interfering with the peaceable and quiet possession of complainant in and of the same."

No conveyance was ever made under this decree by that company, and it is objected that for this reason Sherwood did not acquire by that proceeding the strict legal title, but only obtained an equitable one, and the quieting of that title as against the Sauntee Land and Ferry Company. Section 429 of the Code of Nebraska is, however, relied upon by Sherwood's counsel as giving to the decree in his favor in the chancery suit the effect of an actual conveyance of the title. That section is as follows:

"When any judgment or decree shall be rendered for a conveyance, release, or acquittance in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree."

We are of opinion that if this section of the Code be valid, it was the intention of the makers of it that a judgment and decree, such as the one before us, should have the same effect, where the parties directed to make the conveyance fail to comply with the order, as it would have had if they had complied, in regard to the transfer of title from them to the party to whom they were bound to convey by the decree. The language of this section of the Code hardly admits of any other construction. When the party decreed to make the conveyance does not comply therewith within the time mentioned in the judgment or decree, such judgment or decree shall have the same effect and operation and be as available as if the conveyance had been executed. The operation or effect here meant was the transfer of title, and it could not have been made any clearer if it had said that it should have the effect of transferring the title from the party who fails to convey to the one to whom it ought to be conveyed. This must have been the meaning in the minds of the legislators.

It was undoubtedly the ancient and usual course in such a proceeding to compel the party who should convey to perform the decree of the court by fine and imprisonment for refusing to do so. But inasmuch as this was a troublesome and expensive mode of compelling the transfer, and the party might not be within reach of the process of the court so that he could be attached, it has long been the practice of many of the States, under statutes enacted for that purpose, to attain this object, either by the appointment of a special commissioner who should convey in the name of the party ordered to convey, or by statutes similar to the one under consideration, by which the judgment or decree of the court was made to stand as such conveyance on the failure of the party ordered to convey.

The validity of these statutes has never been questioned, so far as we know, though long in existence in nearly all the States of the Union. There can be no doubt of their efficacy in transferring the title, in the courts of the States which have enacted them; nor do we see any reason why the courts of the United States may not use this mode of effecting that which is clearly within their power.

The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the State in which the land lies. As this court has repeatedly said, the mode of conveyance is subject to the

control of the legislature of the State; and as the case in hand goes upon the proposition that the title had passed from the Government of the United States and was in controversy between private citizens, there can be no valid objection to this mode of enforcing the contract for conveyance between them according to the law of Nebraska. *U. S.* v. *Crosby*, 11 U. S. 7 Cranch, 115; [3: 287]; *Clark* v. *Graham*, 19 U. S. 6 Wheat. 577 [5: 334]; *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 192 [6: 300]; *U. S.* v. *Fox*, 94 U. S. 315 [24: 192]; *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 [24: 858]; *Connecticut Mut. L. Ins. Co.* v. *Cushman*, 108 U. S. 51 [27: 648]. We cannot see, therefore, any error in the circuit court in permitting the proceedings in the chancery suit to be given in evidence, nor in giving to them the effect of transferring from the Sauntee Land and Ferry Company such legal title as it had to any of the property in controversy.

The plaintiff, in order to sustain his right of action in this suit, offered in evidence, first, a certificate of the register of the land office at Omaha, Nebraska, of the date of August 14, 1857, of the location by John Joseph Wright of a military land warrant upon the southwest quarter of the southwest quarter of section 28, and the west one half of the northwest quarter of section 33, in Township 13 North of Range ten East, containing 120 acres. He also offered the assignment of this land and the certificate to the Sauntee Land and Ferry Company. Another certificate of the receiver at Omaha, of the same date, was also offered, acknowledging the payment of $45.50 for the purchase of lot number 1 of quarter section number 33, in Township number 13, North of Range ten East, containing $86\frac{40}{100}$ acres, and an assignment thereof to the same company.

To both of these certificates and assignments the defendants objected, on the ground that they were immaterial and did not purport to be a conveyance of said lands, and that title could not be shown in this action of ejectment by a certificate of a register or receiver. In its findings, the court upon this subject finds specially that by virtue of these certificates "The said Wright became seised in fee of the said lands, and that by his deed of conveyance thereof the same passed to the Sauntee Land and Ferry Company."

It has been repeatedly decided by this court that such certificates of the officers of the land department do not convey the legal title of the land to the holder of the certificate, but that they only evidence an equitable title, which may afterwards be perfected by the issue of a patent, and that in the courts of the United States such certificates are not sufficient to authorize a recovery in an action of ejectment. The ground of these decisions is that in these courts, a recovery in ejectment can only be had upon the strict legal title; that this class of certificates presupposes the existence of the title in the United States at the time they were given; and that something more is necessary to show that this legal title was ever devested from the United States by a patent or otherwise. The decisions on this subject are quite numerous, and the principle on which they rest has been frequently asserted and maintained with uniformity.

In the case of *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 436 [10: 235], this question was very fully considered, and the language of the court, expressive of the result arrived at, is that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance the fee is in the government, which, by the patent, passes to the grantee; and he is entitled to recover the possession in ejectment."

Fenn v. *Holme*, 62 U. S. 21 How. 481 [16: 198], was also a case of this character, and in that the court said: "This is an attempt to assert at law, and by a legal remedy, a right to real property—an action of ejectment to establish the right of possession in land. That the plaintiff in ejectment must in all cases prove a *legal* title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an *equitable* estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them."

The case of *Hooper* v. *Scheimer*, 64 U. S. 23 How. 235 [16: 452], was an action of ejectment in the Circuit Court of the United States for the Eastern District of Arkansas. The plaintiff endeavored to maintain his right to recover possession by the production of an entry made in the United States Land Office. A statute of Arkansas enacted that an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register or receiver of the proper Land Office. This court, however, after referring to the case of *Bagnell* v. *Broderick*, and declaring that its principles are the settled doctrine of the court, adds: "But there is another question standing in advance of the foregoing, to wit: Can an action of ejectment be maintained in the federal courts against a defendant in possession, on an entry made with the register and receiver?" To which question it responds by saying: "It is also the settled doctrine of this court that no action of ejectment will lie on such an equitable title, notwithstanding a State Legislature may have provided otherwise by statute. The law is only binding on the state courts, and has no force in the Circuit Courts of the Union." See also *Foster* v. *Mora*, 98 U. S. 425 [25: 191], for an assertion of the same principle.

The defendants in error rely upon section 411 of the Nebraska Code of Civil Procedure, which is analogous in its provisions to the Statute of Arkansas referred to in the case of *Hooper* v. *Scheimer*. That section is as follows: "The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent, against all but the holder of an actual patent." But, whatever effect may be given to this statute in the Courts of the State of Nebraska, it is obvious that, in the Circuit Court

of the United States, it cannot be received as establishing the legal title in the holder of such certificate. Where the question is one of a derivation of title from the United States, it is plain that this class of evidence implies that the title remains in the United States. The certificate is given for the purpose of vesting in the receiver of it an equitable right to demand the patent of the government after such further proceedings as the laws of the United States, and the course of business in the departments may require.

The circuit court cannot presume that a patent has been issued to the party to whom such certificate was issued, or to anyone to whom he may have transferred it. The fact of the issue of a patent is a matter of record in the Land Department of the United States, and a copy of that record may be so easily obtained by application at the proper office that no necessity exists for the acceptance in an action of law of the receipt of a register or receiver as a substitute for the patent. If it never issued, it is obvious that the legal title remains in the United States, and according to the well settled principles of the action of the ejectment the plaintiff cannot be entitled to recover in the action at law.

To receive this evidence, and to give to it the effect of proving a legal title in the holder of such a receipt, because the statute of the State proposes to give to it such an effect, is to violate the principle asserted in *Bagnell* v. *Broderick*, that it is for the United States to fix the dignity and character of the evidence of title which issue from the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates.

There was error, therefore, in the decision of the court admitting these certificates from the land office as evidence of title, and in the finding that there was such evidence of title in the plaintiff as justified the recovery. The judgment of the court on the facts found in regard to the remainder of the land is correct. *It must, however, be reversed* for the error in regard to the $156\frac{40}{100}$ acres included in the two certificates of the land office. *It is, therefore, remanded* with instructions to render judgment against the plaintiff for the $156\frac{40}{100}$ acres, and in his favor for the remainder of the land.

ROBERT M. LAWSON, Exr. of ANTHONY LAWSON, Deceased, *Appt.*,

v.

GEORGE R. C. FLOYD.

(See S. C. Reporter's ed. 108-121.)

False representations of quantity of land—interpretation of contract—acts of the parties.

1. In an action to make defendant responsible for a deficiency in a quantity of land sold by him to plaintiff, where the question was whether defendant made representations in regard to the number of acres of the land which were intentionally false and made to deceive the plaintiff, *held*, upon the evidence, that defendant did not make any positive representations as to the quantity of the land nor any statements which he knew to be false or which were intended to deceive.

2. *Held, also*, that in the contract for the sale of the land the words "about 1000 acres of land" and the words "estimated to contain 1000 acres" in a subsequent contract of compromise, are to be construed with reference to the circumstances surrounding the parties which would probably influence them in making the contract at the time when it was entered into; and the contract being one for exchange of several tracts of land, some of which were incumbered by liens of judgments and decrees, without an agreed price per acre, that the contract is not to be construed by that strict rule in regard to quantity that might govern its interpretation if it were an independent purchase to be paid for in money.

3. *Held further*, that continued payments upon the land after the purchaser had ample opportunity to discover the deficiency in quantity, afford a presumption that the seller did not intend, by the language used, to warrant the quantity and that the purchaser did not understand him to do so, and that similar words used in the second contract showed that the estimate of quantity was simply conjectural, and that the seller was not under obligation to make good the difference between the amount of 1000 acres and the quantity found within the boundaries by actual survey.

[No. 122.]

Argued Dec. 22, 1887. Decided Jan. 9, 1888.

APPEAL by defendant from a decree of the District Court of the United States for the District of West Virginia for damages for a deficiency in land sold by defendant to plaintiff. *Reversed* and *remanded, with directions.*

The facts and case are fully stated in the opinion.

Mr. **James H. Ferguson,** for appellant:

The contract of December 2, 1857, between Floyd and Lawson, was neither in law nor in fact a sale of the lands, by the one to the other, by the acre, but was a sale in gross; and it does not and cannot amount to a warranty of quantity.

Crislip v. *Cain*, 19 W. Va. 438; *Ketchum* v. *Stout*, 20 Ohio, 453.

Mr. **Cornelius C. Watts,** for appellee:

The contract specifying the quantity of the Logan land, with almost exact certainty, using the word *about* to show that it might be a little less or a little more, in the sense of "more or less," constituted a material element in the determination of the price.

Western Mining & Mfg. Co. v. *Peytona Canal Coal Co.* 8 W. Va. 437; *Blessing* v. *Beatty*, 1 Rob. (Va.) 302.

Mr. Justice **Miller** delivered the opinion of the court:

On the second day of December, 1857, George R. C. Floyd, the appellee in this case, and Anthony Lawson, the appellant, entered into a written agreement for the exchange of several tracts of land which were owned by Floyd for another tract of land owned by Lawson. These tracts were in different parts of the country, and those held by Floyd were incumbered by an indebtedness amounting to over $18,000, which Lawson assumed to pay. In adjusting the exchange of these tracts, those which were to be conveyed by Floyd to Lawson were estimated at $26,000, and the property which Lawson agreed to convey to Floyd at $10,000. The balance which by these estimates would be due from Floyd to Lawson, after Lawson had paid the incumbrances on the Floyd property, some two or three thousand

dollars, was left a little uncertain by reason of the necessity of ascertaining the amounts due on some of the liens, and was to be paid by Floyd in cash.

The contract for this exchange, which is appended to the bill in this suit as Exhibit A, is as follows:

"*Memorandum of an agreement*, made this second day of December, 1857, between George R. C. Floyd, of the one part, and Anthony Lawson, of the other part, *witnesseth:* That the said Floyd has sold to the said Lawson, for twenty-six thousand dollars, two several tracts of land lying in the west end of Burke's Garden, in the County of Tazewell, one known as the Waterford Place, and supposed to contain eight hundred and two acres, and the other known as the Smith Place, adjoining the other, and supposed to contain four hundred and sixty-seven acres; the title to the Waterford Place is in John B. Floyd; and the said George R. C. Floyd binds himself to procure a deed therefor to the said Lawson, with general warranty and relinquishment of dower; and the title to the Smith Place is in one Ballard P. Smith, who will make a deed therefor, with general warranty and relinquishment of dower, upon the payment of the purchase money hereinafter named; and the said Floyd is to deliver possession of said tracts of land at once; and the said Lawson for the said tracts of land binds himself to pay as follows, viz.: to Ballard P. Smith the amount for which said Smith Place sold for under a decree of the Circuit Court of Washington County, which is supposed to be $8,410, but if that is not the correct sum, it is to be ascertained, and to pay to A. S. Gray the sum of $9,850, which may be paid in three installments of $3,283.33 each — one due January 1, 1859, one due January 1, 1860, and the other due January 1, 1861, each bearing interest from January 1, 1858—and also to convey to the said Floyd the property of said Lawson at Logan Court House, consisting of five half acre lots, viz.: Nos. 8, 9, 10, 11, and 12 in the original plan of the Town of Lawnsville, now Aracoma, and about 1,000 acres of land lying on the east side of Guyandotte and north of Aracoma, being all the lands owned by said Lawson below or north of Kezer's Branch, lying back of lots Nos. 6 and 7, and below the public square, and down as far as McDonald's land; and the said Lawson puts the property at ten thousand dollars, and the said Lawson is to make the said Floyd a deed, with general warranty and relinquishment of dower, to the above described property, except one recent grant and part of another tract lying back from the river, which he is only to convey specially; and the said Lawson is to deliver possession of the lands and lots by first March next, except the storehouse and dwelling-house, and of them by the first of May next; and whereas, the above payment to Gray and Smith, and the above property at $10,000, makes more than the sum of $26,000, which the two tracts of land in the garden are rated at, it is agreed that the difference, whatever it may be, between six thousand dollars and the sum necessary to be paid to Smith, shall be due from said Floyd to said Lawson, to be paid when said Lawson delivers possession of the lands, lots, etc., at Aracoma; and the said Lawson has the privilege of retaining the title to the land to be conveyed by him till the said balance is paid.

Witness the following signatures and seals.

Geo. R. C. Floyd. [Seal.]
A. Lawson. [Seal.]"

Each party took possession of the property which he acquired under this exchange, and Lawson paid the liens on the property which he received from Floyd and had the title conveyed to himself. The balance which was due from Floyd to Lawson remained unpaid for fourteen years, when Lawson brought suit in the Circuit Court of Logan County, West Virginia, to collect the debt by the enforcement of the lien which he held on the land—the title remaining in him up to this time.

It seems that Floyd had sold the whole or a large part of the property he received from Lawson to one Johnston, who was made a defendant to that suit. This action was compromised on the third day of August, 1871, by a written agreement of that date, signed by Lawson, Floyd and Johnston. This compromise recognized that there was due to Lawson from Floyd the sum of $5,051.30, which was a lien on the real estate described in the contract, and Johnston assumed and bound himself to pay to Lawson that sum in three installments, with 6 per cent interest; and it was agreed that the property and control of the land should be in Johnston as an indemnity to him for the payment of this purchase money. This agreement is marked Exhibit B in the bill, and is as follows:

"*This contract*, Made this third day of August, 1871, between Anthony Lawson, Geo. R. C. Floyd, and John W. Johnston, *witnesseth:* That whereas, a certain suit is pending in the Circuit Court of Logan County, West Virginia, in which Anthony Lawson is plaintiff, and said Floyd and Johnston and others defendants, touching a balance of purchase money claimed by said Lawson for a tract of land near Logan Court House: *Now, therefore*, The said suit is to be dismissed at the next term of the court, each party paying his own costs, and all matters in said suit are settled on the following terms, viz.: a note executed by A. Lawson to Geo. R. C. Floyd, which was filed by said Floyd as an offset against said Lawson in the said suit, is to be credited with the sum of two thousand seven hundred and sixty dollars, as of the date of June 30, 1858, being the amount, principal and interest, at that date, of the legacies given by the will of Mrs. Letitia Floyd to Letty P. Lewis and Mikattie P. Johnston, which legacies were paid by said Lawson, the said payments so made being hereby ratified by said Floyd; and it is further agreed that said Johnston shall assume, and he does hereby assume and bind himself, to pay to Anthony Lawson the balance of said purchase money, amounting, principal and interest, at this date, to $4,851.30, and the costs of said suit, estimated to be $200, making in all five thousand and fifty-one dollars and thirty cents, as follows, viz.: one third on or before the first day of January, 1873; one third on or before the first day of January, 1874, and one third on or before the first day of January, 1875, all bearing interest at 6 per cent per annum from this date; and it is further agreed that said Lawson and said Floyd shall

each, and they do hereby, bind themselves that the property and the control of the tract of land herein mentioned, sold by the said Lawson to said Floyd, estimated to contain 1,000 acres, shall be in said Johnston as an indemnity to him, which is described as follows, viz.: all the land owned by said Lawson, lying below Kezer's Branch above Aracoma, lying back of the lots Nos. 5, 6 and 7, in the original plan of the Town of Lawnsville (now Aracoma), including the following town lots, as laid down in said plan of the Town of Lawnsville, viz.: Nos. 8, 9, 10, 11 and 12; thence down the river to box elders, at the lower end of said Lawson's land; thence with the division line between said Lawson's land and McDonald's land; thence up the point of the ridge below the sugar camp hollow to the back line of said Lawson's land; thence with the back line to said Kezer's Branch, and thence down the same to the beginning; but the said Lawson is to retain the legal title to said lands and lots as a security for the payment of the said purchase money, except the land and lots sold to Isaac Morgan and John and Urias Buskirk; and it is further agreed that said portions of said land as may be sold by said Johnston or his agent shall be conveyed by the said Lawson to the purchaser, upon the payment to him of the purchase money of the said portion; and the balance of the land, if any, not sold by the said Johnston or his agent to third parties, is to be conveyed by the said Lawson to the said Floyd when the said sum of $5,051.80 is paid, with its interest; and it is further agreed that the portions of land sold by Geo. R. C. Floyd to Isaac Morgan, being about fifty acres, at the lower end of the tract, and lots Nos. 11 and 12 in the original plan of the Town of Lawnsville, now Aracoma, lying between the river and the present street, and extending down to the lower corner of the stable, and thence to the river, sold to Urias Buskirk, shall be ratified, and the legal title shall be conveyed by said Lawson to the said Morgan and to the said Buskirk, respectively, or to such persons as they shall in writing direct, whenever requested to do so by said Floyd. And the said Lawson shall convey all the old patent lands with general warranty and the back lands with special warranty.

Witness the following signatures and seals.

A. Lawson. [Seal.]
Geo. R. C. Floyd. [Seal.]
John W. Johnston. [Seal.]"

In October, 1877, the present bill in chancery was brought by Floyd, against Lawson and Johnston and divers persons who had purchased from Johnston parts of the land. The case being removed into the District Court of the United States for the District of West Virginia, various proceedings were had, all the parties answered, and the record presents considerable complexity and irregularity.

The purpose of Floyd's bill was to enjoin Johnston from making any further sales of the land, and to enjoin Lawson from any further enforcement of his claim for the sum recognized to be due by the agreement of 1871. He based the relief thus sought on the ground that the sale to him of the Lawson property was by a contract for a thousand acres of land, and that in the compromise agreement of 1871 this provision was repeated.

His contention is that by the language of the contract Lawson sold him 1,000 acres of land, which he is bound to make good; also, that in the conversations preliminary to the execution of that contract, Lawson represented to him that there was 1,000 acres in the tract which he was selling to him, and that he, Lawson, knew very well about how much land there was, while Floyd himself was utterly ignorant of the extent of the tract, and relied upon Lawson's statements upon that subject. He also alleges that these statements of Lawson were false and fraudulent, and intended to deceive him; that before bringing this suit he, the plaintiff, had an accurate survey made of the land according to the boundaries mentioned in the contract, and that, instead of there being 1,000 acres, as represented by Lawson, there were only 592 acres, leaving a deficiency of 408 acres. He claims that Lawson should be held to account for this deficiency, at the average value of $10,000 for the thousand, and that Lawson and Johnston had been selling off parts of the land, the purchase money on which went to Lawson to pay the amount supposed to be due to him. If deduction is made for the deficiency in quantity, he prays that Johnston and Lawson be held to account, and for such relief as may be just and right.

Lawson answers this bill by denying emphatically that the land was a sale by the acre, or that it was ever considered to be such; denies that the contract on its face is susceptible of any construction which binds him for the quantity of 1,000 acres, that he ever made any representations with regard to the quantity that was in the tracts which he sold, or that he knew anything more about the quantity within the boundaries mentioned in the contract than Floyd did, and denies any fraudulent purpose or intent. He says that the sale was an exchange of lands in the lump, and the phrase "about 1,000 acres of land lying on the east side of Guyandotte and north of Aracoma," and particularly described by its boundaries, was understood by both parties to be a conjectural estimate of the quantity contained therein, and neither a warranty nor a representation that there was that much land there. He also avers that the repetition of the description in the compromise agreement fourteen years afterwards, where it is said that the land "sold by said Lawson to said Floyd," the boundaries of which are given with more precision, is "estimated to contain 1,000 acres," cannot fairly be construed to be a warranty of sale of that many acres of land.

Testimony was taken on this subject, mainly consisting of that of Floyd and Lawson; and the court, after deciding that Lawson was bound to make good the quantity of 1,000 acres of land or account for the deficiency, had a resurvey made, in which it was ascertained that the amount of the deficit was 368 instead of 408 acres, for which the court decided Lawson to be responsible. The case was then referred to a master, who made two or three reports, which were excepted to, and then to another master to state the accounts between the parties, on the basis of the court's decision that Lawson should account for the quantity which was lacking. Further reports were made and exceptions taken, and reports filed after the decrees, in a

very irregular manner. A final decree was rendered by the court in favor of Floyd and against Lawson for the sum of $5,046.40, with interest thereon from the first day of November, 1883, from which decree Lawson takes the present appeal.

It is proper to state that a cross bill was filed by Lawson, insisting upon his right to recover the sum found to be due in the compromise of 1871, and that it be held to be a lien on the property and enforced against it by decree of the court.

The principal contest, and indeed the only one, necessary to be decided in this court is whether Lawson should be held responsible for the 868 acres which the land he put into the exchange with Floyd fell short of the amount of 1,000 acres; for it does not seem to be disputed that upon an actual survey of the boundaries according to the contract there was that much less than that quantity within its area. The question of this responsibility of Lawson presents itself in two aspects:

First, whether, apart from the written contract of 1857, and at or about the time it was made, Lawson made representations in regard to the number of acres within the boundaries of the tract which he was selling, under circumstances that authorized Floyd to rely upon them as true, and that these representations were either intentionally false and made to deceive or were in fact untrue and known to Lawson to be so;

Second, whether, upon a fair construction of the contract, it is an agreement to sell and convey 1,000 acres of land for the sum of $10,000, or whether it is a contract to convey the tract of land described in the agreement, which was supposed by the parties to contain about 1,000 acres, without any obligation on the part of Lawson that there should be that much.

It would serve no profitable purpose to go over the testimony concerning representations or statements made by Lawson at the time of the making of the original contract, or at the time the compromise of 1871 was entered into, with regard to the quantity of land in the tract. The evidence is almost exclusively that of Floyd and Lawson, and it will be sufficient for the purposes of this decision to say that it does not leave upon us the impression that Lawson made any positive representations as to the quantity of land within the boundaries described, and especially as to the tract containing 1,000 acres, much less any statements on that subject which were intended to deceive, and which he knew to be false or untrue.

Johnston, who was a brother-in-law of Floyd, as he states, and a lawyer, and who drew the compromise agreement of 1871, was introduced as a witness in the case. He says that he does not recollect hearing Mr. Lawson make any statement or representation to Mr. Floyd at that time about the land. He then says:

"I wrote the contract, Messrs. Floyd and Lawson sitting at the table. When I came to that part of the contract where I had to describe the number of acres I asked the question, addressed to both of them, how many acres there were. Mr. Floyd said, 'A thousand.' Mr. Lawson said, 'No; I won't be bound to any particular number of acres; there are several tracts, and I dont know how they would run out.' Then I used the language contained in the contract describing the land, which seemed to be satisfactory to them both."

It is not easy to resist the conclusion that at this moment, when they were compromising a troublesome lawsuit, the fag end of the controversy about all these lands, and the writing embracing that compromise was being drawn up for both of them to sign, and when the scribe put to them both the questions as to the number of acres to be inserted in this description, their attention must have been called to that matter as one of importance, if either of them looked upon the number of acres as an essential part of the contract. And when Floyd suggested the words "a thousand," and Mr. Lawson said "No; I won't be bound to any particular number of acres; there are several tracts, and I don't know how they would run out," and Floyd made no objection to that statement, but consented to the use of the words "estimated to contain 1,000 acres," the evidence seems to us satisfactory that, at least at that time, it was not considered that Lawson was bound for the 1,000 acres, or for any particular quantity of land.

As regards the question of law arising on the construction of the words "about 1,000 acres of land" in the original contract, and especially the similar expression used in the compromise agreement; if there was nothing but the language to be looked to, it must be confessed that under the state of the authorities on that subject it would not be very easy to arrive at a conclusion entirely satisfactory. But in a case of this kind it is eminently proper to consider the circumstances surrounding the parties, and which would probably influence them in making the contract, at the time it was entered into. These, we think, throw much light on the question in this case, and leave but little doubt that it was not intended to bind Lawson to any particular number of acres in the transfer which he made to Floyd, but that the transaction was an exchange of different tracts of land between the parties to the contract, the parcels belonging to each of them being estimated in the lump or indicated by the boundaries and descriptions given in the instruments.

The case is not that of a purchase, standing alone, of a tract of land by one person from another, which is to be paid for by a particular sum of money. It is a case of an exchange of several tracts of land between the parties. This was a governing element in the transaction. The consideration received by Lawson for the land which he was to convey to Floyd was not $10,000 in money, but two distinct pieces of land described by the names of the places, to which Floyd agreed to give him a good title.

It is obvious that the parties in making this exchange also had reference to the further circumstance that Lawson would have to pay out over $18,000, to relieve the land he was to receive from Floyd from liens, a part of which were in judgments or decrees. The contract, then, is not to be construed by that strict rule in regard to the quantity of land which Lawson was to convey to Floyd that might govern its interpretation if it were an independent purchase to be paid for in money.

In the description of the land that Floyd

sold to Lawson it is described as "two several tracts of land, lying in the west end of Burke's Garden, in the County of Tazewell, one known as the Waterford Place and supposed to contain 802 acres, and the other known as the Smith Place, adjoining the other, and supposed to contain 467 acres." The value of these parcels was estimated at $26,000. There is also an uncertainty in the suggestion as to the amount of liens on these lands. It was "supposed to be $8,410" as to one tract, and $9,850 as to the other. It is in accordance with this loose and general way of describing these lands that the phrase "about 1,000 acres of land" is used in the original contract in regard to that belonging to Lawson.

After the statement of the agreement of Lawson to pay the liens on the lands conveyed to him by Floyd, the contract proceeds: "And also to convey to the said Floyd the property of said Lawson at Logan Court House, consisting of five half acre lots, viz.: Nos. 8, 9, 10, 11 and 12 in the original plan of the Town of Lawnsville, now Aracoma, and about 1,000 acres of land lying on the east side of Guyandotte and north of Aracoma; being all the lands owned by said Lawson below or north of Kezer's Branch, lying back of lots Nos. 6 and 7 and below the public square, and down as far as McDonald's land; and the said Lawson puts the property at $10,000."

It is not easy to see that, under the circumstances of this exchange of property, either party was binding himself by this loose language to a definite number of acres in the land which he was conveying to the other; and it seems probable that the sum of $26,000, said to be the value of the Floyd land, and $10,000, the value at which the tract of Lawson was put, was conventional, and adopted as a mode of adjusting the terms of the exchange, and was not intended or supposed by either party to be the actual value of the property so described.

It will be observed, also, that the description of the lands to be conveyed by Lawson is, "all the lands owned by said Lawson" in that place with a sufficient designation of the locality to enable anybody to find out where it is. It is also evident that a small part of this land was bottom land, lying on the Guyandotte River and near the town, and therefore of considerable value, while the larger part of it ran up on to the mountain ridges. In accordance with this understanding, the original contract states that "Lawson is to make the said Floyd a deed, with general warranty and relinquishment of dower, to the above described property, except one recent grant and part of another tract lying back from the river, which he is only to convey specially;" thus showing the difference in value attached to different parts of the land.

In the description found in the articles of compromise, which were made fourteen years after Floyd had obtained possession and control of the parcels allotted to him, and after legal proceedings to collect the purchase money, they seem to have made a more definite description of the land by metes and bounds and by corners and objects than was made in the original contract; and according to the statement of the conversation which took place at that time, as testified to by Johnston, it is fair to suppose that this more definite description was intended to stand as the only means of ascertaining what was sold, leaving no obligation as to the particular quantity of land that might be found within its limits.

It is also to be noted that in addition to the time which had elapsed while the property was under Floyd's control and possession, between the time of the original sale and the compromise of 1871, seven years more passed during which he was selling off portions of it to raise money to pay Lawson, and that during all this time he made no complaint of any deficiency in the quantity, nor of any other fault which he found in regard to the property received by him from Lawson. It is true that this consideration is not conclusive, as the contract still remained an executory one, the title remaining in Lawson as security for the unpaid purchase money; but it affords a strong presumption that with such a large deficit Floyd had ample opportunity to discover that there was only about two thirds of the quantity which he claimed to have purchased, and that if he had understood the contract as obliging Lawson to convey or make good to him the full amount of one thousand acres of land he would long before have ceased to pay Lawson that which he did not owe him, under the construction of the contract which he now asserts, and would not have submitted to a forced sale of the property by Johnston to raise money for that purpose.

Nor do we think it unimportant to consider that this compromise agreement of 1871, made fourteen years after Floyd was in the full possession and actual control of the land, and executed in an adjustment of the suit for the very purchase money, which Floyd now seeks to recover back, must have been made with a fair knowledge of the location, boundaries and description of the land in controversy, and that it was determined at that time to describe it with more particularity as to metes and bounds, and to reject a phrase by which Lawson might have been bound for 1,000 acres, substituting in its place an expression which left it in the form of a conjectural estimate of the quantity therein contained.

Under all these circumstances we are of opinion that Lawson is under no obligation to make good the difference between the amount of 1,000 acres and the quantity found within the boundaries by actual survey. *The decree of the court*, based upon the erroneous idea that he should be held so accountable, *must therefore be reversed.*

As this error pervades all the accounting, and all the reports of the referees to state the accounts between the parties, it is not possible for this court to make a correct accounting and state what the decree should be, taking into consideration the cross bill and the original bill. *The case is, therefore, remanded to the District Court*, with directions to take an accounting on the principles here established, and to render a decree accordingly.

CYRUS WOODMAN ET AL., *Plffs. in Err.*,
v.
MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH.

(See S. C. Reporter's ed. 161–164.)

Stipulation of discontinuance, effect of.

Where parties to a suit pending in this court have stipulated that it may be dismissed and discontinued, and before the stipulation was signed two of the plaintiffs in error sold and assigned their interests in the land, which is the subject matter of the controversy in the suit, to Albert M. Henry, and a rule has been entered in vacation on the stipulation dismissing the case, held, that, upon the petition of the assignee of such interests, the entry of dismissal be amended by adding thereto the words "without prejudice to the right of Albert M. Henry to proceed as he may be advised in the court below for the protection of his interest."

[No. 367.]

Argued Dec. 19, 1887. Decided Jan. 9, 1888.

IN ERROR to the Supreme Court of the State of Michigan. Petition by assignee of plaintiffs in error to set aside an order of discontinuance. *Order amended.*

The facts are stated in the opinion.

Mr. **De Forest Paine,** for plaintiffs in error and Samuel D. Cargill:

The plaintiffs in error having transferred all their interests in the land in controversy in this suit, the suit abates.

Wallace v. *Dunning*, Walker, Ch. 416; *Webster* v. *Hitchcock*, 11 Mich. 56; *Widner* v. *Lane*, 14 Mich. 124; *Perkins* v. *Perkins*, 16 Mich. 162; *Brewer* v. *Dodge*, 28 Mich. 359.

Mr. **George William Moore,** for petitioner.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This writ of error was docketed here October 12, 1885. On the 8th of June, 1887, the parties of record entered into the following stipulation:

"It is hereby stipulated and agreed by and between the parties to this cause, by their respective attorneys, that the writ of error and appeal herein be dismissed and the said cause discontinued without costs to either party; that each party pay his own costs in this court and in the courts below; that the bond for damages executed by plaintiffs in error and sureties be canceled and the liability of the obligors discharged.

"An order shall be entered with the clerk accordingly."

Our Rule 28, is as follows:

"Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant or appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court."

Pursuant to this rule the stipulation of the parties was presented to the clerk of this court, on the 8th of June, 1887, in vacation, and he entered the case dismissed. No mandate or other process has as yet been ordered by the court.

Albert M. Henry claims to have purchased from Charles B. Colton and Lester A. Roberts, two of the plaintiffs in error, their respective interests in the land which is the subject matter of the controversy in the suit, on the 16th of May, 1887, before the stipulation was signed. He now comes here and by petition asks "that an order be entered in this court setting aside and vacating said order of discontinuance, so that your petitioner may have said cause revived as to himself as the grantee and assignee of said complainants, Colton and Roberts," on the ground that the stipulation was signed after his purchase and without authority from him.

Upon consideration of this petition *it is ordered that the entry of dismissal made in vacation be amended* by adding thereto these words: "Without prejudice to the right of Albert M. Henry to proceed as he may be advised in the court below for the protection of his interest."

JOHN GLENN, *Trustee, Plff. in Err.*,
v.
HAMILTON G. FANT.

(See S. C. Reporter's ed. 123, 124.)

Stipulation to submit.

Where a stipulation is made to submit a cause without oral argument, without any particular time being mentioned, and no reference is made to Rule 20, a motion to require defendant in error to submit under Rule 20 will be denied, if opposed; the terms of stipulation will be fulfilled if a submission is made when the case is reached in its order.

[No. 982.]

Submitted Jan. 4, 1888. Decided Jan. 9, 1888.

IN ERROR to the Supreme Court of the District of Columbia. Motion to require defendant in error to submit the cause under Rule 20. *Denied.*

Mr. **Conway Robinson, Jr.,** in support of the motion.

Mr. **M. F. Morris,** in opposition.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. While the stipulation binds the parties to submit the cause without oral argument, there is nothing which requires this to be done at any particular time. Its terms will be fulfilled if the submission is made when the case is reached in its order. As no reference is made to Rule 20, we cannot apply that rule to the case on the suggestion of one of the parties against the protest of the other.

BENJAMIN DREYFUS ET AL., Copartners, *Appts.*,
v.
SOPHIA SEARLE, EXR., of JOHN SEARLE, Deceased.

(See S. C. Reporter's ed. 60–64.)

Patent for improving wines, void.

In a suit for the infringement of letters patent, No. 48728, granted to John Searle, July 11, 1865, for an improved process of imparting age to wines, held, that there was no novelty in the process: and

that there was no patentable invention in applying, to the heating of wine from the inside of the cask, apparatus which had been previously used to heat another liquid in the same manner, and that the suit be dismissed.

[No. 118.]

Argued Dec. 20, 21, 1887. Decided Jan. 9, 1888.

APPEAL from the Circuit Court of the United States for the District of California, from a decree of said court awarding a recovery to the plaintiff for damages and costs. *Reversed.*

The facts are stated by the court.

Mr. **J. Hubley Ashton,** for appellants:

The court below erred in sustaining the validity of the patent sued upon, and in not dismissing the bill, upon the ground that the patent was void for want of patentable novelty and invention.

Brown v. *Piper*, 91 U. S. 41 (23: 201); Knight's Mechanical Dictionary, art. *Heating Apparatus*, and 2 Ure's Dictionary of Arts, art. *Distillation*, 51; *Grier* v. *Wilt*, 120 U. S. 429 (30: 717); *Pennsylvania R. R. Co.* v. *Locomotive E. S. Truck Co.* 110 U. S. 490 (28: 222); *Blake* v. *San Francisco*, 113 U. S. 688 (28: 1072); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 76); *Miller* v. *Foree*, 116 U. S. 27 (29: 554); *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 554 (29: 960); *Gardner* v. *Herz*, 118 U. S. 180 (30: 158); *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335 (30: 406); *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 294 (30: 945).

The court below erred in adjudging that profits were made by the defendants by the use of the so called Searle process.

Carwood Patent, 94 U. S. 710 (24: 243); *Illinois Cent. R. R. Co.* v. *Turrill*, 110 U. S. 302 (28: 155); *Black* v. *Thorne*, 111 U. S. 124 (28: 373); *Locomotive S. Truck Co.* v. *Pennsylvania R. R. Co.* 2 Fed. Rep. 679; *Wetherill* v. *New Jersey Zinc Co.* 1 Bann. & Ard. 486.

The profits recoverable in equity for the infringement of a patent are those only which defendants actually realized.

Livingston v. *Woodworth*, 56 U. S. 15 How. 546 (14: 809); *Seymour* v. *McCormick*, 60 U. S. 19 How. 98 (15: 557); *New York* v. *Ransom*, 64 U. S. 23 How. 487 (16: 515).

Messrs. **A. C. Bradley** and *W. J. Newton*, for appellee:

A process is a mode of treatment of certain materials to produce a given result. If new and useful, it is just as patentable as a piece of machinery.

Cochrane v. *Deener*, 94 U. S. 788 (24: 141); *Tilghman* v. *Proctor*, 102 U. S. 722 (26: 285); *American Wood Paper Co.* v. *Fiber Disintegrating Co.* 90 U. S. 23 Wall. 566 (23: 31).

The defense that the patent is defective will not be entertained where it is not set up in the answer.

Providence Rubber Co. v. *Goodyear*, 76 U. S. 9 Wall. 788 (19: 566); *Webster Loom Co.* v. *Higgins*, 105 U. S. 587 (26: 1180).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of California, by Sophia Searle, as executrix of the last will and testament of John Searle, deceased, against Benjamin Dreyfus, Emanuel Goldstein, Jacob Frowenfeld, and John J. Weglein, copartners under the firm name of B. Dreyfus & Co. for the infringement of letters patent of the United States, No. 48728, granted to John Searle, July 11, 1865, for seventeen years from June 15, 1865, for an improved process of imparting age to wines. The bill was filed December 21, 1881.

The specification and claim of the patent are in these words:

"Be it known that I, John Searle, of the City and County of San Francisco, State of California, have invented a new and improved process for imparting 'age to wines and liquors;' and I do hereby declare that the within is a full and exact description of the same.

"The nature of my invention consists in providing a process for shortening the time that is now required for ripening wines and liquors to about one half the period, without deteriorating their flavor by the use of steam.

"Madeira, sherry, port, teneriffe, and other wines have been prepared for many years, for imparting age, through the medium of 'estufas,' or large ovens, having flues by which they are heated. These 'estufas' are filled with wines and spirits in casks or pipes, and are kept at a proper heat until the contents of the casks show the desired age through the staves. By this process the heat must necessarily be very great (say 140°), which impairs the flavor of the wine, by imparting to it the taste of the cask; and oftentimes the casks have to be taken out and recoopered before the process can be completed.

"By the use of my process the following advantages are derived:

"1. There is a great saving of time and fuel, the building and air not being heated within as by the old process.

"2. It can be effected in casks of the largest size, thereby insuring uniformity of quality in the wine.

"3. The process can be carried on in any storehouse or cellar.

"4. There is no injury to the casks, whereas, by the old system they become damaged and require constant repairs.

"5. The breakage and loss on the liquors is very much reduced, which is sometimes excessive in the 'estufas,' by the falling to pieces of the heated and dried up casks.

"6. No bad taste is imparted to the liquors during my process, which is too often the case in the 'estufas,' where the wine receives the heat through the sides of the cask.

"To enable others skilled in the art to make use of my improvement, I will proceed to describe my process and its operation. I use casks or tanks (as the case may be) for holding the wine; if casks, they may be placed on end. Through each of these casks or tanks, near the base, I pass an iron or metallic pipe (copper is preferable) of about one inch, and open at its end. These pipes connect with a main steam pipe, and can be closed and the steam shut off, should the heat become too great for the wine, by means of a stop cock attached to each of the pipes.

"The degree of heat which I use in the operation varies from 100° to 140°.

"The time required to perfect the operation of ripening wine by this process is about six

weeks; yet, of course, it will be left to the knowledge and discretion of the keeper of the cellar to determine when the ripening process is completed.

"Having thus described my invention, what I claim and desire to secure by letters patent is the introducing the heat by steam, or otherwise, to the wine itself, by means of metallic pipes or chambers passing through the casks or vessels, substantially as set forth."

The answer of the defendants denied that the invention was new or useful, and alleged that it was in public use in San Francisco for more than two years prior to the date of the application by Searle for the patent, by two persons, named Wieland and Voorman.

Issue being joined, proofs were taken on both sides, and, on the 22d of May, 1883, the circuit court entered an interlocutory decree, adjudging the patent to be valid, that the defendants had infringed upon it by treating and aging wine by the process described and claimed in it, and ordering a reference to a master to take and report an account of profits from the infringement. He reported the amount of profits to have been $3,249.60. Both parties excepted to the report, but all the exceptions were overruled, and a final decree was entered in August, 1884, awarding a recovery to the plaintiff of $3,249.60, with interest from the date of the entry of the interlocutory decree, May 22, 1883, and costs. From this decree the defendants have appealed to this court.

It is stated in the specification of the patent, that age had been imparted to wines, for many years, by placing them in casks, in estufas, or large ovens, and keeping up a proper heat therein, on the outside of the casks, until the contents of the casks showed the desired age. The application of artificial heat to impart age to wines was, therefore, old. The heat was applied to the wine from the outside. The new process claimed in the patent is to introduce the heat by causing steam, or other heating medium, to pass through metallic pipes or chambers placed on the inside of the cask, and within the body of the wine in the cask. This is called in the patent a new process; but, so far as the action or effect of heat on the wine is concerned, in respect to ripening it or imparting to it what is called "age," or any other quality imparted to it by heat, the effect or result is the same as that produced by imparting the heat to the wine from the heated air, in the old fashioned estufa or oven. It is shown by the evidence that the application of the heat to the wine from the inside of the cask has no different effect upon it from that of the heat as applied by the old process, and that no chemical or other change is produced in the wine different from that produced by the old process.

There was no novelty in the process as a patentable process. Whatever novelty there could have been must have consisted wholly in the apparatus used for introducing the heat to the inside of the body of the wine. But it appears by the evidence that the apparatus, as a means of imparting heat from it to the body of the liquid inside of which it was placed, was not new. Wieland testifies that for twenty-five years prior to November, 1882, he had, in conducting his business as a brewer in San Francisco, heated water by means of a copper coil filled with exhaust steam, placed in the water, the water being in a closed tub containing fifty or sixty barrels, the copper pipe entering the tube on the side, near the bottom, and forming a coil inside, and then passing out through the top. It also appears that a like apparatus was used in the United States, prior to the issuing of the plaintiff's patent, for the purpose of heating high wines by means of steam in a copper coil, so as to evolve the alcoholic vapors. There was no patentable invention in applying to the heating of wine or any other liquor, from the inside of the cask, the apparatus which had been previously used to heat another liquid in the same manner,

The case falls directly within the decisions of this court in *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335, 338 [30: 406, 408] and the cases there collected, and in *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286 [30: 942].

There having been, therefore, nothing new as a process in the operation or effect of the heat on the wine, and nothing patentable in the application of the old apparatus to the heating of the wine, *the decree of the Circuit Court must be reversed, and the case be remanded to the Circuit Court for the Northern District of California, with a direction to dismiss the bill.*

RANSOM F. HUMISTON, to the Use of WILLIAM P. HORTON, *Plff. in Err.*,

v.

JAMES P. WOOD ET AL., Copartners.

(See S. C. Reporter's ed. 12-20.)

When case should be submitted to jury.

In an action to recover the consideration for the sale, to defendants, of the right to make, use and vend a patented apparatus in Pennsylvania and New Jersey, *held*, that the evidence in the case was sufficient to entitle the plaintiff to have the issue submitted to the jury; and that it was error to direct a verdict for the defendants, the evidence tending to establish an agreement between plaintiff on the one part and defendants on the other, that the defendants would take the patent and pay the consideration.

[No. 83.]

Argued Nov. 29, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania. *Reversed.*

The jury, under the direction of the court, returned a verdict for defendants. This direction, being excepted to, is assigned for error; and all the evidence is brought into the record by bill of exceptions.

The facts and case are fully stated in the opinion.

Messrs. **Francis E. Brewster,** *David W. Sellers* and **F. Carroll Brewster,** for plaintiff in error:

The court below erred in instructing the jury to find a verdict for the defendants.

There was evidence for the consideration of a jury.

Eiting v. *Bank of U. S.* 24 U. S. 11 Wheat. 59 (6:419); *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30 (27:65); *Keyes* v. *Grant*, 118 U. S. 25 (30:54); *Fehl* v. *Good*, 2 Binn. 495; *McGee* v. *Northumberland Bank*, 5 Watts, 32; *Gardner* v. *Clark*,

17 Barb. 538; *Chichester* v. *Whiteleather*, 51 Ill. 259; *Kane* v. *Learned*, 117 Mass. 190; *First Nat. Bank* v. *Dana*, 79 N. Y. 108; *Conover* v. *Middletown*, 42 N. J. L. 382; *Little Rock & Ft. S. R. R. Co.* v. *Perry*, 37 Ark. 164; *Demill* v. *Moffat*, 45 Mich. 410; *Taylor* v. *McNutt*, 58 Tex. 71; *Parker* v. *Middleton*, 65 Iowa, 200; *Cunningham* v. *Cambridge Sav. Bank*, 138 Mass. 480.

Messrs. A. H. Wintersteen and **Wayne MacVeagh**, for defendants in error:

An act of one partner to bind the firm must be within the scope of the partnership business.

Lindley, Partnership, 236–239, 290–292; *Clay* v. *Carter*, 16 Weekly Notes of Cases (Pa.) 385; *Brettel* v. *Williams*, 4 Exch. 630; *Schuylkill & D. Improvement & R. R. Co.* v. *Munson*, 81 U. S. 14 Wall. 448 (20:872).

If the court can see that if a verdict for the plaintiff should be rendered, it ought to be set aside as being unwarranted by the testimony, an instruction to find for the defendants should be given in advance of the verdict.

Pleasants v. *Fant*, 89 U. S. 22 Wall. 116 (22: 780); *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29:224); *Marshall* v. *Hubbard*, 117 U. S. 415 (29:919;) *Goodlett* v. *Louisville & N. R. R. Co.* 122 U. S. 391 (30:1230).

The acts and declarations of the defendants, made before the execution of the agreement dated July 31, or of the assignment of September 30, are not evidence to show an alleged ownership in the patent, contrary to the terms of those papers.

Hunt v. *Rousmanier*, 21 U. S. 8 Wheat. 174 (5:589); *Shankland* v. *Washington*, 30 U. S. 5 Pet. 390 (8:166); *Specht* v. *Howard*, 83 U. S. 16 Wall. 564 (21:348); *Bailey* v. *Hannibal & St. J. R. R. Co.* 84 U. S. 17 Wall. 96 (21:611).

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action of assumpsit, brought by the plaintiff in error to recover the sum of $25,000 as consideration for the sale and transfer to the defendants below of the exclusive right for the States of Pennsylvania and New Jersey to make, use and vend to others Humiston's atmospheric hydrocarbon apparatus for generating light and heat, under letters patent dated June 24, 1879, No. 216853, issued to Ransom F. Humiston.

The defense relied upon was the plea of non-assumpsit. The cause was tried to a jury; and, the testimony having closed on the part of the plaintiff, the defendants offering none, the judge charged the jury to return a verdict for the defendants, which was accordingly done. This ruling, being duly excepted to, is now assigned for error, all the evidence in the cause being brought into the record by a bill of exceptions.

The principal witness on the part of the plaintiff below was Ransom F. Humiston, the patentee. He testified that, having received his patent on June 24, 1879, he was introduced to the defendants on the second of July, by their superintendent, they being manufacturers of ranges and heaters. Having tried and tested the patented apparatus at their manufactory, a negotiation was entered into for the sale of the patent. In answer to the question how he proposed to sell it, the witness stated that he had no experience, but understood that the usual way was to form a stock company, and that if he did not find a purchaser he should organize one. One of the defendants asked him if he was particular about forming a stock company, and whether he would be willing to sell it to the firm. He said he would prefer to do this, and named $20,000 as the price for Pennsylvania, $5,000 cash and $5,000 in monthly installments. After some further conversation, the defendant said that it would be easier to raise the money by forming a stock company, and went to the office of an attorney for the purpose of having the papers drawn to contain their agreement. At this time it was further agreed to include New Jersey at an additional price of $5,000 on the same terms. The interview at the attorney's office when the papers were drawn was on July 31, 1879, and they were signed on the second of August. The witness added: "The substance of what was said by defendants was that we will be the owners of the patent, but it is necessary to have certain names to an application for a charter, and we (myself, Myers and Feltwell) consented to go on application articles." The papers referred to by the witness, and put in evidence are two. The first is an agreement concluded July 31, 1879, the parties to which are Joseph Wood, James P. Wood, B. M. Feltwell, William H. Myers, and R. F. Humiston. It was thereby agreed that the parties named would "associate themselves together for the object of obtaining a charter of incorporation under the name and title of the 'American Light and Heat Company of Philadelphia, Pennsylvania,' said organization to be perfected, and to be for the manufacture and sale of Humiston's atmospheric hydrocarbon apparatus for generating light and heat, and for the manufacture and sale of fixtures for the same; also, for the preparation and sale of oil suitable for the use of the said apparatus, and for any other business or matter necessary in carrying out the purposes aforesaid." The capital stock of the company was placed at $200,000, and it was provided that each of the parties should use his best endeavors in disposing of the stock. It was also provided "That the said party of the fifth part (Humiston) shall forthwith transfer to the other parties hereto the sole right of the improvement in apparatus for burning hydrocarbons for the States of Pennsylvania and New Jersey, letters patent for said improvement No. 216853, and bearing date the 24th day of June, A. D. 1879, said transfer to cover any and all improvements hereafter to be made on said apparatus. That the said party of the fifth part shall receive from the concern or association or corporation for said patent right for said States the sum of $25,000, to be paid to him as follows, to wit: $5,000 thereof within thirty days from the date hereof; the further sum of $5,000 in sixty days from the date hereof; the further sum of $5,000 in ninety days from the date hereof; the further sum of $5,000 in one hundred and twenty days from the date hereof; and the balance of $5,000 in one hundred and fifty days from the date hereof; the said payments to be made to the said party of the fifth part, or his legal representatives."

The other paper, also dated July 31, 1879, and signed by R. F. Humiston alone, is as follows:

"*Whereas*, By a certain agreement made the 31st day of July, 1879, wherein James P. Wood, Joseph Wood, Benjamin M. Feltwell, William H. Myers and Ransom F. Humiston agreed to form a company for the manufacture and sale of Humiston's improvement in apparatus for burning hydrocarbons, and also agreed to pay the said Ransom F. Humiston for all his interest in the letters patent for said improvement for the States of Pennsylvania and New Jersey the sum of $25,000, to be raised from sales of the stock of said company, in payments of $5,000 each, the first payment to be made in thirty days after the execution of the agreement, and $5,000 every thirty days thereafter until the whole sum be paid; therefore, in consideration of said agreement, I hereby agree with the said James P. Wood, Joseph Wood, Benjamin M. Feltwell and William H. Myers that I will not hold them personally responsible for the payment of the said sum of $25,000, but will look to them only as trustees for the sale of the stock of the said company and the payment to me of such moneys as may be received for such sales until the whole is paid; and I further agree that if sufficient money be not received to pay the first installment of $5,000 when it becomes due, that I will extend the time of payment for ten, twenty or thirty days, as may be necessary."

The witness further testified that finding difficulties in the way of obtaining a charter in Pennsylvania that idea was abandoned at a meeting of the parties held on the 7th of October at the office of the defendants, when a committee was appointed to ascertain the laws of New Jersey relative to corporations in that State, to report at a subsequent meeting on November 3. At that interview, the witness testifies: "I spoke to Joseph Wood, asked him when the committee would report, and Joseph said to me, If you are perfectly satisfied we don't care about the company; we will take the ownership ourselves on the same terms (I mean as to price and payment). I cannot give the exact language; the substance was that James and Joseph Wood would take the patent on the same terms as the company had." In the mean time, as the witness further stated, the defendants received offers from various parties to buy territorial rights; amongst others, an offer, as he learned, from Joseph Wood for the county in which Newark, New Jersey, was, of $10,000, and asked the witness what he thought of it. He testifies that he replied: "I would take it, as it was twice as much as he had given for the whole stock. He said it was no one's business what they had given for it. He said Jersey City was in it. It is worth $40,000." The witness further testified that Joseph said "That parties in Pennsylvania were proposing to buy the State west of the Allegheny Mountains, and talked of $25,000 for about one third of the State. He said it was worth more. I said it was his business and not mine. I wanted my pay." He also testified that Mr. Moran had seen the apparatus at the state fair, and entered into an agreement in writing with James P. Wood in reference to the patent. This writing Moran brought to the witness, and thereupon he says: "I told Mr. Wood that Moran had brought an article to me to be signed, and I stated that I was not the owner, but that they were; and then the agreement was signed. When I told James Wood this, he said to Moran: Draw up the contract and I will look it over!" The witness further testified that the defendants issued circulars advertising the apparatus as their own, and employed him to go to Western Pennsylvania to make sales of rights under it for them. He remained in Pittsburgh for that purpose about a month, corresponding with the defendants in reference to the subject. He also went to New York, upon letters of introduction from the defendants, to see about putting in the apparatus there. The witness further testified as follows: "In March, 1880, I called on the defendants for some money and they handed me $200; I told them I needed money; I think $200 was the amount; defendants had paid me $640 on account of purchase money; the last payment in June or July, 1880, of $40. Defendants said they could not pay it then; this was in June, 1880. They gave no reason at that time. At a subsequent time, late in June, they called to see me, and said the reason they could not pay me was because there had been a great deal of competition in their business, and they had made nothing in two or three years, but that they had some contracts which were better, and if I would not press them they would pay me from time to time. I did not press the matter for the time being; that was the end at that time. I called on them for some money and they paid me this $40. I called on them again, and they said it was impossible. I told them $1,000 was wanted. They said they were getting some money from some institution, but they were disappointed. I asked them if they could let me have $500, and they said no; $200, no; $50, no; $10, and they said no; they had men to pay off and could not let me have $10, and I saw it was time to be looking after my securities. This was the last interview."

In the mean time, on the 30th of September, 1879, the witness had executed an assignment of the patent, reciting that "*Whereas*, James P. Wood, Joseph Wood, Benjamin M. Feltwell and William H. Myers, of the City of Philadelphia and State of Pennsylvania, and said Ransom F. Humiston, have associated themselves together for the purpose of forming a company to manufacture and sell said apparatus and territorial rights under said patent, and have appointed the said Joseph Wood their trustee to take the title of said patent on behalf of said association, and are desirous of acquiring an interest therein," etc., and assigning the patent accordingly for the States of Pennsylvania and New Jersey to Joseph Wood, trustee for the said association. The witness also testified to having received at various times from the defendants the sum of $616; of this $100, paid July 26, 1879, was before the execution of the contract, and for which he gave his due bill. He gave another due bill for $150, paid on the 8th of November, 1879. For the other sums no due bills were given. He testified that he understood that all the payments, except the first $100, were on account of purchase money.

The only other witness called was William H. Myers, a notary public, in whose office the agreements were drawn up, and whose name

was put in, as he says, to furnish the number to get the charter, though he had no interest in the business or in the patent. He says the charter did not go through because money had to be paid, and that at a meeting of the parties in interest at his office he and James P. Wood were appointed a committee to obtain information in regard to getting a charter in New Jersey, but nothing further was done. Later, in 1879, he says that he saw Joseph Wood, who told him it might be a good thing; the territory might be sold probably for sufficient to pay for the patent. "During the conversation we spoke of the difficulty of raising the company. Joseph said they had thought something of taking it themselves and of abandoning the company; they thought territory sufficient might be sold to pay Humiston. Defendants spoke to me of sending the plaintiff to Pittsburgh. * * * When they said they thought of abandoning the company, defendants employed me to make sale, and they said they would give me a commission—$5,000 if $25,000 were realized, or a less sum, a proportionate commission. This was about the 10th of December, 1879."

In the correspondence between the parties put in evidence there is a letter from Humiston, dated February 12, 1880, addressed to J. P. Wood & Co., in which it is stated that the writer had an interview with the superintendent of the elevated railroads in New York in regard to the use of the invention in running locomotives on the railroads. In that letter it is also stated that a party had called upon him "to know if I had yet sold the right to use my apparatus for railroad purposes in any of the States. I told him that I had sold the right for all purposes for Pennsylvania and New Jersey. He told me that I had made a great mistake, for that sale almost shut up New York City from her most important outlets. I told him that I felt confident that I could buy back the right for railroad purposes for those States at a reasonable figure. Now, I feel confident that this man means business, and he is known to be connected with a wealthy corporation; and I believe that if you will authorize me to sell just so much of the right as is applicable to railroad purposes alone for Pennsylvania and New Jersey, that I can do it within thirty days from this date, and bring you money enough to pay me off; and still you will own the right for the above named States for all purposes except for use on railroads. Now, I want you to name your lowest price for sixty days. I mean that you shall give the refusal for sixty days at the price you name, selling only the railroad right. He is to call for my answer on Saturday, P. M. at 8 o'clock. * * * Give me your minimum price, and I will get as much more as possible."

On the next day, February 13, 1880, the defendants, by a letter signed J. P. W. & Co., per Hinkle, addressed to Prof. R. F. Humiston, say: "Yours of yesterday received. We are pleased to learn of your prospective success with railroads. With reference to price for our interest in Pennsylvania and New Jersey for railroad purposes, we leave it entirely with you to make such arrangements as you may deem best for the interest of all concerned."

On the 18th of February, 1880, at New York, Humiston writes again to James P. Wood & Co. on the subject of trying the heating apparatus for running locomotives, in which he says: "Please do not forget to talk with James about the money matters. I should not trouble you now, but I need it more than ever; send what you can spare." And also: "James will remember saying to me that until sales were made that I could have such small sums as I needed for my current expenses."

This was the substance of all the testimony in the case, so far as necessary to the determination of the question involved.

We think that this evidence was sufficient to entitle the plaintiff to have the issue submitted to the jury. We assume that the original negotiations prior to July 31, 1879, were merged in the written agreements of that date, which contemplated the organization of a corporation to receive an assignment of the patent for the States of Pennsylvania and New Jersey in consideration of $25,000, to be paid by the corporation, and the contemporary agreement by which the individual corporators (including the defendants) were exonerated from any personal responsibility for the payment of the consideration, Humiston thereby agreeing that he would look to them only as trustees for the sale of the stock of the company, and the payment to him of such moneys as might be received for such sales until the whole was paid. But this project was abandoned; and the tendency of Humiston's testimony certainly was to establish an agreement, between himself on the one part and James and Joseph Wood on the other, that the defendants would take the patent on the same terms as it had been agreed that the company should; that is to say, that the defendants were to stand in the matter precisely as it had been agreed that the corporation should if it had been formed. That being so, the defendants would succeed to the obligation of the company to pay the consideration of $25,000 absolutely and unconditionally. The collateral agreement of July 31, 1879, by which the individual corporators were not to be personally responsible for the consideration, would thus be rendered nugatory; as it was only intended to have effect in the event of the organization of the corporation.

Upon this state of facts, if proven to their satisfaction, the jury would have been warranted in finding a verdict for the plaintiff. *It was error, therefore, in the Circuit Court to direct a verdict for the defendants. For this error its judgment is reversed, and the cause is remanded with directions to grant a new trial.*

DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY, Limited, *Plff. in Err.*,

v.

ELLIS G. HUGHES.

(See S. C. Reporter's ed. 157-160.)

Reference of suit—Oregon law—stipulation—rulings of trial court, when not reviewable.

1. Under a common-law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject; and if the report be set aside the

cause stands for trial, precisely the same as if it had never been referred.

2. In Oregon, under its Code of Civil Procedure, where there was no written consent to the order for a trial by referee, it would, if objection had been made, have been error in the court to proceed with a new trial after the referee's report was set aside, without a stipulation in writing waiving a jury; but where no such objection was made and the court proceeded, evidently in accordance with the understanding of the parties, to make new findings, precisely as it would if the order of reference had been actually made under the Code (upon the consent in writing) and no exception was taken to this proceeding in the trial court, *held*, that it is too late to make it here for the first time.

3. Rulings of a circuit court, upon a trial by it without a jury, when there has been no waiver of a jury as the statute requires by stipulation in writing signed by the parties or their attorneys and filed with the clerk, are not reviewable here.

[No. 94.]

Argued Dec. 2, 1887. *Decided Jan. 9, 1888.*

IN ERROR to the Circuit Court of the United States for the District of Oregon, from a judgment in favor of plaintiff, upon findings made by the court, after the findings of the referee were set aside. *Affirmed.*

The facts and case are stated in the opinion.

Messrs. **Thomas De Witt Cuyler** and **George F. Edmunds,** for plaintiff in error:

Where the parties have instituted a suit, they may submit it to arbitrators.

Kyd, Award, 346, note; *Moore* v. *Barnett*, 17 Ind. 350; Russell, Awards, 69, 75; Morse, Arbitration & Award, 43, 47, 330; Wait, Actions & Defenses, 508.

Where a suit is pending, and it is agreed to refer it to arbitration, it may be so referred under a rule of the court.

Francis v. *Ames*, 14 Ind. 252.

Had the reference been directed by the court, defendant would have had a remedy by writ of error.

Dederick v. *Richley*, 19 Wend. 112; *Newcomb* v. *Wood*, 97 U. S. 581 (24: 1085).

Under a common-law reference the court has no power to modify an award, nor to vary the report of the referee. If the report be set aside, the cause remains as if it had never been sent to the referee at all, and stands for trial in the court in which it is pending.

Morse, Arbitration & Award, 338, 617; Russell, Award, 674.

The resolution of the company's directors in reference to the attorney's fees is clear and precise in its terms, and constitutes a contract.

Brown v. *Genet*, 63 How. Pr. 230.

A court cannot construe an illegal contract in a different and legal sense.

2 Parsons, Contracts, 636.

Where a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract.

Adams v. *Hill*, 16 Maine, 215.

A mere assertion in the opinion of the court does not amount to a finding, and has no force as such.

Dickinson v. *Planters' Bank*, 83 U. S. 16 Wall. 257 (21: 279).

There is no such ambiguity here as to justify the admission of parol evidence to explain the intent.

Van Hagen v. *Van Rensselaer*, 18 Johns. 420; *Coopwood* v. *Wallace*, 12 Ala. 790; 1 Parsons, Contracts, 116.

An attorney does not warrant or guaranty the correctness of his work.

Dundee Mortgage Co. v. *Hughes*, 10 Sawy. 147.

An attorney owes perfectly good faith to his client.

Wait, Actions & Defenses, 465.

In England, counsel have no legal claim for services.

Kennedy v. *Brown*, 106 Eng. C. L. 18 C. B. N. S. 677; *Mostyn* v. *Mostyn*, L. R. 5 Ch. App. Cas. 457.

The client is under the influence of the attorney; and for that reason the conduct and acts of the latter are closely watched and scrutinized.

Goodenough v. *Spencer*, 46 How. Pr. 351; *Hornberger* v. *Planters' Bank*, 41 Cold. 573; *Tate* v. *Williamson*, L. R. 1 Eq. 528; *Starr* v. *Vanderheyden*, 9 Johns. 253; Sutherland, Damages, 448.

If the language used by the parties is indefinite or ambiguous, the practical interpretation by the parties themselves is entitled to great if not controlling influence.

Chicago v. *Sheldon*, 76 U. S. 9 Wall. 54 (19: 596).

In all cases of contract the measure of damages is a question of law.

Sedgwick, Damages, 37, 435.

Counsel should be awarded as compensation what his services are reasonably worth.

Van Every v. *Adams*, 10 Jones' & S. 126; *People* v. *Bond St. Sav. Bank*, 10 Abb. N. C. 15; *Slow* v. *Hamlin*, 11 How. Pr. 452.

Mr. **J. N. Dolph,** for defendant in error:

The seventh section of the Act of February 19, 1864, 13 Stat. at L. 4, was superseded by the general Statute of March 3, 1865.

La. Mut. Ins. Co. v. *Tweed*, 74 U. S. 7 Wall. 44 (19:65); *Flanders* v. *Tweed*, 76 U. S. 9 Wall. 425 (19: 678).

With the consent of the parties the United State Courts have power to refer the issues in an action, whether of law or fact.

Newcomb v. *Wood*, 97 U. S. 581 (24: 1085); *Heckers* v. *Fowler*, 69 U. S. 2 Wall. 123 (17:759).

The parties must be held to have consented to the trial by the court; the objection cannot be raised here for the first time.

Bell v. *Bruen*, 42 U. S. 1 How. 169 (11: 89); *Marine Bank* v. *Fulton Bank*, 69 U. S. 2 Wall. 252 (17: 785); *Klein* v. *Russell*, 86 U. S. 19 Wall. 433 (22: 116); *Edwards* v. *Elliott*, 88 U. S. 21 Wall. 532 (22: 487); *Walker* v. *Sauvinet*, 92 U. S. 90 (23: 678); *Wheeler* v. *Sedgwick*, 94 U. S. 1 (24: 31).

Parties may waive a jury without filing a written stipulation.

Flanders v. *Tweed*, *supra*; *Guild* v. *Frontin*, 59 U. S. 18 How. 135 (15: 290); *Campbell* v. *Boyreau*, 62 U. S. 21 How. 223 (16: 96); *Kearney* v. *Case*, 79 U. S. 12 Wall. 275 (20: 395); *Gilman* v. *Illinois & M. Tel. Co.* 91 U. S. 603 (23: 405); *Boogher* v. *N. Y. L. Ins. Co.* 103 U. S. 90 (26: 310); *Madison Co.* v. *Warren*, 106 U. S. 623 (27: 311); *Bond* v. *Dustin*, 112 U. S. 604 (28: 835).

Findings of fact and law by the court can only be reviewed in this court when a jury is waived and a cause submitted to the court by the written stipulation, in pursuance of section 649 of the Revised Statutes.

R. S. § 700; *French* v. *Edwards*, 88 U. S. 21 Wall. 147 (22: 534); *Allen* v. *St. Louis Nat. Bank*, 120 U. S. 20 (30: 573).

This is the case whether the trial below was by the court, a referee, or an arbitrator.

Guild v. *Frontin, supra; Kelsey* v. *Forsythe*, 62 U. S. 21 How. 86 (16: 32); *Dickinson* v. *Planters Bank*, 88 U. S. 16 Wall. 250 (21: 278).

If one is employed in the service of another, the law implies a promise to pay.

Moreland Twp. v. *Davidson Twp.* 71 Pa. 377; *Prince* v. *McRae*, 84 N. C. 674; *Dougherty* v. *Whitehead*, 31 Mo. 255; *Chase* v. *Corcoran*, 106 Mass. 286; *Ames* v. *Potter*, 7 R. I. 265; *Handy* v. *Clark*, 4 Houst. 16; *Rider* v. *Union India Rubber Co.* 28 N. Y. 379; *Hay* v. *Walker*, 65 Mo. 17; *Allen* v. *Richmond*, 41 Mo. 302; *Darling* v. *McDonald*, 77 Ill. 520; *Medsker* v. *Richardson*, 72 Ind. 328; *Lewis* v. *Atlas Mut. L. Ins. Co.* 61 Mo. 534; *Beall* v. *Van Bibber*, 19 La. Ann. 434; *Camfranco* v. *Pilie*, 1 La. Ann. 197; *Martin* v. *Fox & W. Imp. Co.* 19 Wis. 552.

Where the court tries issues of fact without a jury under a stipulation of the parties, its special findings should set forth ultimate facts and not evidence establishing them.

Union C. Silver Mining Co. v. *Taylor*, 100 U. S. 37 (25: 541).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Ellis G. Hughes against the Dundee Mortgage and Trust Investment Company, to recover an amount claimed to be due for professional services. After the pleadings were complete and the issues joined, the following entry was made on the minutes of the court:

"Now at this day comes the plaintiff * * * by Mr. George H. Williams, of counsel, and the defendant by Mr. William H. Effinger, of counsel, and by consent of parties it is ordered that this cause be, and the same is hereby, referred to Mr. Wm. B. Gilbert to take the testimony herein, pursuant to a stipulation to be filed herein within three months from this date, to try said cause, and to report to this court his conclusions of fact and law herein; and said Wm. B. Gilbert is hereby appointed referee for the purpose aforesaid."

Under this order the referee reported May 5, 1884, that the parties appeared before him January 16, 1884; "and thereupon the testimony in said cause was taken before me, and the same is herewith filed. That upon the conclusion of said testimony the said cause was argued before me by the respective counsel of said parties. That upon consideration of the pleadings and the testimony herein I make the following" "findings of fact" and "conclusions of law"—which were then stated.

To this report each party filed exceptions. These exceptions were heard by the court, both parties appearing; and on consideration the findings of the referee were set aside and new findings made by the court, on which a judgment was rendered in favor of Hughes and against the Company for $8,407.61. From that judgment this writ of error was brought.

There is no bill of exceptions in the record, and it nowhere appears that any exception whatever was taken to the action of the court at the hearing or in giving the judgment. The testimony taken by the referee and by him reported to the court is not here. The case stands on the pleadings; the order of reference made by consent, which was not, so far as appears, in writing; the report of the referee; the exceptions thereto; the rulings of the court thereon; and the new findings by the court and the judgment.

The errors assigned are in substance:

1. That the court erred in substituting its own findings of facts for those of the referee, and in entering judgment upon its conclusions of law founded thereon; and,

2. That the conclusions of law are not supported by the facts found.

Section 221 of the Code of Civil Procedure of Oregon provides that "All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties." A trial by referee is to be conducted in the same manner as a trial by the court (§ 226); and the report of the referee must state the facts found; and when the order of reference includes an issue of law, the conclusions of law separate from the facts. Sec. 227. Section 229 is as follows: "The court may affirm or set aside the report either in whole or in part. If it affirm the report, it shall give judgment accordingly. If the report shall be set aside, either in whole or in part, the court may make another order of reference, as to all or so much of the report as may be set aside, to the original referees, or others; or it may find the facts and determine the law itself, and give judgment accordingly. Upon a motion to set aside the report, the conclusions thereof shall be deemed and considered as the verdict of a jury."

The argument in support of the first assignment of error is that as no allusion is made to the Oregon Code in the order of reference, and no written consent was filed as required by that Code, the order was in its legal effect only a reference at common law; and, such being the case, it was error after rejecting the report to make the new findings. It is undoubtedly true that under a common-law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject; and if the report be set aside the cause stands for trial, precisely the same as if it had never been referred. As there was in this case no written consent to the order for a trial by referee, it would have been error in the court, if objection had been made, to proceed with a new trial of the case after the report was set aside, without a stipulation in writing waiving a jury, as provided by section 649 of the Revised Statutes; but no such objection was made, and the court proceeded, evidently in accordance with the understanding of the parties, to make new findings, precisely as it would if the order of reference had been actually under the Code upon a consent in writing. No exception was taken to this proceeding in the court below, and it is too late to make it here for the first time. Had the attention of the court been called to the exact condition of the record, the error would probably have been avoided by the filing of the necessary stipulation in writing, or in some other way. The case, therefore, comes here upon the ruling at the trial by the circuit court without a jury, when there had been no waiver of a jury, as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. Rulings of a circuit court made under

such circumstances are not reviewable here. *Bond* v. *Dustin*, 112 U. S. 604 [28:885], and the cases there cited. The concession on both sides that there was actually no consent in writing to the order of reference, distinguishes this case materially from *Booghet* v. *N. Y. L. Ins. Co.* 103 U. S. 90 [26:310] where the existence of a stipulation in writing, waiving a jury, was presumed under the circumstances which were there presented.

The judgment of the Circuit Court is affirmed.

LEWIS H. BEESON ET AL., Trustees under the Will of STROTHER M. BEESON, Deceased, *Plffs. in Err.*,

v.

JOHN JOHNS, Admr. of HENRY JOHNS, Deceased, ET AL.

(See S. C. Reporter's ed. 56-60.)

Taxes on nonresidents—errors, how corrected.

1. In an action to set aside, as void, three tax deeds made upon sales for taxes on lands of plaintiff, on the ground that the lands belonged to a nonresident of the State and were assessed and taxed at a higher rate than the lands of resident owners, *held*, that there was no sufficient evidence in the case of any purpose to discriminate against the nonresident owner of the lands in controversy, nor of any actual injury to him by the assessment which was made upon his property.

2. If a tax were levied under a law of a State which required either the assessment or the rate levied upon that assessment to be more favorable to the resident owners of the property than to those who resided in another State, all assessments and sales under such a statute might, possibly, be declared void. But where the question relates to the action of a single assessor, or of a township or county board of equalization which does not profess to be carried on with any purpose of making such discrimination, the mere errors in assessment should be corrected by proceedings, which the law allows before such sale or before a deed is finally made.

[No. 98.]

Submitted Dec. 6, 1887. Decided Jan. 9, 1888.

IN ERROR to the Supreme Court of the State of Iowa. *Affirmed.*

Action in state court to set aside tax deeds as void. That court dismissed the action, and from this decree an appeal was taken to the supreme court of the State, where the decree was affirmed. From that decision a writ of error is taken to this court.

The facts are stated in the opinion.

Mr. **Nathaniel Bacon,** for plaintiffs in error:

The taxation, and the tax title based thereon, are void, because said unequal taxation was in violation of that part of the Ordinance of 1887, and of said supplemental Act, each of which provides: "In no case shall nonresident proprietors be taxed higher than residents."

Cooley, Taxation, 344; *Treadwell* v. *Patterson*, 51 Cal. 687; *Bucknall* v. *Story*, 36 Cal. 67; Blackwell, Tax Titles, 192; *Drew* v. *Davis*, 33 Am. Dec. 213; *Wills* v. *Austin*, 58 Cal. 152; *Harper* v. *Rowe*, 58 Cal. 238; *Glidden* v. *Chase*, 56 Am. Dec. 694, Note; *Wattles* v. *Lapeer*, 40 Mich. 625.

In *Humes* v. *Scruggs*, 94 U. S. 28 (24:53), it is said: "Fraud or no fraud is generally a question of fact to be determined by all the circumstances of the case." Acts indicate the intention.

Broom, Legal Maxims, 801.

The Constitution of the United States precludes any State from imposing upon the property within its limits belonging to citizens of other States any higher burdens by way of taxation than are imposed upon the like property of its own citizens.

Corfield v. *Coryell*, 4 Wash. C. C. 380; *Wiley* v. *Parmer*, 14 Ala. 627.

Whenever public officers exceed their authority, their acts are void.

Jones v. *Gibson*, N. C. Term Rep. 41; *S. C.* 7 Am. Dec. 690.

But where a court has not by law an authority to act, its acts are void and may be set aside on motion.

Whitley v. *Black*, 2 Hawks, 179; *S. C.* 11 Am. Dec. 753.

Although a court has jurisdiction both of subject matter and of person, its judgment is void if it exceeds its power.

Ex parte Lange, 85 U. S. 18 Wall. 163 (21:872); *Voorhees* v. *Jackson*, 35 U. S. 10 Pet. 449 (9:490); *Reynolds* v. *Stansbury*, 20 Ohio, 344; *U. S.* v. *Arredondo*, 31 U. S. 6 Pet. 729 (8:561); *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 170, 171 (2: 71); *McCulloch* v. *Md.* 17 U. S. 4 Wheat. 423 (4:605); *Satterlee* v. *Matthewson*, 27 U. S. 2 Pet. 412 (7:468); *Prov. Bank* v. *Billings*, 29 U. S. 4 Pet. 563 (7:956); *Perkins* v. *Fairfield*, 11 Mass. 227; *McPherson* v. *Cunliff*, 11 Serg. & R. 429; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 167, 168 (7:385); *Rogers* v. *Bradshaw*, 20 Johns. 739, 740; *Shand* v. *Henderson*, 2 Dowl. P. C. 521.

In sales for taxes, if any of the statutory requirements are neglected, no title passes.

McClung v. *Ross*, 18 U. S. 5 Wheat. 116 (5:46); *Ronkendorff* v. *Taylor*, 29 U. S. 4 Pet. 349 (7:882); *Thatcher* v. *Powell*, 19 U. S. 6 Wheat. 119 (5:221).

Provisions of tax laws are not merely directory, when a departure from them would be prejudicial to the owners of the property taxed.

People v. *Auditor Gen.* 41 Mich. 30; *French* v. *Edwards*, 80 U. S. 13 Wall. 514 (20:704).

Where the assessors did not follow the law, but their action was in opposition to the plain words of the statute, the assessment is void.

Desty, Taxation, 643, citing *Chemung Nat. Bank* v. *Elmira*, 53 N. Y. 49 and cases cited.

Assessments made in willful disregard of the rule of uniformity and assessments not verified by the affidavit of the assessor, as required by the statute, are invalid.

Id. 643; *Tierney* v. *Union Lumbering Co.* 47 Wis. 250; *Philleo* v. *Hiles*, 42 Wis. 527; *Plumer* v. *Marathon Co.* 46 Wis. 163; *Torry* v. *Millbury*, 21 Pick. 64; *Sibley* v. *Smith*, 2 Mich. 499; *Clark* v. *Crane*, 5 Mich. 154; *Scott* v. *Babcock*, 3 Greene (Iowa), 133; *McGahen* v. *Carr*, 71 Am. Dec. 425.

Mr. **Gaiusha Parsons,** for defendants in error:

The assessment and levy were not void; and for the correction of the error the remedy provided by law is ample for the complete protection of the taxpayer.

Pelton v. *Com. Nat. Bank*, 101 U. S. 143; (25:901); *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153 (25:903); *Stanley* v. *Albany Co.*

121 U. S. 585 (30:1000); *Williams* v. *Albany Co.* 122 U. S. 154 (30:1088).

As to all matters within the jurisdiction of a special tribunal, the party must submit his grievance to that tribunal before, as a party plaintiff, he can demand the aid of a court of equity.

Macklot v. *Davenport*, 17 Iowa, 379; *Nugent* v. *Bates*, 51 Iowa, 77.

The ordinary proceedings in the different States for the levy and collection of taxes are due process of law.

McMillen v. *Anderson*, 95 U. S. 37 (24:335); *Kelly* v. *Pittsburgh*, 104 U. S. 82 (26:660); *State Railroad Tax Cases*, 92 U. S. 575 (23:663); *Kirtland* v. *Hotchkiss*, 100 U. S. 498 (25:562); *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 (18:339).

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa. In one of the inferior courts of that State, Strother M. Beeson brought suit against Henry Johns and Henry Ohrt, the defendants in error. Beeson having died, the present plaintiffs, as his executors, were substituted; and, as the record comes to us from the supreme court of the State, there was filed in that court an abstract of the case from the court below. The object of the suit was to set aside and have declared void three tax deeds purporting to have been made upon sales for taxes on lands of the plaintiff, Beeson.

The original petition relied mainly upon the fact that there was fraud in the tax sale by reason of a combination of bidders to prevent a fair competition and sale. An amended petition set out: First, that there was no legal and valid assessment for taxes of the land so sold, neither to plaintiff or his grantor nor to unknown owners, and that in fact there was no assessment of the land for that year:

"Second. That said lands belonged at the time of assessment for the year 1869 and on the first day of January, A. D. 1869, to a nonresident of the State of Iowa; and that if any assessment of said land for the year 1869 was ever made, it, together with all the lands belonging to nonresidents of the State in the township in which said land is situated, was assessed and valued, and equalized and taxed, by the officers and authorities making such assessment and equalization and taxation, at a higher price and value and at a higher rate of tax than the property and lands of resident owners of property and lands in said township and county for the same year, and that all the other lands and property in said township, except the lands of nonresidents of Iowa, were assessed, equalized and taxed at a value and rate far below its actual cash value, and the said assessment was void, and was, in fact, no legal assessment of said land, and the proceedings based thereon and sale are void:

"Third. That at the time the assessment of said land was made there was a rule established by the board of supervisors and equalization of said county, and recognized and followed by the assessors of the different townships, including the township where said land was situated, to assess improved lands belonging to resident owners and personal property at from one third to one half of its actual cash value, and that said assessment for the year 1869 was made on that basis and value, and at from one third to one half its value, and the same was illegal and void."

These allegations were put in issue by a general denial.

It is in regard to these last two charges in the amended petition that the plaintiffs in error claim a right to bring the case to this court. That right they base in their brief, first, upon a provision of the ordinance of 1787, to the effect that in no case shall nonresident proprietors be taxed higher than residents; and also to a similar provision contained in the Act of Congress of March 3, 1845, providing for the admission of the States of Iowa and Florida into the Union.

As the case was decided against the right set up by the plaintiffs in error under this Act of Congress, we must inquire whether the decision of the Supreme Court of the State on the subject is sound. After carefully examining the testimony on this subject, as found in the record, it does not appear to us, as it did not appear to the Iowa Supreme Court, that there was any clear discrimination in the valuation of the property of this nonresident owner in the State of Iowa, nor any purpose to discriminate against citizens of other States in favor of those residing in that State. The only evidence on this subject which had any tendency whatever in that direction was the statement of one witness that lands which had valuable improvements upon them were not estimated so near their real cash value taken altogether, as were the lands which had no improvements upon them; and the following extract from the proceedings of the board of equalization of the county in which the lands in controversy lay, to wit:

"On motion the board proceeded to the equalization of assessments. A motion was made that all lands in the county assessed to unknown owners be assessed at six dollars per acre; and an amendment was offered that said lands be assessed at five dollars per acre, which motion carried; after which the motion, as amended, was adopted."

It is true that one witness testified that the improved lands were mainly owned by residents. The language of the supreme court of the State on this subject in its opinion is as follows:

"Conceding the land in controversy belonged to nonresidents and that it was assessed at a greater value than similar land belonging to residents, is the tax title void under the Ordinance of 1787 or the Act of Congress admitting the State of Iowa into the Union? We are not prepared to say if such an assessment was objected to at the proper time and manner it could be sustained; but we do not believe, under the facts in this case, the title of the purchaser at the tax sale by reason thereof is void. The authorities cited by counsel for appellant do not go to this extent. Fraud is not alleged or shown; nor is it claimed there was an actual intent to discriminate against nonresidents. At most it appears the improved lands of residents were not assessed as high in proportion as the unimproved lands. No discrimination was made

between the unimproved lands of residents and nonresidents. For aught that appears, the relative value of the improved and unimproved lands were erroneous only. Under such circumstances a correction or abatement should have been applied for as provided for by law. The assessment and levy were not void, and for the correction of the error the remedy provided by law is ample for the complete protection of the taxpayer."

While we do not decide that in no case of a settled purpose to discriminate in the taxation of lands in a county or State against owners residing in another State would such a sale be held void, we do not see in the case before us any reason for holding the tax sale complained of here to be void on that account. If a tax were levied under a law of the State which required either the assessment, or the rate levied upon that assessment, to be more favorable to the resident owners of the property than those who resided in another State, all assessments and sale under such a statute might possibly be declared to be void. But where the question relates to the action of a single assessor, or of a township or county board of equalization, and does not profess to be carried on with any purpose of making such discrimination, the mere errors in assessment should be corrected by proceedings which the law allows before such sale or before a deed is finally made. There is no sufficient evidence in this case of any purpose to discriminate against the owner of the lands in controversy, nor of any actual injury to him by the assessment which was made upon his property.

The only discrimination made was between improved and unimproved lands, without regard to the residence of the owners and the accidental circumstance that more improved lands were owned by residents than by nonresidents, does not show a violation or a purpose to violate the Act of Congress.

The judgment of the Supreme Court of Iowa is affirmed.

LOUIS DRYFOOS, *Appt.*,
v.
WILLIAM WIESE.

(See S. C. Reporter's ed. 32-33.)

Patent for improvement in quilting machines—equivalent mechanism—infringement.

1. In an action for the infringement of reissued letters patent, granted to Louis Dryfoos, assignee of August Beck, Feb. 24, 1880, for an improvement in quilting machines, held, that said patent must be limited to mechanism described and claimed by it, and cannot be extended so as to cover all mechanism for giving a circular direction to the feed motion, nor to the process of operation of the mechanism described in the patent.

2. Held further, that the defendant's mechanism, in each form of his machine, cannot be regarded as merely an equivalent for the plaintiff's mechanism; that neither one of defendant's machines infringed said patent; that the plaintiff's machine gave the circular motion to the goods by mechanism which accomplished the result in one way, while in the defendant's machine the result was accomplished by different mechanism in a different way, and that, although the same result might be produced, it was not produced by the same means.

[No. 109.]

Argued Dec. 14, 1887. Decided Jan. 9, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a bill of complaint, charging infringement of reissued letters patent granted to the complainant Louis Dryfoos, as assignee, for an improvement in quilting machines. *Affirmed.*

The case and facts are fully stated in the opinion.

Mr. **Edmund Wetmore,** for appellant:

The second claim of the reissue in suit is valid.

A claim may be lawfully added by reissue, provided it is justified by the original specification and is applied for with due diligence.

Battin v. *Taggert*, 58 U. S. 17 How. 83 (15: 40); *Morey* v. *Lockwood*, 75 U. S. 8 Wall. 230 (19: 339); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20:33); *Mahn* v. *Harwood*, 112 U. S. 354 (28: 665); *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 (26:783); *Wollensak* v. *Reiher*, 115 U. S. 101 (29:351).

The second claim of the reissue in suit has been infringed by the defendant.

Holbrook v. *Small*, 10 Off. Gaz. 508; *Yale Lock Mfg. Co.* v. *Norwich Nat. Bank*, 19 Blatchf. 123; *Potter* v. *Braunsdorf*, 7 Blatchf. 97; *Dederick* v. *Cassell*, 9 Fed. Rep. 306; *Winans* v. *Denmead*, 56 U. S. 15 How. 330 (14:717); *Mason* v. *Graham*, 90 U. S. 23 Wall. 261, 274 (23:86, 87); *Ives* v. *Hamilton*, 92 U. S. 426 (23:494); *Marsh* v. *Seymour*, 97 U. S. 348, 359 (24:963, 966); *Cross* v. *MacKinnon*, 11 Fed. Rep. 601; *Putnam* v. *Von Hofe*; 6 Fed. Rep. 897.

Defendant is clearly personally liable.

Steiger v. *Heidelberger*, 4 Fed. Rep. 455; *St. Louis Stamping Co.* v. *Quinby*, 18 Off. Gaz. 571.

(No counsel appeared, on the argument, for appellee.)

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by Louis Dryfoos against William Wiese, for the infringement of reissued letters patent No. 9097, granted to said Dryfoos, assignee of August Beck, February 24, 1880, for an improvement in quilting machines, on an application for a reissue filed January 24, 1880, the original patent, No. 190-184, having been granted to Louis Dryfoos and Joseph Dryfoos, as assignees of Beck, May 1, 1877, on an application filed February 27, 1877. Joseph Dryfoos assigned all his interest to Louis Dryfoos, and the patent was reissued to Louis Dryfoos January 29, 1878, as No. 8063, on an application filed January 2, 1878.

There are six claims in the second reissue, but the bill alleges infringement only of claim 1, and prays for an injunction only as to claim 1. The plaintiff's proofs, however, were directed to showing an infringement of claims 1 and 2.

The circuit court (22 Blatchf. 19) considered the case in respect to both claim 1 and claim 2. It held the second reissue to be invalid in respect to claim 1, and to be valid as to claim 2; but it held that the defendant had not infringed claim 2, and dismissed the bill. From that decree the plaintiff has appealed.

In the opinion of the circuit court, delivered by *Judge* Wheeler, the questions involved are so well stated that we adopt his language, as

follows: "The invention was and is stated, in the original and reissues, to be of improvements on the quilting machine shown in letters patent No. 159884, dated February 16, 1875, granted to the same inventor" (that is, to Louis Dryfoos, as assignee of Beck as inventor). "That machine was for quilting by gangs of needles in zigzag parallel lines, and was fed by cylindrical rolls having an intermittent rotary motion, which would move the cloth while the needles were out of it, and could be arranged to feed in straight lines, direct or oblique. The original of the patent in suit showed different mechanism for actuating the feed rolls, so that the length of stitch could be varied at pleasure, and conical rolls having an intermittent motion to feed the conical bodies of skirts and skirt borders in a circular direction, when the needles were out of the cloth, as well as cylindrical rolls for straight goods, and other improvements upon other parts of the machine, and had claims for the feed mechanism, and improvements upon the other parts of the machine, but none for the conical feed rolls. The first reissue further described the conical feed rolls as made of such taper as to conform to the shape of the skirt or border to be quilted, and claimed the combination of the series of needles with the conical feed rolls acting intermittingly, in place of one of the other claims. The reissue in suit still further describes the conical feed rolls as the embodiment of a feed device which extends substantially throughout the width of the conical strip of goods, and, as it departs from the shorter curved edge and approaches the longer curved edge, is adapted to have a proportionately increased range of feed movement, so that it will feed the conical strip of goods in the requisite curved path evenly and without any injurious strain or drag; and further claims the combination with the gang of sewing mechanisms, and the cloth plate which supports the goods under them, of a feed device operating intermittingly in the intervals between the formation of the stitches, which extends and operates substantially across the conical strip of goods, and which, as it departs from the shorter curved edge, and approaches the longer curved edge, of the goods, is adapted to have a proportionately increased range of feed movement. The defendant is engaged in using a quilting machine for quilting conical goods, having a gang of needles, and short cylindrical feed rollers at each edge of the goods, which they feed in a circular direction, by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while in it; and also one with a four motion feed, which is capable of feeding in a circular direction, by lengthening the feed at the longest edge of the goods, but is not shown to have been so used, or intended to be so used. The validity of the reissue and infringement of it, if valid, are denied." The circuit court then proceeds: "Beck well appears to have meritoriously invented effective means for giving circular direction to the feed of quilting machines having gangs of needles for quilting several parallel seams. He set forth these means in the specifications and drawings of his original patent, and seems to have been well entitled to then have a patent for them, and for the combination of the mechanism with the gang of needles. But he does not appear to have been entitled to a patent for merely giving such direction to such feed motion, apart from the mechanism, nor to the process of operation of his mechanism for giving such direction. Neither could he claim the combination of mechanism not then known, or its processes, with the needles. He invented his own mechanism, and the combination of that with the co-operating parts of the machine, and nothing more; and seems to have been entitled to a patent for those and no more. The first reissue was within a few months of the original, and before others appear to have done anything in that region of invention, and seems to have been well enough. The second reissue was more than two years after the original, but, whether too long after or not, was, in effect, for the combination of the gang of needles and cloth plate with any feeding mechanism which would reach across the cloth and feed the long side faster than the other. This was, clearly, beyond the invention shown in the original, and, except as to the mechanism shown in the original, beyond the invention in every way. This claim of the reissue is, therefore, wholly invalid."

Claims 1 and 2 in the second reissue are as follows:

"1. In a machine for quilting conical strips of goods, the combination, with the series or gang of sewing mechanisms and the cloth plate which supports the goods under the action of the same, of a feed device operating intermittingly in the intervals between the formation of the stitches, which extends and operates substantially across, or from edge to edge of, the conical strip of goods, and which, as it departs from the shorter curved edge and approaches the longer curved edge of said goods, is adapted to have a proportionately increased range of feed movement, substantially as and for the purposes set forth.

"2. The combination, with a series of vertically reciprocating needles mounted in a laterally-reciprocating sewing frame, of conical feed rolls, and mechanism for causing them to act intermittingly during the intervals between the formation of stitches, substantially as herein shown and described."

Claim 1 is not brought before us by the counsel for the appellant; for in his brief he states that it is only necessary to consider claim 2, for the reason that if claim 1, first introduced into the second reissue, is broader than claim 2 (which is substantially in the same language as claim 1 of the first reissue) it is an unlawful expansion, introduced nearly three years after the original patent was granted; and that if the defendant has not infringed claim 2 of the second reissue, he has infringed no lawful claim of it. We, therefore, make no ruling as to claim 1.

As to claim 2 the circuit court held that as it was valid as claim 1 of the first reissue, in the form in which it there appeared, and was brought forward into the second reissue, as claim 2 thereof, in substantially the same language, it was not made invalid by the fact that claim 1 of the second reissue was invalid; and that the plaintiff appeared, therefore, to be entitled to a monopoly of the conical feed rollers in claim 2.

On the question of the infringement of claim 2, the circuit court held that neither one of the defendant's machines above described infringed that claim, because neither one of those machines had conical rollers, nor any of the other mechanism of the plaintiff; that what the defendant did was not to divide the plaintiff's conical feed rollers into sections or parts, in such manner as to make the parts the equivalent of the whole, but that the plaintiff's machine gave a circular direction to the goods by mechanism which accomplished the result in one way, while in the defendant's machines the result was accomplished by different mechanism in a different way. We are of opinion that this view of the case was correct.

The specification of the second reissue states that Beck's feed device "extends substantially throughout the width of the conical strip of goods;" that, as such feed device "departs from the shorter curved edge and approaches the longer curved edge of the goods," it "is adapted to have a proportionately increased range of feed movement;" that such feed device "consists, as shown in the drawings, of feed rolls H, which are made of conical shape, and of such taper or relative diameters at their respective ends as to conform to the shape of the skirt or border to be quilted." In one of the defendant's machines there are short cylindrical feed rollers at each edge of the goods, which they feed in a circular direction by moving at different rates of speed constantly, the needles having a forward movement corresponding to that of the cloth while the needles are in it. The other one of the defendant's machines has the well known sewing machine four-motion feed, which is capable of feeding in a circular direction by lengthening the feed at the longest edge of the goods. Neither of these machines has any such conical rollers as are found in the plaintiff's patent, and are particularly specified as an element in claim 2 of the second reissue.

It is contended for the plaintiff that as Beck was the first to devise a combination the gist of which is a feed, feeding faster at one end than at the other, with a laterally moving gang or series of needles, and an intermittent feed when the needles are out of the stitches, he is entitled to cover all variations in the form of the feed, so long as by any means it operates to feed faster at one end than at the other; and that, if that result is accomplished, the mechanism must be an equivalent for that of the plaintiff.

The plaintiff's patent must be limited to the mechanism described and claimed by him, and cannot be extended so as to cover all mechanism for giving a circular direction to the feed motion, nor to the process of operation of the mechanism described in his patent; and the defendant's mechanism, in each form of his machine, cannot be regarded as merely an equivalent for the plaintiff's mechanism. The case is substantially like that of *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 373 [29:950]. There the claim of the patent, which was for an improvement in permutation locks, claimed the arrangement of two or more rollers, of varying eccentricity, resting upon the periphery of a cam, for the purpose of preventing the picking of the lock. In the defendant's lock, the rollers were identical with each other in eccentricity and shape; but it was claimed by the plaintiff that, when in revolution, they varied in eccentricity in reference to the cam which operated them, so that, in action, their eccentricity varied, and the same result was produced. But this court held that the description in the patent, and the claim, required that the variation of eccentricity should be between the rollers themselves, and not a variation in action in reference to the cam; that, although the same result might be produced, it was not produced by the same means, and there was no infringement.

Decree affirmed.

EMORY E. NORTON, Assignee in Bankruptcy of GOVY HOOD, *Appt.*,
v.
GOVY HOOD ET AL., Exrs. of HENRY FRELLSEN, Deceased.

(See S. C. Reporter's ed. 20-32.)

Sale under judgment and execution, held valid.

In an action by an assignee in bankruptcy, against the bankrupt and his grantees under a judgment and execution sale, alleging that the judgment, execution and sale were fraudulent simulations for the purpose of putting the property beyond the reach of creditors and to confer an unlawful preference, and asking for a decree, adjudging the assignee in bankruptcy to be the owner of the property, and that a mortgage executed by the bankrupt might be canceled, *held*, that the case made by the bill is not established by the proofs; that the acts and doings alleged to have been fraudulent were fair and honest; and that the relief demanded by the bill should be denied and the bill dismissed.

[No. 111.]

Argued and submitted Dec. 14, 1887. Decided Jan. 9, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, affirming a decree of the District Court as to one party and remanding the cause to the District Court for further proceedings. *Affirmed.*

Messrs. **J. D. Rouse** and **E. H. Farrar**, for apppellant:

The failure to seize the property and to dispossess Hood was a fatal defect in the proceedings; and the subsequent sale by the sheriff did not devest Hood's title.

Morgan v. *Johnson*, 27 La. Ann. 539; *Kilbourne* v. *Frellsen*, 22 La. Ann. 207; *Corse* v. *Stafford*, 24 La. Ann. 263; *Watson* v. *Bondurant*, 88 U. S. 21 Wall. 123 (22:509).

A debtor in failing circumstances cannot waive an appraisement or any other legal formality.

Lawrence v. *Young*, 1 La. Ann. 297.

A contract of sale, although absolute in its terms, may always be shown to be a mortgage.

Peugh v. *Davis*, 96 U. S. 336 (24:776).

A court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as a security for a loan of money. Any evidence, written or oral, tending to show this is admissible.

Brick v. *Brick*, 98 U. S. 516 (25:256); *Hughes*

v. *Edwards*, 22 U. S. 9 Wheat. 489 (6:142); *Russell* v. *Southard*, 53 U. S. 12 How. 139 (13:927); *Taylor* v. *Luther*, 2 Sumn. 228; *Pierce* v. *Robinson*, 13 Cal. 116; *Livingston* v. *Story*, 36 U. S. 11 Pet. 351 (9:746); *Calderwood* v. *Calderwood*, 23 La. Ann. 658; *Collins* v. *Pellerin*, 5 La. Ann. 99; *Smith* v. *Dwight*, 10 La. Ann. 691.

A general denial of fraud in an answer is nothing more than a denial of conclusion of law.

Lathrop v. *Drake*, 91 U. S. 520 (23: 415); *Parkman* v. *Welch*, 19 Pick. 234.

The limitation of two years, contained in section 5057, R. S., creates no bar of a suit brought by the assignee against the bankrupt himself.

Phelps v. *McDonald*, 99 U. S. 298 (25: 473); *Clark* v. *Clark*, 58 U. S. 17 How. 315 (15: 77).

The knowledge of one's attorney is his own knowledge.

Rogers v. *Palmer*, 102 U. S. 263 (26:164).

The bar of the statute does not begin to run in cases of concealed fraud, until the fraud is discovered.

Carr v. *Hilton*, 1 Curtis, 238; *Bailey* v. *Glover*, 88 U. S. 21 Wall. 342 (22: 636); *Rosenthal* v. *Walker*, 111 U. S. 185 (28:395); *Sherwood* v. *Sutton*, 5 Mason, 143; *Erickson* v. *Quinn*, 47 N. Y. 418.

Having shown that the existence and evidence of the fraud was concealed by the defendants, the onus was thrown upon them to show affirmatively that there was negligence or laches upon the part of the assignee in coming to such knowledge.

Tyler v. *Angevine*, 15 Blatchf. 544.

Mr. **John A. Campbell,** for appellees:

The Civil Code, art. 2487, does not place the thing at the risk of the promisee, nor transfer ownership of it, if by consent the promise is canceled.

McDonald v. *Aubert*, 17 La. 448; *Garrett* v. *Crooks*, 15 La. Ann. 483; *Dean* v. *Frellsen*, 28 La. Ann. 513; *Robert* v. *Brown*, 14 La. Ann. 606.

Hood has not offered to perform, and has surrendered his property to an assignee in bankruptcy and disabled himself from performing.

Civil Code, 2462–2464; *Richardson* v. *Hardwick*, 106 U. S. 252 (27:145); *Storm* v. *U. S.* 94 U. S. 76 (24:42); *N. O.* v. *Rigney*, 24 La. Ann. 235; *Dean* v. *Frellsen*, 28 La. Ann. 513; Pollock, Contracts, 160.

The clear intention of the parties should be carried into effect.

Dalloz, De Vente, Gen. J. No. 1270; 1 Duvergier, De Vente, No. 462; Troplong, De Vente, No. 668; 4 Zach. 312–316; Touillier, Nos. 568, 557.

The supreme court of the State sustained the executory process and the seizure, and dismissed the petition of Hood.

Hood v. *Frellsen*, 31 La. Ann. 577.

The appointment of an assignee was made in February, 1869. The right of Norton to maintain this suit terminated two years after the date of that appointment.

Internat. Bank v. *Sherman*, 101 U. S. 403 (25: 866); *Bailey* v. *Glover*, 88 U. S. 21 Wall. 342 (22:636).

The plaintiff has not pleaded, nor proved how and in what manner he discovered fraud, and what that fraud was that he had discovered, and at what time and why that was not sooner made.

Wood v. *Carpenter*, 101 U. S. 135 (25: 807); *Gifford* v. *Helms*, 98 U. S. 248 (25:57); *Kennedy* v. *Green*, 3 Myl. & K. 722; *Nudd* v. *Hamblin*, 8 Allen, 130; *Hudson* v. *Wheeler*, 84 Tex. 356; *Shannon* v. *White*, 6 Rich. Eq. 96; *McLure* v. *Ashby*, 7 Rich. Eq. 480.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 15th of February, 1862, Govy Hood, a planter residing in the Parish of Carroll, in the State of Louisiana, made his seven promissory notes, payable to the order of the mercantile firm of Frellsen & Stevenson, of New Orleans, composed of Henry Frellsen and John A. Stevenson, for the aggregate amount of $39,019.49, all the notes bearing interest at the rate of 8 per cent per annum from their maturity respectively until paid, and being for the following several amounts and due at the following dates: October 15, 1862, $5,273.33; November 3, 1862, $5,291.11; November 17, 1862, $5,307.88; December 3, 1862, $5,327.77; December 18, 1862, $5,338.89; December 20, 1862, $5,346.66; and January 10, 1863, $7,133.85.

The firm of Frellsen & Stevenson was dissolved in December, 1865, and the seven notes became the property of Frellsen. On the second of April, 1866, Frellsen commenced a suit in the Thirteenth Judicial District Court of the State of Louisiana, in and for the Parish of Carroll, against Hood, to recover the amount of the seven notes, with interest, and the further sum of $300, with interest from March 24, 1862, alleged to be the amount of premiums paid on the insurance of Hood's gin house and machinery. A judgment was entered in the suit, in favor of Frellsen, on the second of April, 1866, founded upon a confession dated February 13, 1866, signed by Hood and accompanying the petition, in the following words: "I accept service of this petition and waive citation, and agree to confess judgment for the amount as above set forth, say, the sum of thirty-nine thousand three hundred and nineteen dollars and forty-nine cents, and interest and cost, as prayed for, with the understanding that no execution is to issue on said judgment for one year from this date, when, if I pay $3,000 upon said judgment, there shall be a further stay of execution for one year more; when, if I pay one fourth of the whole amount of the balance of said judgment, there is to be a stay of execution for one year more; when, if I pay one third of the balance, there is to be a further stay of execution for one year more; when, if I pay one half the balance, there is to be a further stay of execution for one year more; when execution may issue for the balance, it being understood that execution is not to be stayed if I fail to make any of said payments punctually."

The judgment was in the following terms: "It is ordered, adjudged, and decreed, that the said plaintiff recover of the said defendant the sum of thirty-nine thousand three hundred and nineteen dollars and forty-nine cents, with interest at the rate of 8 per cent per annum on $5,273.33 of said amount from October 15, 1862; and same

interest on $5,291.11 from November 8, 1862; and the same interest on $5,307.88 from November 17, 1862; and same rate of interest on $5,327.77 from December 8, 1862; and the same interest on $5,338.89 from December 13, 1862; and the same interest on $5,346.66 from December 20, 1862; and the same interest on $7,133.85 from 10th day of January, 1868, until paid, and all costs; and that there be a stay of execution on the judgment until the 13th February, 1867; when, if the said Hood pays upon the judgment $3,000, there shall be a further stay of execution until the 13th of February, 1868; when, if the said Hood punctually pays one fourth of the amount of the judgment then due, there shall be a further stay of execution thereon to the 13th of February, 1869; when, if the said Hood punctually pays one third the balance then due, there shall be a further stay of execution thereon to the 13th of February, 1870; when, if the said Hood punctually pays one half the balance then due, there shall be a further stay of execution until the 13th of February, 1871; when execution may issue for the balance; and it is further ordered, by consent of parties, that, upon failure of said Hood to punctually pay any of the installments as stated, execution may issue for the whole amount of the judgment, or the balance then unpaid."

Hood having made default in complying with the terms of the judgment, a *fi. fa.* was issued by the court to the sheriff of the parish, on the 22d of July, 1868, to collect the full amount of the judgment, with interest until paid, "by seizure and sale of the property, real and personal, rights and credits of Govy Hood, in the manner prescribed by law." On the 23d of July, 1868, Hood signed the following indorsement upon the *fi. fa.*: "I accept service of notice of seizure, after pointing out to the sheriff the lands described on the reverse hereof, in this case."

On the 5th of September, 1868, the sheriff made a return to the *fi. fa.*, setting forth that he had received it on the 22d of July, 1868, and had, on the 23d of July, 1868, seized three plantations situated in the parish, and pointed out by the defendant; namely, (1) the Black Bayou Place, of 840 acres; (2) the Home Place, of 1,500 acres, and (3) the undivided half of the plantation known as the Hood and Wilson Place, containing in the aggregate 700 acres; that notice of the seizure had been waived by Hood on the 23d of July, 1868; that on the 25th of July, 1868, the sheriff advertised the property in a weekly newspaper named, published in the parish, to be sold on the 5th of September, 1868, for cash; and that he had sold the property on that day, at public auction, to Frellsen, for the sum of $24,210, that being two thirds of the appraised value of the lands. On the 5th of September, 1868, the sheriff executed a deed, selling and adjudicating to Frellsen all the right, title, interest, and claim which Hood had to said property.

On the 23d of November 1868, a second *fi. fa.* was issued by the court for the collection of the amount of the judgment, with interest, subject to a credit of $24,210. On the same day, Hood signed a waiver of notice of seizure and advertisement, except by posting in three public places from that date, and a consent that the property seized might be sold on the 5th of December, 1868. To this second *fi. fa.* the sheriff made return that he had received the writ on the 23d of November, 1868, and on the same day had seized certain described land, containing in all 1992.75 acres, and had, on the same day, advertised it to be sold on the 5th of December, 1868, by posting advertisements in three public places in the parish, and had, on the 5th of December, 1868, sold it at public auction, to Frellsen, for $664.27, and credited that amount on the execution.

After receiving the deed of September 5, 1868, Frellsen entered into an agreement for the sale of his judgment and mortgage rights to persons named Dean and Pearce; but the transaction fell through, resulting in a suit brought by Dean and Pearce against Frellsen, which ultimately terminated in favor of Frellsen, and is reported as *Dean* v. *Frellsen*, 23 La. Ann. 513. After the agreement of Frellsen with Dean and Pearce fell through, a written contract was made between Frellsen and Hood, on the 26th of October, 1868, in the following terms:

"It has been agreed between Henry Frellsen, of the City of New Orleans, and Govy Hood, of the Parish of Carroll, Louisiana, as follows:

"*Whereas*, the said Frellsen did, on the 5th September last, purchase at sheriff's sale, under an execution issued upon a judgment obtained by him in the district court of said parish against the said Hood for the sum of thirty-nine thousand three hundred and nineteen $\frac{49}{100}$ dollars, with interest as stated therein, certain property belonging to said Hood, consisting of lands and plantations, as follows: the plantation on Lake Providence occupied by said Hood, known as the Home Place, and the plantation on said Lake Providence, known as the Black Bayou Place, and also the undivided half of the plantation known as the Hood and Wilson Place, and certain lots and lands adjoining, all of which are described in the act of sale made by the Sheriff of Carroll to said Frellsen and of record:

"*And whereas*, the said Frellsen does not desire to speculate on the said Hood, or to take any advantage of him or his family, or to do more than to secure the balance due him on his said judgment, after crediting the same with the amount of the sale of the property on said lake, known as the Wilson Place, and sold under a mortgage and judgment held by said Frellsen against Geo. G. Wilson:

"Now, the said Frellsen hereby stipulates and promises as follows: That he will sell and transfer the above named property to the said Hood, or to his assigns, without any warranty, however, of any nature, as to the title to said property or the incumbrances upon it, all of which said Hood is fully informed, upon condition that said Hood, or his assigns, as the case may be, punctually pay said Frellsen the balance due upon his said judgment, less the credit above stated, as follows: Seven thousand dollars on or before the 15th day of December next, and eight thousand dollars annually from that date for four years, and the balance at the end of five years from the 15th of December next, and also all costs and expenses attending said sheriff's sale, and other incidental expenses attending this arrangement, and all taxes now due or which may become due hereafter on said

property; and also pay to Sparrow and Montgomery two thousand five hundred dollars, in four equal annual payments, from 15th December next, with 8 per cent interest thereon from that date, it being understood that the failure of the said Hood or his assigns to punctually pay any of the amounts above stated at the dates fixed is to operate as a discharge and to release the said Frellsen from all his obligations hereon. The costs and expenses named above are to be paid on or before the 15th December next.

"The said Frellsen agrees further that he will lease to said Hood, or to his assigns, the said property, from year to year, whilst this agreement is in force, until he is paid in full for such annual rent as he may think just, not, however, to exceed $8,000 a year, with the understanding that he will credit the rent which may be paid him upon the yearly installments as above stated; and further, that if the said Hood or his assigns fail to pay punctually any of the annual installments as above stated, after having paid one or more of them, and this agreement has become null and void thereby, the said Frellsen will pay back to him or his assigns any surplus remaining, after deducting all interest which might accrue on the said above named judgment from this date.

"Witness our hands this 26th day of October, 1868.

Henry Frellsen,
By his att'y in fact, Edw. Sparrow,
Govy Hood,
Henry Frellsen."

Hood failed to pay the amount provided to be paid on the 15th of December, 1868. On the 29th of December, 1868, he filed a voluntary petition in bankruptcy, in the District Court of the United States for the District of Louisiana, and was adjudged a bankrupt on the 26th of January, 1869. Emory E. Norton was appointed his assignee in bankruptcy, and the usual assignment was made to Norton. Hood received his discharge in bankruptcy on January 27, 1871.

In the latter part of the year 1869, Frellsen sold and conveyed the Black Bayou Plantation to one Alling for the sum of $32,000, upon a credit. He had also collected $2,212 on the sale of the Wilson Place, mentioned in the agreement of October 26, 1868, and had received, as proceeds of cotton grown on the plantations after the seizure and sale of 1868, and accepted by him in payment of rent, $5,598.92. On the first of May, 1871, an account current was stated between Hood and Frellsen, charging Hood with the amounts of the seven notes dated February 15, 1862, and with the $300 for the insurance premiums, and with interest on those amounts to the 18th of February, 1866, making due on the last named date $49,921.52, and charging him with interest thereon to January 14, 1869, viz., $11,648.85, and with sheriff's fees on the sale of the property, $227, making a total amount due by him, January 14, 1869, of $61,807.37. The account credited him, on the last named date, with the proceeds of the cotton, $5,598.92, leaving a balance due on that date of $56,208.45. It then charged him with interest on that amount to January 1, 1870, namely, $4,320.38, making the amount due on the last named date $60,528.83. It then credited him, on that date, with $32,000 as the proceeds of the sale of the Black Bayou Plantation, and with $2,212 collected on the Wilson note, leaving due January 1, 1870, $26,316.83, to which was added, for the taxes of 1869, $721.50, and interest to May 1, 1871, $3,113.68, making due on the last named date, by Hood to Frellsen, $30,152.03.

On the first of May, 1871, Frellsen executed a deed to Hood, conveying to him: (1) the Home Place, containing 1500 acres; (2) the south half of the Hood and Wilson Place, containing 346 acres (the Hood and Wilson Place having been partitioned between Frellsen and the Wilson heirs in May, 1870, and the south half of it, containing 346 acres, having been set off to Frellsen), and (3) the 1992.75 acres, for the consideration of $30,152 (being the amount stated to be due by the account current), payable in six equal annual installments, for which Hood gave six notes for $5,025.33 each, bearing 8 per cent. interest from May 1, 1871, payable respectively at one, two, three, four, five and six years after date, to the order of Frellsen. The conveyance, which was executed also by Hood, declared that Hood specially mortgaged and hypothecated to Frellsen all the property so conveyed, and contained a *pact de non alienando*. Hood went into possession of the property, but did not make any payments upon any of the notes.

On the 24th of December, 1874, Frellsen obtained from the Thirteenth Judicial Court for the Parish of Carroll an order of executory process, in a suit then brought by him in that Court against Hood, ordering the seizure and sale of the property covered by the instrument of May 1, 1871. Notice of the order was served upon Hood. Thereupon, Hood commenced a suit by petition against Frellsen in the same district court. The petition alleged that certain credits ought to be allowed on the six notes, which sums the petitioner pleaded in compensation and payment of the claim of Frellsen. The petition also prayed for an injunction against further proceedings in the seizure and sale of the property, and for a judgment that the six notes were paid, and for a further judgment in favor of Hood against Frellsen for $8,000, as the amount due him by Frellsen in excess of the notes. By an amended petition, Hood prayed a trial by jury. He also filed another amended petition, in which he set forth that the sale under the executions on the judgment of April 2, 1886, was in effect a consent conveyance; that it was agreed that Frellsen should take title to the property as security for his debt; that Hood was to continue to reside on the Home Place as before, which he did; that Frellsen was to lease out the land and collect the rents, and credit Hood with the amount on the indebtedness evidenced by the judgment; that it was also agreed that Hood should have the right to negotiate a sale of the property, and Frellsen should pass the title, and collect the price, and credit Hood with the amount on the judgment debt; that, accordingly, the Black Bayou Place was conveyed to Alling for $32,000; that Frellsen was to reconvey to Hood the legal title to the remainder of the property after the payment of the judgment; that, in pursuance of such agreement, Frellsen, in May, 1871, reconveyed such title to Hood; that, at that time, Hood was induced by the

agent of Frellsen to sign the mortgage notes, whereas in fact he did not then owe Frellsen anything; that he was old, ignorant, feeble in body and mind, and broken down and crushed by his misfortunes and losses in the war; and that the entire business, as well as the bankruptcy proceedings, were gotten up by the agent of Frellsen, in the interest of Frellsen and said agent, for the purpose of defeating other creditors of Hood and of defrauding him.

On the commencement of the suit by Hood, he obtained an injunction forbidding a sale by Frellsen. Frellsen answered the petition, denying its allegations, averring that Hood had received all the credits to which he was entitled, and set up as a defense the fact that Hood had been discharged in bankruptcy on the 27th of January, 1871. The State District Court, in December, 1878, sustained the petition of Hood, so far as to reduce the amount due by him on May 1, 1871, to $6,564.06, with interest at 8 per cent per annum from that date, less a credit thereon of $1,200, to take effect from January 1, 1872. On an appeal taken by Frellsen to the Supreme Court of Louisiana, that court, in May, 1879, reversed the judgment of the lower court, and gave judgment in favor of Frellsen, rejecting the demand of Hood and dissolving the injunction. *Hood* v. *Frellsen*, 31 La. Ann. 577.

Norton, the assignee in bankruptcy of Hood, then filed the bill in equity in this suit, in the District Court of the United States for the District of Louisiana, against Hood and Frellsen and one Asberry, Sheriff of the Parish of East Carroll. The bill set forth that Hood was insolvent during the whole of the years 1866, 1867, and 1868; that Frellsen advised Hood to go into bankruptcy and relieve himself of his debts; that the confession of judgment by Hood, the issuing of executions upon it, the sales at auction of the four parcels of land to Frellsen, and the conveyance of May 1, 1871, by Frellsen to Hood, were fraudulent simulations, for the purpose of enabling Hood to put his property beyond the reach of his creditors and of enabling Frellsen, by means of an unlawful preference, to obtain payment of his claim in full; that, to that end, it was agreed that Frellsen should nominally execute the confessed judgment, and should nominally buy in all the property of Hood, and should hold the same until after Hood should have obtained his discharge in bankruptcy, and then a reconveyance should be made to Hood; that Hood should remain in possession and control of the properties, and they should be his, he being liable for all taxes, costs and expenses, and entitled to all the rents and revenues and the proceeds of sales; that the agreement on the part of Frellsen was that he was simply to receive the amount of his judgment, principal, interest and costs, in full, and was to be considered only as the nominal owner of the property; that the sheriff took no possession of the property under the *fi. fa.* of July, 1868; that, during the whole time Hood was in bankruptcy, from December 29, 1868, to January 27, 1871, he remained in possession of all the properties except the Black Bayou Place, and regularly paid the taxes, and was treated as the owner by Frellsen, who accounted to him for some of the rents and for the proceeds of the sale of the Black Bayou Plantation, by crediting them on the judgment during the time when Hood was an undischarged bankrupt; that such fraudulent conspiracy between Hood and Frellsen was not known to the plaintiff until within a few weeks past; that the existence of the fraud was brought to light during the trial of the above named suit, brought by Hood against Frellsen, when the agreement of October 26, 1868, was first produced, in December, 1878; and that, in consequence of the dissolution of the injunction in that suit, Frellsen was proceeding to sell the Home Place and the Hood and Willson Place under the executory process so issued by him, The bill prayed for a decree adjudging the plaintiff to be the owner, as assignee in bankruptcy, of all the properties above mentioned, from the time of the filing of the petition in bankruptcy, and entitled to recover the rents thereof; that the mortgage of May 1, 1871, made by Hood, might be canceled; and that the sale under the executory process of Frellsen might be enjoined. On the filing of the bill, a restraining order was issued in accordance with its prayer.

Frellsen answered the bill, asserting the validity of the judgment confessed by Hood and of the executions issued thereon, and of the purchases made by Frellsen at the auction sales. He denied the allegations that there was any pretended sale or simulated title, or any fraud or collusion at the sales or in the purchases. He averred that the consideration for the agreement of October 26, 1868, and the motives for it were set forth therein; that the motives were a disposition to oblige and assist Hood by affording him an opportunity to reinstate himself, if he should find it practicable; that the consideration was that Hood should pay with exact punctuality the debt owing by him, in the manner set forth in the agreement; that not one of the payments provided for by the agreement was made; that the agreement ceased to be operative before any order was made on Hood's petition in bankruptcy; that neither the plaintiff nor Hood had ever offered to pay the installments of money mentioned in the agreement; that, in 1868, 1869, 1870, and afterwards, the property was under the exclusive control of Frellsen and subject to his title and possession, as purchaser; that Frellsen made no concealment of the agreement of October 26, 1868; that that agreement became inoperative and valueless by the discharge of Hood in bankruptcy; that the conveyance and mortgage of May 1, 1871, were made after such discharge in bankruptcy; and that the property specified in that mortgage was never within the possession, control or authority of the District Court of the United States, or of the plaintiff.

A replication was filed to this answer and proofs were taken on both sides; and, on the 18th of June, 1881, the District Court entered a decree, that the judgment in favor of Frellsen against Hood in 1866, and the executions thereunder in 1868, with the sales and conveyances by the sheriff, were valid and operative; that no fraud, collusion or malpractice was established against Frellsen; that those proceedings entitled him to the property conveyed to him, discharged from any claim of the plaintiff; that any surplus arising from the sale under the executory process in favor of Frellsen

should not be paid to Hood, but should be paid to the complainant as assignee in bankruptcy; that the injunction should be dissolved; and that the sheriff should dispose, under the direction of the court, of the surplus that might remain after paying the debt due to Frellsen, and the costs of suit.

The plaintiff appealed to the circuit court, which, on the second of February, 1884, affirmed the decree in favor of Frellsen, and dismissed the bill as against him, and remanded the cause to the district court to enter such decree, and for such further proceedings against Hood, in favor of the plaintiff, as might be consistent with the equity of the bill, and proceedings against him personally. From that decree the plaintiff has appealed to this court.

We find no difficulty in holding that the decree of the circuit court was correct. The case made by the bill is not established. On the contrary, the answer of Frellsen is supported by the proofs. His acts and doings throughout appear to have been fair and honest. The debt due to him, as secured by the confessed judgment, was an honest debt. By means of his purchases at the auction sales on the executions, he became the absolute owner of the properties he bought. The agreement of October 26, 1868, does not contain or suggest anything fraudulent. It assigns fair and natural motives for the favor he was doing to Hood. Although the agreement was executed by Hood as well as Frellsen, it contains no covenants or stipulations on the part of Hood, and no agreement by Hood to pay the amounts mentioned in it, making up the balance due on the judgment. The only stipulations in it are those made by Frellsen. He does not, by the agreement, sell and transfer the property to Hood, but only stipulates that he will sell and transfer it on condition that Hood shall punctually make the payments specified in it; and it contains an express stipulation that the failure of Hood or his assigns to punctually pay any of the amounts stated, at the times fixed, is to operate as a discharge of Frellsen from all his obligations therein contained.

Hood wholly failed to take the benefit of this agreement, but, instead thereof, immediately after the first day of payment mentioned in it, he filed a petition in bankruptcy. By the terms of the agreement, all rights existing under it in favor of Hood had ceased prior to the filing of the petition in bankruptcy, and there was no right growing out of the agreement which passed, or could pass, to the assignee in bankruptcy, as representing Hood, because, in that respect, the rights of the plaintiff attached only to rights which existed in favor of Hood at the time of the filing of the petition in bankruptcy. The only other right which the plaintiff could have, in his capacity as assignee in bankruptcy, was the right to reach property transferred by Hood in fraud of his creditors. As to that, the proof is that no property was transferred by Hood in fraud of his creditors, or taken by Frellsen in fraud of such creditors.

We see nothing to impeach the validity of the rights of Frellsen sought to be enforced by the executory process, and affirm the decree of the Circuit Court.

INLAND AND SEABOARD COASTING COMPANY, *Plf. in Err.*,
v.
GEORGE W. HALL.

(See S. C. Reporter's ed. 121, 122.)

Case followed.

Judgment reversed, and cause remanded with directions to take further proceedings therein, in accordance with the opinion in Metropolitan R. R. Co. v. Moore, 121 U. S. 558 (30: 1022).

[No. 121.]

Submitted Dec. 22, 1887. Decided Jan. 9, 1888.

IN ERROR to the Supreme Court of the District of Columbia. *Reversed.*

Mr. **Nathaniel Wilson,** for plaintiff in error:

The court below erred in dismissing the appeal taken from the order made at the special term, disallowing the defendant's motion for a new trial, on the ground that the verdict was against the weight of evidence.

Metropolitan R. R. Co. v. *Moore,* 121 U. S. 558 (30: 1022).

Messrs. **L. G. Hine** and **Sidney T. Thomas,** for defendant in error:

The appellee was not a volunteer upon defendant's wharf, but was there upon appellant's invitation; and it was bound to exercise ordinary care that no harm came to him by reason of any unsafe condition of its premises.

Holmes v. *North Eastern R. Co.* L. R. 4 Exch. 254; Cooley, Torts, 550, 605; *Indermaur* v. *Dames,* L. R. 2 C. P. 311.

Appellee was not a fellow servant.

Burke v. *Norwich & W. R. R. Co.* 34 Conn. 474; *Smith* v. *New York & H. R. R. Co.* 19 N. Y. 127; *Swainson* v. *North Eastern R. R. Co.* L. R. 3 Exch. Div. 341.

The verdict for $4,000 was not excessive.

Illinois Cent. R. R. Co. v. *Barron,* 72 U. S. 5 Wall. 90 (18: 591); *Thurston* v. *Martin,* 5 Mason, 497; *Walker* v. *Erie R. Co.* 63 Barb. 260; *Chicago & A. R. R. Co.* v. *Wilson,* 63 Ill. 167; *Louisville & N. R. R. Co.* v. *Fox,* 11 Bush, 495; *Metropolitan R. R. Co.* v. *Moore,* 121 U. S. 558 (30: 1022).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This judgment is reversed on the authority of *Metropolitan R. R. Co.* v. *Moore,* 121 U. S. 558 [30: 1022] *and the cause remanded,* with directions to take further proceedings therein in accordance with the opinion in that case; that is to say, to consider the appeal from the order at special term denying the motion of the Inland and Seaboard Coasting Company for a new trial, made on the ground that the verdict was against the weight of the evidence.

MARY E. R. BOYD, By Her Next Friend JAMES R. BOYD, *Appt.*,
v.
WILLIAM G. WYLY ET AL.

(See S. C. Reporter's ed. 98-107.)

Removal of executor—fraudulent sale.

1. In proceedings to remove a testamentary executor, where it appeared that he had abandoned his duties and deserted his trust and had no domicil or residence in the State, and that certain attorneys were authorized to oppose the application for his removal, and appeared for him for that purpose, *held*, that he was an actual party to the proceeding which resulted in his removal from his office as executor, and that the appointment of another person in his place, to continue the unfinished administration of the succession, was valid.

2. Where, owing to a general depreciation of property immediately after the war and the scarcity of ready money, lands were sold for low prices when disposed of at forced sale, *held*, that the opinions of the witnesses, of the intrinsic value of the land in question to hold, and not of the actual cash market value at the time when sold, are not sufficient, under the circumstances of this case, to establish that the lands in question were sold at a price so grossly inadequate as to shock the conscience, or that the sale was effected by fraudulent means and through fraudulent motives, or to impeach it to such a degree that it should be set aside.

[No. 118.]

Argued Dec. 14, 15, 1887. Decided Jan. 9, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Louisiana, dismissing a bill to set aside proceedings for the sale of property by an administrator appointed in place of a testamentary executor. *Affirmed.*

Statement by *Mr. Justice* **Matthews:**

This is a bill in equity, filed in the Circuit Court of the United States for the Western District of Louisiana on September 10, 1881, on behalf of Mary E. R. Boyd, wife of Frederick W. Boyd, by her son and next friend, James R. Boyd, citizens of Wisconsin, against William G. Wyly and Charles Egelly, of the Parish of East Carroll, citizens of Louisiana, and to which by an amendment Frederick W. Boyd, of Wisconsin, was made an additional defendant as dative testamentary executor of the last will of James Railey, late of Adams County, Mississippi. The bill avers that on February 1, 1860, James Railey, the father of the complainant, made his last will, and died in the summer of that year, leaving large estates in Mississippi, Arkansas and Louisiana, which were disposed of by the will, bequeathing to the complainant a certain plantation in the Parish of Carroll, Louisiana, known as the Raleigh Plantation; that James G. Carson was named in the will as executor; that the will was duly probated in the proper court of the Parish of Carroll, and that Carson qualified according to law as executor, and took upon himself the burden of the execution of the will; that an inventory and appraisement of the property of the succession in the Parish of Carroll were made on December 12, 1860, and that the lands of said Raleigh Plantation were valued at $119,393, which was the fair and reasonable value of the same; that thereafter, Carson having died, Frederick W. Boyd, the husband of the complainant, was duly appointed dative testamentary executor of said will, and qualified as such, and that on July 16, 1866, in due course of administration, he caused the said Raleigh Plantation to be again inventoried and appraised as containing 1935 acres at $55 per acre, making in the aggregate $95,645, which is alleged to be the fair and reasonable value of the same at that time.

The bill further alleges that in July, 1868, the defendants Wyly and Egelly combined and confederated with Edward Sparrow and J. West Montgomery, attorneys at law, and with divers other persons, to defraud the complainant by procuring under the forms of law, a sale to Wyly of the Raleigh Plantation at a price far below its real value; that to accomplish the said fraud they took advantage of the temporary absence of Frederick W. Boyd, the dative testamentary executor, and instituted on July 16, 1868, proceedings in the Parish Court of Carroll Parish to destitute him from his said office, and to procure the appointment of Egelly as administrator of the succession; that Boyd was not made a party to the proceedings, either personally or by the appointment of a *curator ad hoc* to represent him, and had no notice of the proceedings nor of any subsequent proceedings resulting in the sale of the Raleigh Plantation to Wyly, until after the same had been consummated; that on the same day on which said proceedings to destitute Boyd of the executorship were instituted (merely upon the *ex parte* affidavit of Montgomery, one of the lawyers who had instituted the proceedings) judgment was rendered, removing the executor from his office, and thereafter, on September 16, 1868, the defendant Egelly was appointed administrator of the succession, and gave bond as such, with his attorney, Montgomery, as surety.

The bill further alleges that on the same day the proceedings for the destitution of the executor were instituted and ended, July 16, 1868, an order was obtained for a new inventory and appraisement of the property of the succession, and that the defendants, Wyly and Egelly, in combination with Montgomery, caused such an inventory and appraisement to be made on September 4, 1868, by ignorant and incompetent appraisers, who corruptly and fraudulently appraised the value of the lands of the Raleigh Plantation at the insignificant sum of $2,533.05. The bill further alleges that, under the pretext that it was necessary to sell the said plantation in order to pay debts of said succession to the amount of $46,000, of which $6,000 were alleged to be due to Sparrow & Montgomery, as attorneys of the estate, an order was obtained from the parish court for the sale of the same for cash, and that, after a single advertisement in an obscure paper, the plantation was, without the knowledge of the complainant, or the said Frederick W. Boyd, on October 20, 1868, fraudulently adjudicated to Wyly for the said sum of $2,533.05, being at the rate of $1.50 per acre for the said lands. The bill further alleges that the fraudulent character of the transaction was well known to Wyly, who participated therein and who thereby became a purchaser of the said plantation in bad faith, and should be held in equity to have acquired the legal title to the said Raleigh Plantation in trust for the complainant, responsible to her from the date of his purchase for the rents and revenues thereof. The bill further alleges that shortly after the adjudication of the plantation to Wyly he sued out in the proper court a process known to the law of Louisiana as a monition, alleging that he was an innocent third party, who had purchased the plantation in good faith, and praying for an adjudication of homologation of title, which was accordingly entered.

The bill charges that under the laws of Louisiana said judgment of homologation of title extends only to the cure of defects of form, and not to the validation and ratification of acts of fraud and spoliation, such as are alleged to have infected the pretended purchase of said property by Wyly. The bill calls for answers, but not under oath, and prays for a decree declaring the pretended sale of the Raleigh Plantation by the said Egelly to Wyly on October 20, 1868, to be collusive, fraudulent, null and void, and that Wyly was a purchaser thereof in bad faith, and that he be required to deliver possession thereof to the complainant, to account to her for the fruits and revenues thereof, and for general relief.

The defendants, Wiley and Egelly, answered the bill, setting up various technical objections to its frame in bar of the relief prayed, and also denying positively and circumstantially all allegations therein imputing or charging fraud in the sale and purchase of the said plantation.

The cause was heard upon the pleadings and full proofs, when the court found that Wyly had acquired, by the proceedings referred to, a valid title to the property without fraud in fact or in law on his part, and was entitled as a purchaser in good faith to the protection of the defense based upon the statutory prescription of ten years. The bill was accordingly dismissed; from which decree this appeal is prosecuted.

Messrs. Robert Mott and **Wm. A. Maury,** for appellant:

That the relief prayed for in the bill should have been granted, see *Psyche* v. *Paradol*, 6 La. 366.

Where a legacy is given to two jointly, one cannot sue for it alone; although where there are several legacies each may sue for his own.

1 Dan. Ch. Pl. & Pr. 201, 211.

A legatee may sue alone for his own legacy. *Id.* 238.

A particular legatee may pursue specific property aliened.

McLeod v. *Drummond*, 14 Ves. Jr. 353; *S. C.* 17 Ves. Jr. 167; 1 Story, Eq. Jur. § 424.

No previous acceptance of the succession is necessary before bringing suit.

O'Donald v. *Lobdell*, 2 La. 301; C. Code, La. 162, art. 74.

He who assumes the quality of heir in a judicial proceeding accepts the succession.

Le Cesne v. *Cottin*, 2 Mart. N. S. 475; *Le Page* v. *N. O. Gaslight & B. Co.* 7 Rob. (La.) 183.

Against a spoliator or unlawful possessor of succession property, a joint heir or proprietor may maintain a petitory action for the entire property, without joining with him in the action his coheirs or coproprietors.

Dufour v. *Camfranc*, 11 Mart. 713; *Pearson Grice*, 6 La. Ann. 235; *Compton* v. *Mathews*, 3 La. 134.

There is no law requiring a particular legatee in any case to give security for the payment of other legatees or of creditors.

C. C. 1012, 1671 (1664); *Succession of Fisk*, 8 La. Ann. 707; *Succession of Boutte*, 30 La. Ann. 128.

Nor is it necessary that the particular legatee should have had possession or seisin of the specific property bequeathed to him, and been dispossessed of it, in order to enable him to maintain an action to recover it from an unlawful possessor or spoliator, claiming title to it under a collusive and fraudulent sale by an executor or administrator.

Art. 1630, C. C.; *Psyche* v. *Paradol*, 6 La. 366; C. P. 43.

All claims to real property belong to courts of ordinary jurisdiction.

O'Donogan v. *Knox*, 11 La. 388; *Donaldson* v. *Dorsey*, 4 Mart. N. S. 509; *Casanova* v. *Acosta*, 1 La. 183; *Lesassier* v. *Lesassier*, 15 La. 55; *Trichel* v. *Bordelon*, 9 Rob. (La.) 191; *Choppin* v. *Forstall*, 28 La. Ann. 308; *Pratt* v. *Northam*, 5 Mason, 95; *Michoud* v. *Girod*, 45 U. S. 4 How. 503 (11:1076); *Gaines* v. *Hennen*, 65 U. S. 24 How. 553 (16:770).

In Louisiana relief will be afforded in courts of ordinary jurisdiction, against proceedings and judgments of courts of probate, where effected by fraud and collusion. The equity jurisdiction of the Courts of the United States is not affected, nor its remedies limited, by state practice or legislation.

Payne v. *Hook*, 74 U. S. 7 Wall. 425 (19:260) and cases there cited. *Dupuy* v. *Bemiss*, 2 La. Ann. 509; *Shelton* v. *Tiffin*, 47 U. S. 6 How. 185 (12:397); *Gillespie* v. *Twitchell*, 34 La. Ann. 299.

Complainant's right of action is not barred by prescription, by the law of Louisiana.

Art. 3542, La. Civil Code.

A total defect of citation or notice does not come within the scope of the rule of prescription enacted by article 3543; nor do defects in judicial proceedings or sales attributable to fraud and collusion of parties.

Morton v. *Reynolds*, 4 Rob. (La.) 26; *McCluskey* v. *Webb*, 4 Rob. (La.) 202; *Gaines* v. *N. O.* 73 U. S. 6 Wall. 642 (18:950); *Gaines* v. *De la Croix*, 73 U. S. 6 Wall. 720 (18:966).

By the Code of Practice, arts. 1017, 1018, it is essential to the validity of a proceeding to remove an executor, that the action should be commenced by petition and citation, and be conducted in the usual form.

Scott v. *Lawson*, 10 La. Ann. 547; *Succession of Winn*, 27 La. Ann. 688; *Succession of White*, 9 Rob. (La.) 353; *Succession of Guilbeau*, 25 La. Ann. 474.

The order removing F. W. Boyd from the executorship, having been made without citation, notice or appearance, was a nullity.

When a judgment is absolutely null, anyone having the least interest in opposing its effect may, at any time and in any form of proceeding, have such nullity pronounced.

Quine v. *Mayes*, 2 Rob. (La.) 510; *Conery* v. *Rotchford*, 30 La. Ann. 692.

The probate court cannot have jurisdiction to order the sale of property unless its jurisdiction is invoked by parties lawfully entitled to do so, and unless those against whom the judgment is to have effect are notified of the proceeding, by citation or other lawful process, or unless they voluntarily appear.

Boswell v. *Otis*, 50 U. S. 9 How. 350 (13:170); *Walden* v. *Craig*, 39 U. S. 14 Pet. 154 (10:397).

The complainant was an indispensable party to any suit to subject that property to the payment of the testator's debts.

Doriocourt v. *Jacobs*, 1 La. Ann. 214.

The judgment under which the Raleigh Plantation was sold to Wyly was void, for want of jurisdiction in the court which rendered it.

Nations v. *Johnson*, 65 U. S. 24 How. 200 (16: 630); *Baldwin* v. *Hale*, 68 U. S. 1 Wall. 233 (17: 534).

The purchaser, at a sale, under and by virtue of a void judgment, is without title.

Freeman, Executions, § 20.

Defendant cannot protect himself in the enjoyment of the fruits of his fraud and spoliation by the effect of the process of monition.

City Bank v. *Walden*, 1 La. Ann. 46.

This demurrer is utterly untenable.

Shelton v. *Tiffin*, 47 U. S. 6 How. 185 (12: 397); *Sands* v. *Codwise*, 4 Johns. 588; *Muse* v. *Yarborough*, 11 La. 531; *Martin* v. *Smith*, 1 Dill. 85.

Inadequacy of the price may be so gross as to shock the conscience, and amount in itself to conclusive and decisive evidence of fraud.

Coles v. *Trecothick*, 9 Ves. Jr. 246; *Underhill* v. *Horwood*, 10 Ves. Jr. 219; *Copis* v. *Middleton*, 2 Madd. 410; *Stilwell* v. *Wilkins*, Jacob, 280; *Peacock* v. *Evans*, 16 Ves. Jr. 512; *Gwynne* v. *Heaton*, 1 Bro. Ch. 9; *Osgood* v. *Franklin*, 2 Johns. Ch. 23; *S. C.* 14 Johns. 527; Perry, Trusts, § 810; *Scott* v. *Tyler*, 2 Dick. 725.

Messrs. **J. R. Beckwith** and **John T. Ludeling**, for appellees:

The plaintiff, a married woman, is not authorized to bring this suit.

Daniell, Ch. Pl. 109.

The succession of James Railey is still unsettled in the Probate Court of East Carroll; the succession and heirs are both necessary parties.

The debts must be paid before any legacies can be.

Civil Code, art. 1671; *N. O.* v. *Prats*, 10 Rob. (La.) 459; *Tucker* v. *Beatty*, 12 Rob. (La.) 548; *Phelan* v. *Ax*, 25 La. Ann. 379; *Brown* v. *Jacobs*, 24 La. Ann. 530.

Fraud is not to be presumed.

2 Story, Eq. Jur. 199.

The complainant has never tendered the purchase money.

Barrelli v. *Gauche*, 24 La. Ann. 324; *Janin* v. *Franklin*, 4 La. 198; *Barrett* v. *Bullard*, 19 La. 281; *Stockton* v. *Downey*, 6 La. Ann. 581; *Chambers* v. *Wortham*, 7 La. Ann. 113; *Brown* v. *Bowny*, 80 La. Ann. 174.

The judgments are all final and conclusive against all persons.

Code Practice, 593, 613; *Morgan* v. *Locke*, 28 La. Ann. 807; *Shields* v. *Chase*, 32 La. Ann. 409; *Succession of Quin*, 30 La. Ann. 947; *McGoon* v. *Scales*, 76 U. S. 9 Wall. 30 (19: 547).

The prescription of five years under article 3543 cures all informalities in public sales.

Davis v. *Gaines*, 104 U. S. 399 (26: 762); *Wells* v. *Wells*, 30 La. Ann. 939; *Bicknell* v. *Comstock*, 113 U. S. 149 (28: 962).

The defendant, Wyly, is protected by the decree or judgment of the probate court ordering the sale. He is not required to look beyond the judgment of the court having jurisdiction of the thing.

Succession of Gernon, 14 La. Ann. 622; *Lalanne* v. *Moreau*, 13 La. 431; *Woods* v. *Lee*, 21 La. Ann. 507; *State* v. *Gordon*, 18 La. Ann. 530; *Succession of Hebrand*, 18 La. Ann. 493; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 166 (7: 384); *Davis* v. *Gaines*, 104 U. S. 391 (26: 759); *Grignon* v. *Astor*, 43 U. S. 2 How. 319 (11: 283); *Comstock* v. *Crawford*, 70 U. S. 3 Wall. 403 (18: 37); *Newell* v. *Norton*, 70 U. S. 3 Wall. 267 (18: 273).

Mr. Justice **Matthews** delivered the opinion of the court:

The first point raised in argument on the part of the complainant is as to the validity of the proceeding in the Court of East Carroll Parish, by which Frederick W. Boyd was, in the language of the Louisiana law, destituted of his office as dative testamentary executor, and the defendant Egelly substituted in his place. It is alleged in the bill, and insisted upon in argument, that this proceeding was had without any actual, and without any legal constructive notice to Boyd and that it is, therefore, null and void. It is charged as a consequence, that Egelly became, not the rightful executor, but executor *de son tort*, and that of this Wyly had notice imputed to him by law because shown by the record. It is thence argued, as an inference reasonably to be deduced, that the proceeding must have been in pursuance of the fraud charged in the bill, and, taken in connection with the subsequent proceedings and their result, constitutes proof of the fraud charged.

It appears from a transcript of the record of the proceedings in question, that on July 16, 1868, there was filed in the office of the Parish Court for the Parish of Carroll, a petition on behalf of certain creditors of the succession of James Railey, among whom are named Edward Sparrow and J. W. Montgomery, in which it is alleged that Frederick W. Boyd, after qualifying as dative testamentary executor in 1866, had leased out the plantation for one year and cultivated it himself during the year 1867; that he had never filed any account of his administration, but had appropriated and used the rents and revenues of the estate for his individual benefit, without paying any of the creditors any portion of their just dues; that he had abandoned his administration, and had no domicil or residence in the State, and was permanently absent therefrom; that he had never given any sufficient bond for the faithfulness of his administration, the sureties thereon being insolvent, and had no property in the parish, nor in the State, and that he had left no power of attorney authorizing anyone to represent him in the management of the estate. The petitioners, therefore, prayed that the office of the said Boyd and the administration of the estate might be declared to be vacated and unrepresented; that Boyd be decreed to have abandoned his trust, and that, in order to protect the interest of the creditors, an administrator be appointed to finish the administration of the estate, and that Egelly be appointed thereto. This petition was signed on behalf of the petitioners by Sparrow and Montgomery as their attorneys, and was verified by the affidavit of Montgomery.

Among the papers on file in the matter of this proceeding in the parish court appears one styled "Opposition of F. W. Boyd," which is as follows:

"To the Hon. Geo. C. Benham, Parish Judge in and for the Parish of Carroll, State of Louisiana:

"The petition of Frederick W. Boyd, a resi-

dent of the State of Mississippi, with respect shows that he is the duly appointed executor of the last will and testament of Jas. Railey, late resident of your said parish and State; that he has duly administered the property of the succession of the said Railey since his appointment and confirmation as executor under the will.

"Petitioner further shows that an application has been made to your honorable court, praying that C. R. Egelly, Esq., be appointed dative testamentary executor of the said succession, notwithstanding your petitioner is acting as executor of the same.

"Wherefore your petitioner prays that the said application be rejected, and that the said applicant pay all costs of this proceeding, and for all general relief."

This is signed by Goodrich, Pilcher and Montgomery, as attorneys. There are no official marks upon it showing the fact or date of its being filed. The testimony of Charles M. Pilcher, one of the firm who signed it, is that the document was written by him from a memorandum given to him by his partner, Goodrich, who was the member of the firm who had charge, during the administration of Boyd, of the business of the succession of the Railey estate. The witness states that the paper was prepared and filed, as he believes, on behalf of Boyd, by virtue of authority of the firm to act for him; and he states as his belief, that when prepared and filed it was upon a full sheet of paper, upon the back of which the style of the case was noted, and on which would also be indorsed the fact and date of its being filed in court, and that the paper bears evidence of having been since mutilated by this half sheet being torn off. F. F. Montgomery, the only other surviving member of the firm whose name appears signed to the paper in question, was examined as a witness, and has no recollection of the paper nor of the transaction, but testifies that the document is in the handwriting of his partner, Pilcher. Another witness, R. J. London, testified that he was deputy clerk of the court at the time when these proceedings took place, and having examined the document, stated that he believed it to be the original opposition of Boyd to the appointment of C. R. Egelly; that his impression is that it was marked filed, and put among the mortuary papers of the succession of James Railey by himself as deputy clerk, though the part of the sheet upon which the title was written and the filing indorsed thereon seemed to have been torn off. The handwriting is that of Charles M. Pilcher. He says: "I know that an opposition was filed, and my impression is that the document marked B is the one. The opposition I refer to was regularly filed and put away among the mortuary papers, as was customary in like cases."

Frederick W. Boyd was not called by the complainant as a witness, though he was a party defendant in the cause, having entered his appearance in person, but filed no answer, permitting a decree to be taken against him by default. If the facts were as alleged on behalf of the complainant, that this proceeding, by which he was removed from his office, was without notice to him, the fact could easily have been established by his oath. The allegations contained in the petition for his removal, that he had abandoned his duties and deserted his trust as dative testamentary executor of the estate of Railey, and that he had no domicil or place of residence in the locality or in the State, are not denied by him; nor does he deny that the firm of Goodrich, Pilcher & Montgomery were authorized to oppose the application for his removal, and that they, in fact, appeared for him for that purpose. The conclusion, therefore, cannot be resisted that he was an actual party to the proceeding which resulted in his removal from his office as executor, and that the appointment of Egelly in his place, to continue the unfinished administration of the succession, was valid.

The next point urged in support of the equity of the bill is that the sum at which the plantation was valued by the appraisers and sold to the defendant Wyly is so grossly inadequate, compared with the true value of the property, as to shock the conscience of the court, and to furnish full proof of the fraudulent means by which it was effected, and of the fraudulent motives and intent of the parties in effecting it. A large mass of testimony in the case bears upon this point. It is undoubtedly true that, compared with the previous appraisements of the property and with its real value prior to the breaking out of the Civil War in 1861, the price at which the plantation was sold to Wyly appears grossly out of proportion; and several witnesses are called who do testify that the appraisement was below what it ought to have been, when made in 1868. On cross examination, however, some of these very witnesses also show by their testimony that the standard in their own minds by which they test the fairness of the appraisement is their opinion of the intrinsic value of the property to hold and to use in reference to the future, and not the actual market value of the property at the time to be sold for cash.

It also abundantly appears from the evidence in the cause that immediately at the close of the war in 1865, and during that year and the following year 1866, there were a great many speculative enterprises entered into by persons from the Northern States investing large sums of cash capital in the cultivation of cotton plantations in the expectation of large profits. These expectations were not realized; on the contrary, almost universally they resulted in disaster, the pecuniary losses usually absorbing the entire amount invested. A reaction immediately set in, producing a corresponding depression in values. There was scarcely any cash capital in the country for investment. In addition to this, the labor of the country was disorganized as a result of the war, and of the political and social disorders which followed it. According to the proof in the case, this disorganization seemed so complete and so hopeless as to paralyze the business and industry of the community, and to lead quite a number to such a despair of the situation as to induce them to abandon the country in order to better their fortunes by emigration to Mexico and South America. The result of the testimony on this point is stated very moderately by the District Judge, Boarman, in his opinion in this case, in the following extract, 18 Fed. Rep. 355:

"In the early years after the war, the testimony in this case affirms what is historically known to be true, that the section of the State

in which the Raleigh Plantation is situate, was, by overflows and other physical and moral causes, almost entirely bereft of its old time prosperity and value. The plantation was greatly damaged by previous overflows, and had but little fencing; and it is shown by defendant Wyly, that he, shortly after purchasing it, expended $25,000 in improvements. Defendant has shown, whatever may have been the general causes that depreciated property on the Mississippi River in 1868, that many thousand acres of land, as valuable as the plantation in question, were sold for prices not unlike the paltry price at which Wyly bought his place. The testimony as to the scarcity of ready money, as to the price for which much valuable land sold when disposed of at forced sale, and as to the political, moral and physical bankruptcy of the country, leads me to believe that the complainant and the unpaid creditors of her father's succession were victims to the indifferent management and neglect of the executor and to the physical and moral prostration of the country, which was apparent everywhere in Louisiana in the early years following the end of the war, rather than to the acts of any of these several defendants."

The defendant Wyly took a more hopeful view, and, upon the basis of a well grounded faith in the future of his country, he was willing to invest his money in real estate, abandoned by its owners, upon valuations made under the authority and with the sanction of the proper judicial tribunals of the locality.

We have examined with scrutiny and weighed with care all the evidence in this cause, and every consideration urged upon us by the zeal and ability of the counsel for the complainant, with a view to ascertain and secure to her her just rights. We are unable to discover any sufficient proof of the particulars of the fraud by which, as she complains, she has been wronged. The sale to the defendant Wyly, however advantageous it has proved to be to him, in our opinion, has not been impeached.

The decree of the Circuit Court was therefore right, and is hereby affirmed.

CORNELIUS GUMBEL, *Plff. in Err.*,
v.
JOHN R. G. PITKIN, U. S. Marshal, ET AL.

(See S. C. Reporter's ed. 131-157.)

Attachment by marshal—powers of court—state attachment—state laws—service by writ—right of creditor.

1. When a marshal, upon a writ of attachment, takes property of a person not named in the writ, the property is in his official custody, and under the control of the court, whose officer he is and whose writ he is executing; and the rightful owner cannot maintain an action of replevin against him nor recover the property specifically in any way, except in the court from which the writ issued; but such owner may intervene by petition in the action, and obtain relief in that manner.

2. The equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse and injustice, are inherent, and as extensive as the necessity for their exercise requires, and may be invoked by strangers to the litigation, without regard to the citizenship of the complaining and intervening party.

3. Where the marshal had taken possession of goods on Sunday, under color of process issued the same day, illegal by the laws of the State, it was his duty, when the sheriff appeared with a lawful writ of attachment from the state court, to surrender possession to him; and, for his failure and refusal to do so, an action at law could be brought against the marshal to recover damages for any loss caused thereby; but where, instead of resorting to such an action, the attaching creditor in the state court applied to the circuit court, under whose process the marshal had taken the goods, that court was entitled to administer equity in the case, and to grant to the intervener suitable and proper relief.

4. By section 915 of the Revised Statutes, the circuit court is authorized, in favor of suitors in that court, to administer the attachment laws of the State in which the court is held; and the exercise of this jurisdiction necessarily draws to itself everything properly incidental, even though it may bring into the court, for the adjudication of their rights, parties not otherwise subject to its jurisdiction.

5. The circuit court in this case acquired exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto; in such case a creditor may be permitted, by service of notice upon the marshal, to make a constructive levy of an attachment issued by a state court upon the property, subject to all prior liens, and without disturbing the marshal's possession.

6. Where the attaching creditor made himself a party to the proceedings in the circuit court by its leave, and proceeded in that tribunal against its officer the marshal, and the creditors for whom he had acted, and on the trial it appeared that the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual, it was competent for the circuit court, and its duty, to hold the marshal liable as garnishee; and, having in its custody the fund arising from the sale of the property, and all the parties interested therein before it, that court was bound to do complete justice between the parties and give such creditor the priority over other creditors to which he was entitled.

[No. 116.]

Argued Dec. 20, 1887. *Decided Jan. 9, 1888.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana. *Reversed.*

The facts fully appear in the following:

Statement of the case by *Mr. Justice* **Matthews**:

This case was before this court on a motion to dismiss the writ of error, the result of which is reported in 118 U. S. 545 [28: 1128]. It is now here for final disposition upon its merits.

It appears by the record that a number of creditors of Joseph Dreyfus brought several actions at law against him as a citizen of Louisiana in the Circuit Court of the United States for that district, the plaintiffs being citizens of other States, in which writs of attachment were issued and levied upon the stock of goods belonging to him contained in a store and warehouse, No. 33 Tchoupitoulas Street, in the City of New Orleans. In these actions judgments were rendered in favor of the several plaintiffs, and proceedings were had in them whereby the attached property in the hands of the marshal was sold, and the proceeds brought into the court for distribution. Pending these proceedings, and before an actual sale under the order of the court, Cornelius Gumbel, a citizen of Louisiana, the present plaintiff in error, filed a petition, called, according to the practice in that State, a petition of intervention and third opposition. In that petition he shows that on October 27, 1888, he instituted a suit in the Civil District Court for the Parish of Orleans against Joseph Dreyfus, and obtained therein a

writ of attachment, which he alleges was executed by a seizure of the defendant's property, being the same as that levied on by the marshal in the actions in the circuit court; that subsequently judgment was rendered in his favor for the amount of his claim and interest, on which a writ of *fi. fa.* was issued to the sheriff of said civil district court, directing the seizure and sale of the same property to satisfy his judgment; that the sheriff was obstructed in the execution of said writs, and the petitioner prevented from realizing the fruits thereof by the fact that the property subject to his attachment is in the actual custody of the Marshal of the United States. The petition particularly sets out the facts constituting a conflict of jurisdiction to be, that on the morning of the 29th of October, 1883, when it was claimed that the sheriff had made his levy under the petitioner's writ of attachment, he found at the store, claiming to exercise rights of possession and control, deputy marshals of the circuit court in charge as keepers, and in execution of writs of attachment issued from that court; that at the time of the seizure made by the sheriff no valid or legal writ had issued from the circuit court; that the writ or writs under which the marshal or his deputies were holding and claiming to hold the property had been issued on Sunday, October 28, 1883, and were absolutely null and void, both by common law and the statute law of Louisiana; that said writs so issued on Sunday, on account of their illegality, were discontinued and abandoned by the plaintiffs in the several suits in which they had been issued; that other writs subsequently issued in the same actions were issued to the marshal, and under them he detained the property, which, however, in the mean time had become subject to the seizure under the petitioner's writ in the hands of the sheriff. The petition prays that the property in the custody of the marshal then advertised for sale should be restored to and placed in the hands of the civil sheriff, to be sold under the petitioner's writs of execution, in order that the proceeds might be distributed by the civil district court, or, if sold by the marshal, that the proceeds of the sale be ordered to be paid over to the civil sheriff, to be distributed by the civil district court, and also "for such other and further aid, remedy, and relief as the nature of the case may require and law and equity permits." This petition of intervention was filed by leave of the court, and with it a transcript of the proceedings in the civil district court in the case of Gumbel against Dreyfus. The motion of the intervener for a stay of the marshal's sale of the goods levied on was denied; and thereupon, on January 21, 1884, by leave of the circuit court, an amended and supplemental petition of intervention was filed by him, and also on the 8th of March, 1884, a second supplemental petition. In these, the petitioner claims that if it be held in fact and in law that the marshal of the circuit court had effected a seizure of the property attached, which vested the jurisdiction of the circuit court as to its disposition and the distribution of its proceeds, and rendered impossible any actual seizure or physical control over the property by the civil sheriff, the intervener is entitled to have his attachment recognized by the circuit court, and to share in the distribution of the proceeds of the property according to priority of time of seizure under the laws of the State; and alleges that, in addition to the efforts made and proceedings had in behalf of the intervener, the United States Marshal had been served with interrogatories as garnishee, and in every legal and practicable way notified of the writ held by the sheriff, whereby a valid seizure was effected on petitioner's behalf, to take rank according to the time at which it was thus executed, and claims, in consequence, to be entitled to payment out of the fund in preference to all other attaching creditors.

The attaching creditors, plaintiffs in the circuit court, were made parties to these petitions of intervention, to which they appeared and answered. The cause came on for hearing in the circuit court, and judgment was rendered therein dismissing the petitions of intervention and distributing the entire fund in court, being the proceeds of the sales of the attached property, to the other parties plaintiffs in the attachments in that court. The facts in relation to the levies under the attachments are found by the court as follows, 20 Fed. Rep. 426:

"Various creditors had obtained attachments on Sunday in this court which were also levied on Sunday. The same and other creditors obtained attachments in several suits also in this court, some early Monday morning, shortly after midnight, and others between 8 and 10 o'clock A. M., which were also levied upon the same property.

"The intervener had obtained his writ from the state court on Saturday. Early Monday morning, shortly after midnight, and while the marshal was holding possession of the property under the Sunday writ alone, the sheriff came to the store where the property was situated for the purpose of serving the writ and demanded entrance, which the marshal refused. The sheriff placed his keepers around the building and guarded the same continuously down to the time of the sale, and served notice of seizure and subsequently process of garnishment upon the marshal in charge of the store (before the service of any of the Monday writs), who had executed the process of attachment from this court. The marshal preserved his possession without interruption from the moment of seizure down to the time he sold the property under the Monday writs, the Sunday writs having been abandoned. The property seized was the wines and brandies, etc., the stock of a wholesale liquor store."

The grounds of law on which the circuit court denied the right of the intervener to participate in the distribution of the proceeds of the sale are stated as a conclusion of law, as follows:

"1. As to the effect of what was done by the sheriff, nothing is before the court except the proceeds of a sale. They and they alone can have an award who show title, and, since all claim under process against the property of a common debtor, those alone who show a levy of the process upon the property. For in this State the issuance and existence of the process create no lien. It disposes of this part of the case to say that the sheriff made no seizure, no caption of the property; its possession was withheld from him and access to it was forcibly denied him. Whether this was done under color

of good or bad writ, or without any writ, all seizure was prevented and no lien was effected. This would end the case of the intervener as to any privilege upon the fund, unless he can maintain that the marshal, holding under color of a writ from this court, can be made to hold also under a writ from the state court subsequently served by the garnishment process. The authorities for this proposition cited are *Patterson* v. *Stephenson*, 77 Mo. 329, and *Bates* v. *Days*, 17 Fed. Rep. 167. Those cases are put by the courts which decided them upon a Statute of the State of Missouri, which was deemed to have been adopted by the Practice Act of Congress regulating the procedure in the federal courts. In Louisiana we have no such statute, and there is, therefore, no need to discuss the question as to what would be the legal consequences if one existed. In this State the courts are to be guided by the doctrine which is settled by the cases of *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 [9: 470] and *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 [15:1028], to the effect that when property susceptible of manual delivery has been seized and is held by the officer of and under process from the court of one jurisdiction, it is incapable to be subjected to seizure by another officer of and under process from the court of another jurisdiction. The authorities are collated in *Wilmer* v. *Atlanta & R. A. L. R. Co.* 2 Woods, 427, 428. It follows, then, that since the goods were and continued to be in the physical possession and custody of the marshal, under writs of this court, the intervener could have acquired and did acquire no interest in the goods under his writ from the state court, and he can have no claim to the proceeds arising from their sale."

Proceeding further in its judgment to determine the order of priority of the creditors who attached under the writs from that court, the circuit court said: "No right is claimed, and no right could have been acquired, under the Sunday writs or seizures. The statute prohibits (C. P. art. 207) the institution of suits and all judicial proceedings on Sunday. The question then is as to the priority of the attachments which were issued on Monday, *i. e.*, after 12 o'clock on Monday morning." The judgment then proceeds to award priority among these writs according to the order in which they were levied, after they came into the possession of the marshal, by him. On the trial of the issues upon the petitions of intervention, as appears by a bill of exceptions in the record, the intervener offered in evidence a transcript of the proceedings and judgment of the Civil District Court for the Parish of Orleans in the suit in which he was plaintiff against Dreyfus, to the introduction of which the defendants objected. From that transcript it appears that by a petition in that cause it was alleged that Pitkin, the Marshal of the United States for the Eastern District of Louisiana, was indebted to the defendant or had property and effects in his possession or under his control belonging to the defendant; wherefore it was prayed that Pitkin, as marshal, be made garnishee, and ordered to answer under oath the accompanying interrogatories filed therewith. A citation was issued thereon to Pitkin requiring him to answer the interrogatories, which, according to the sheriff's return, was, together with a copy of the original and supplemental petition and interrogatories in the cause, served on Pitkin in person on October 29, 1883, at 25 minutes past 12 A. M. The sheriff's return to the writ of attachment is as follows:

"Received Oct. 27, 1883, and on the 29th day of October, 1883, proceeded to execute this writ against the movable property of def't described more fully in my notice of seizure when I found the said property in possession of the U. S. Marshal, and by instructions of pl't'ffs' att'y placed my keepers on the sidewalk in front of said property, and kept them continually, both night and day, until January 25th, '84, when they were withdrawn by order of the pl't'ffs' att'y; also made general seizure by garnishment in the hands of J. R. G. Pitkin, Marshal of the U. S. Dist. Court; from said general seizure nothing has as yet come into my possession or under my control, and this return is made up to date for the purpose of enabling the clerk of this court to complete a transcript of appeal."

It further appears from the transcript that on November 7, 1883, Pitkin appeared in the civil district court as garnishee without answering the interrogatories, and excepted to the jurisdiction of the court. On November 16, 1883, judgment was rendered by the civil district court in favor of Gumbel and against Dreyfus for the sum of $23,184.57, with interest from October 24, 1883, "with lien and privilege on the property herein attached, and that plaintiff's claim be paid by preference over and above all other creditors, with costs of suit."

On December 6, 1883, a rule was granted by the civil district court upon Pitkin, requiring him to show cause why he should not desist from interference with the sheriff in the custody of the attached property or be punished for contempt of the court in obstructing the execution of its orders and judgments; and also a rule was granted December 17, 1883, upon the marshal, jointly with the attaching creditors in the Circuit Court of the United States, requiring them to show cause why the property seized under the attachment issued at the suit of Gumbel should not be sold, and the proceeds of the sale distributed in that cause. On January 4, 1884, some of the defendants to that rule, without answering the same, excepted to the jurisdiction of the court, on the ground "that it is incompetent to either sell the property, or determine the rank of the attaching creditors, or distribute the proceeds of said property, for the reason that the said property was in the hands of the United States Marshal under attachment issued by order of the Judge of the Circuit Court of the United States for the Eastern District of Louisiana at the time of said pretended seizure by the civil sheriff." On January 14, 1884, the transcript of the record shows the following entry: "The rule and exception herein fixed for this day was by consent of counsel ordered to be continued indefinitely."

Messrs. **Chas. F. Buck** and *Geo. H. Braughn*, for plaintiff in error:

For the purpose of administering the attachment laws of the State, for the benefit of creditors, against a common debtor, who is insolvent, and all of whose property is attached, the federal and state courts are courts of concur-

rent jurisdiction. Each court retains its jurisdiction, as between the plaintiff and defendant; but the court whose officer first seizes must distribute it among the various claimants.

Bates v. *Days*, 17 Fed. Rep. 167; *Patterson* v. *Stephenson*, 77 Mo. 331; Drake, Attach. §§ 263, 265, 269 and authorities cited; *Tomlinson* v. *Collins*, 20 Conn. 364; *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 (9:470); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15:1028); *Wilmer* v. *Atlanta & R. A. L. R. Co.* 2 Woods, 427.

Messrs. **Wm. A. Maury** and *Thos. J. Semmes*, for defendants in error:

Actual physical possession is necessary to constitute a valid seizure under a writ of attachment.

Haggerty v. *Wilber*, 16 Johns. 287; *Scott* v. *Davis*, 26 La. Ann. 688; *Stockton* v. *Downey*, 6 La. Ann. 585; *Page* v. *Generes*, 6 La. Ann. 551; *Dennistoun* v. *N. Y. C. & S. Fancet Co.* 6 La. Ann. 782; *Nelson* v. *Simpson*, 9 La. Ann. 311.

Priority is dependent upon the date of the seizure.

C. P. art. 723; *Scholefield* v. *Bradlee*, 8 Martin, O. S. 495; *Heppy* v. *Glover*, 15 La. 461; *Harmon* v. *Juge*, 6 La. Ann. 768; *Tufts* v. *Carradine*, 3 La. Ann. 430.

Seizure alone will not confer priority unless it is followed up by a judgment in the lifetime of the debtor.

Marr v. *Lartigue*, 2 Martin, O. S. 98; *Hanna* v. *Creditors*, 12 Martin, O. S. 32; *Beck* v. *Brady*, 6 La. Ann. 444; *Fisher* v. *Vose*, 3 Rob. (La.) 457; *Collins* v. *Duffy*, 7 La. Ann. 39.

Hagan v. *Lucas*, 35 U. S. 10 Pet. 400 (9: 470) and *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15:1028), settle the question that goods in possession of the marshal are not susceptible of seizure by process from a state court.

Williams v. *Benedict*, 49 U. S. 8 How. 107 (12:1007); *Wiswall* v. *Sampson*, 55 U. S. 14 How. 52 (14:322); *Peale* v. *Phipps*, 55 U. S. 14 How. 368 (14:459); *Pulliam* v. *Osborne*, 58 U. S. 17 How. 471 (15:154).

A debt cannot be attached in a state court after suit has been brought upon it in a court of the United States.

Wallace v. *McConnell*, 38 U. S. 13 Pet. 136 (10: 95); *Thomas* v. *Woolridge*, 2 Woods, 668; *Harris* v. *Dennie*, 28 U. S. 3 Pet. 292 (7:683).

The marshal was in possession of the goods *qua* marshal; such possession was the possession of the court which issued the writ by virtue of which the marshal took possession.

Saunderson v. *Baker*, 3 Wilson, 309; *Campbell* v. *Phelps*, 17 Mass. 246; *Knowlton* v. *Bartlett*, 1 Pick. 271; *Walden* v. *Davison*, 15 Wend. 575; *James* v. *McCubbin*, 2 Call, 273; *Lammon* v. *Feusier*, 111 U. S. 19; (28:337); *Lowell* v. *Parker*, 10 Met. 313.

The issue of the Sunday writs was not an unlawful act.

State v. *Bott*, 31 La. Ann. 663; *Minden* v. *Silverstein*, 36 La. Ann. 916; *Swann* v. *Broome*, 3 Burrows, 1595; *Pearce* v. *Atwood*, 13 Mass. 347; *Purdee* v. *Cocke*, 18 La. 485; *Hoghtaling* v. *Osborn*, 15 Johns. 119; *Baxter* v. *People*, 8 Ill. 368; *Smith* v. *Ihling*, 47 Mich. 614; *Johnston* v. *People*, 31 Ill. 473; *Johnson* v. *Day*, 17 Pick. 109.

Messrs. **I. A. Gilmore** and **J. C. Gilmore**, for William Adler and C. Lazard, defendants in error:

The relief sought by the plaintiff in error cannot be allowed.

Plaintiff in error invokes the provisions of section 915, Revised Statutes, U. S., Act of June 1, 1872.

To the plaintiff coming from a state court, it is so utterly inapplicable as to be not at all involved in the consideration of his case.

Nudd v. *Burrows*, 91 U. S. 441 (23:290); *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 301 (23:901); *Amis* v. *Smith*, 41 U. S. 16 Pet. 314 (10:977); *Chittenden* v. *Darden*, 2 Woods, 487; Field, Fed. Procedure, 175; *Boogher* v. *New York L. Ins. Co.* 103 U. S. 95 (26:311); *Kern* v. *Huidekoper*, 103 U. S. 485 (26:354); *Ex parte Boyd*, 105 U. S. 647 (26:1200); *Canal & C. Sts. R. R. Co.* v. *Hart*, 114 U. S. 661 (29: 228).

When the property got into the custody of the circuit court it was in the actual custody of the law, and the case was one of superior diligence of the parties.

Drake, Attachment, § 251, p. 153; §§ 503-506.

The property was withdrawn from the reach of process of other courts.

Hagan v. *Lucas*, 35 U. S. 10 Pet. 400 (9:470); *Pulliam* v. *Osborne*, 58 U. S. 17 How. 471 (15: 154); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15:1028); *Covell* v. *Heyman*, 111 U. S. 176 (28: 390); *Williams* v. *Benedict*, 49 U. S. 8 How. 107 (12:1007); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16:749); *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 (18:257); *Yonley* v. *Lavender*, 88 U. S. 21 Wall. 276 (22:536); *People's Bank* v. *Calhoun*, 102 U. S. 256 (26:101); *Barton* v. *Barbour*, 104 U. S. 126 (26:672); *Lammon* v. *Feusier*, 111 U. S. 17 (28:337); *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 294 (28:729); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28:145); *Wiswall* v. *Sampson*, 55 U. S. 14 How. 52 (14:322).

Messrs. **George Denegre, Walter D. Denegre** and **Thomas L. Bayne**, for Hoffheimer & Bros.:

There was no levy upon the property, no actual seizure; such a seizure is essential, without which there is no lien created, and the court acquires no jurisdiction.

The Ann, 13 U. S. 9 Cranch, 289-291 (3:784, 785); *The Josefa Segunda*, 23 U. S. 10 Wheat. 322-326 (6:332, 333).

The seizure gives jurisdiction to the court.

The Silver Spring, 1 Sprague, 551; *Freeman* v. *Howe*, 65 U. S. 24 How. 454 (16:750); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15:1028); *U. S.* v. *Tarble*, 80 U. S. 13 Wall. 406 (20:600); *Re Neill*, 8 Blatchf. 165; *Goubeau* v. *New Orleans, & N. R. Co.* 6 Rob. (La.) 345; *Page* v. *Generes*, 6 La. Ann. 551; *Nelson* v. *Simpson*, 9 La. Ann. 311

Jurisdiction accrues only when the officer of the court has possession of the *res*.

Pennoyer v. *Neff*, 95 U. S. 714 (24: 565); *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 402 (9:471); *Bronson* v. *Schulten*, 104 U. S. 410 (26:797).

When the property is in the possession of one court for administration it is not liable to be seized by process from another.

Taylor v. *Carryl* and *Freeman* v. *Howe*, *supra*; *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 (18: 257); *People's Bank* v. *Calhoun*, 102 U. S. 256 (26:101); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28:145); *Tua* v. *Carriere*, 117 U. S. 208 (29:

857); *Wilmer* v. *Atlanta & R. A. L. R. Co.* 2 Woods, 427.

Mr. Justice **Matthews** delivered the opinion of the court:

The grounds on which the circuit court proceeded in denying the relief prayed for by the intervener, and which have been reiterated in argument at the bar, are: (1) that no levy of the writ of attachment was in fact made by the sheriff, because he did not and could not acquire actual possession of the property sought to be seized then in the possession of the marshal, it being essential, under the laws of Louisiana, to the validity of the levy of such a writ, that the officer should thereby acquire actual and exclusive possession of the property to be attached; and (2) that no levy by the sheriff under his writ of attachment was effected by the notice served upon the marshal as garnishee, because the marshal, as an officer of the Circuit Court of the United States, was not amenable to and could not be affected by process from a state court.

It may be remarked in the outset, that if the intervener is entitled to any relief, the mode in which he has sought it is appropriate. On the motion to dismiss the writ of error, 118 U. S. 545 [28:1128], it was decided that his right to intervene by petition in this action was justified by the laws of Louisiana and by the decision of this court in *Freeman* v. *Howe*, 65 U. S. 24 How. 450 [16:749]. In *Krippendorf* v. *Hyde*, 110 U. S. 276, 283 [28:145, 148], it was said: "The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court. So the equitable powers of courts of law over their own process, to prevent abuses, oppression and injustice, are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law. *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 [18:257]; *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 [9:470]. And when in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several States, the very circumstance appears which gives the party a title to an equitable remedy, because he is deprived of a plain and adequate remedy at law; and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest as what *Mr. Justice Story* calls in *Clarke* v. *Mathewson*, 37 U. S. 12 Pet. 164, 172 [9:1041, 1044], a dependent bill." In that case it was further stated, speaking of contests between execution or attachment creditors in the federal courts on the one hand and strangers to the actions claiming title to the property on the other, that "If the statutes of the State contain provisions regulating trials of the right of property in such cases, it might be most convenient to make them a part of the practice of the court as contemplated by sections 914, 915, 916, of the Revised Statutes."

In the subsequent case of *Covell* v. *Heyman*, 111 U. S. 176 [28:390], it was decided that the principle that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being, applies both to a taking by a writ of attachment under a mesne process and to a taking under a writ of execution. It was there also decided that "property thus levied on by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim and color of that authority, without respect to the ultimate right to be asserted otherwise and elsewhere, as already sufficiently explained, that furnishes to the officer complete immunity from the process of every other jurisdiction that attempts to dispossess him." So in *Lammon* v. *Feusier*, 111 U. S. 17, 19 [28:337], it was said: "When a marshal upon a writ of attachment on mesne process takes property of a person not named in the writ, the property is in his official custody and under the control of the court, whose officer he is, and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way except in the court from which the writ issued."

It thus appears that the plaintiff in error came rightfully into the circuit court for whatever relief, either of a legal or equitable nature, that court was competent to give. It is equally true that he must depend exclusively on the circuit court for such relief as he can there obtain, for it is quite clear that the civil district court acquired no jurisdiction over the property under the writ of attachment held by the sheriff, nor any jurisdiction over the person of the marshal as garnishee, by virtue of the notice served upon him to answer interrogatories as such. The sheriff acquired no such possession of the property as to bring it within the custody of the state court, and the marshal was not amenable to the state court as its custodian for property which he claimed to hold officially under process from the circuit court. The circuit court alone had jurisdiction to inquire into and determine all questions relating to the property, and the rights growing out of its custody held by its own officer under color of its authority, saving, of course, all rights of action against the marshal personally for his wrongful and illegal acts resulting in injury to third persons, except such as involved the legal right to take the property out of his possession.

As we have already seen, and as has been many times declared by this court, the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litiga-

tion as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party. This is the equity invoked by the plaintiff in error, which was denied to him by the circuit court.

It is certainly true, and must be conceded, as was adjudged in the court below, that Gumbel acquired under his writ of attachment no strict and technical legal standing as an attaching creditor with an actual levy on his debtor's property. There was no such actual seizure of the property by the sheriff as was necessary to constitute a levy at law. That seizure was prevented, and the attempted levy thus defeated, by the wrongful and illegal act of the marshal. That officer had taken possession of the goods on Sunday, under color of process issued the same day, illegal by the laws of the State, and as such discontinued and abandoned by the parties. The possession thus acquired was made use of for the benefit of the plaintiffs in attachment in the circuit court to defeat the execution of the process of the state court. It was illegal in the marshal to have taken possession of the goods under the writs in his hands issued on Sunday. It was his duty, when the sheriff appeared with a lawful writ from the state court, to surrender possession to him. His failure and refusal to do so was an actionable injury in which the present plaintiff in error, in a suitable action at law, would have been entitled to recover, both against him and against the attaching creditors for whom and at whose request he was acting, the whole amount of the loss, measured by what the plaintiff would have made if he had secured the benefit of the priority to which he would have been entitled by a first levy of his attachment upon the property. Instead of resorting to such an action, the plaintiff in error appealed to the circuit court for that equity which that court was entitled to administer by virtue of its duty to redress injuries occasioned by the abuse of its process on the part of its officers and suitors. Why should that equity not be administered in this proceeding? The court had before it all the parties, together with the property which was the subject of contention. The remedy was plain, simple and effectual. It could award to the intervener the position in respect to the property and fund in court which, but for the injustice done him by the conduct of its officer and suitors in the abuse of its process, he would have acquired by a legal levy under his attachment. Neither the marshal nor the creditors for whose benefit he acted ought to be allowed to say that the intervener had been deprived of the substance of his rights, because by their illegal and oppressive conduct he had been prevented from clothing it with technical forms. It is a cardinal maxim that no one shall be allowed in a court of justice to take advantage of his own wrong. No more flagrant instance of a violation of that fundamental principle can be conceived than that which is furnished by the circumstances of the present case. The very ground, and the sole ground, on which relief is denied to the plaintiff in error is that he has been prevented from asserting it legally by the violence and wrong of those who now deny it.

This principle has especial application in cases of proceedings by attachment. "The existence of the proceeding by attachment (it is said in Drake on Attachments, § 272) could hardly fail to give rise to fraudulent attempts to obtain preference where the property of a debtor is insufficient to satisfy all the attachments issued against him. When it transpires that there are circumstances justifying resort to this remedy, the creditors of an individual usually press forward eagerly in the race for precedence, sometimes to the neglect of important forms in their proceedings, and sometimes without due regard to the rights of others. On such occasions, too, notwithstanding the safeguards generally thrown around the use of this process, and in violation of the sanctity of the preliminary oath, it has been found that men in collusion with the debtor, or counting on his absence for impunity, have attempted wrongfully to defeat the claims of honest creditors by obtaining priority of attachment on false demands. There is, therefore, a necessity—apparent to the most superficial observation—for some means by which all such attempts to overreach and defraud, through the instrumentality of legal process, may be summarily met and defeated. Hence, provision has been made in the statutes of some States for this exigency; but where such is not the case, the courts have broken the fetters of artificial forms and rules, and attacked the evil with commendable spirit and effect." Accordingly, it has been held in New Hampshire, in the absence of a statute authorizing an attaching creditor to impeach the good faith of previous attachments, that on a suggestion that a prior attachment was prosecuted collusively between the plaintiff and defendant for the purpose of defrauding creditors, the court would permit a defense to be made by the creditors in the name of the defendant, (*Buckman* v. *Buckman*, 4 N. H. 319); and that a subsequent attaching creditor might move to dismiss a prior attachment on the ground that there was no such person as the plaintiff therein. *Kimball* v. *Wellington*, 20 N. H. 439.

In Virginia it has been held that a junior attaching creditor may come in and defend against a senior attachment by showing that the debt for which it issued had been paid. *McCluny* v. *Jackson*, 6 Gratt. 96. In *Smith* v. *Gettinger*, 8 Ga. 140, it was decided upon general principles, and without any aid from statutory provisions, that a judgment in an attachment suit may be set aside in a court of law upon an issue, suggesting fraud and want of consideration in it, tendered by a junior attaching creditor of the common defendant. In Massachusetts provision is made for appropriate relief in such cases by statute. *Lodge* v. *Lodge*, 5 Mason, 407; *Carter* v. *Gregory*, 8 Pick. 165; *Baird* v. *Williams*, 19 Pick. 381; *Swift* v. *Crocker*, 21 Pick. 241.

The case of *Paradise* v. *Farmers & M. Bank*, 5 La. Ann. 710, is an important adjudication, having a direct bearing upon the point now under consideration. A suit in chancery was instituted in Memphis, Tennessee, by stockholders of a bank there against the bank and its president and directors, in which a receiver was appointed, an injunction obtained, and an order for the delivery of the assets of the bank to the receiver served on the president, who, during an unsuccessful attempt to enforce the process of the court, obtained possession of the

assets and ran off with them to New Orleans, where they were attached in his hands by a creditor of the bank, and were claimed in the attachment suit by the receiver appointed by the court in Tennessee. The courts of Louisiana ordered the attached property to be released from the process and delivered to the receiver. The supreme court of the State, in its opinion, said: "The property which thus stands before us for adjudication thus appears to have been brought within the jurisdiction of this court in disobedience and in violation of the process of a court of a sister State, and in fraudulent violation of the rights of property of its real owners. It is proved that the process of the court of chancery and a writ of injunction and an order directing the delivery of the assets of the bank forthwith to the receiver were duly served on Fowlkes (the president), as well as the directors of the bank. The grounds on which it is contended the judgment of the district court (ordering the property to be delivered to the receiver) is to be reversed are; (1) that a receiver in chancery cannot maintain a suit without special authority from the court which appoints him; (2) that the possession of the property attached not having been in the receiver, it is liable to the process of attachment at the instance of a *bona fide* creditor. We will not inquire into the technical question whether the authority of the chancellor is necessary to institute a suit at law; it is sufficient for us that property, in relation to which an order of a court of a sister State of competent jurisdiction has been issued, has been fraudulently or forcibly withdrawn from its jurisdiction by a party to the suit, and that the injunction issued in this case by the chancellor is still in force and binding upon the offending party. The order of the court of chancery is a sufficient authority for the intervener (the receiver) to receive the assets of the bank; and the delivery to him will be a good delivery, binding upon the bank as well as in furtherance of justice. We have uniformly discountenanced all attempts, in whatever form they may be made, of making our courts instruments for defeating the action of courts of other States on property within their jurisdiction by means of clandestine or forcible removal to this State. The only decree which we render in such cases is that of immediate and prompt restitution, or one preventing any rights to be acquired by these attempts to defeat the ends of justice. This is an answer to the question raised concerning the peculiar right of the creditor. The only right which he in any event could reach would be subordinate to the injunction from the operation of which this property has been attempted to be removed. Not only on general principles, but on the cases cited by the learned judge who decided this case, the claim of the plaintiff to subject this property to attachment is without the shadow of right."

The case just cited was not so flagrant as the present. The attaching creditor in that case was innocent of any participation in the wrong involved in the removal of the property from the jurisdiction of the Tennessee court. Here the attaching creditors are the very parties at whose instance and for whose benefit the wrong upon the intervener has been perpetrated. Upon general principles, therefore, and in the exercise of its equitable power as a court of law to prevent and redress injustice committed upon a stranger by the abuse of its process on the part of its officers and suitors, the circuit court ought to have granted the relief to the intervener which by its judgment it denied.

There is, however, another ground on which the same conclusion may safely rest. By section 915 of the Revised Statutes, the circuit court is authorized, in favor of suitors in that court, to administer the attachment laws of the State in which the court is held, and the exercise of this jurisdiction necessarily draws to itself everything properly incidental, even though it may bring into the court for the adjudication of their rights parties not otherwise subject to its jurisdiction. So that, in *Krippendorf* v. *Hyde*, 110 U. S. 276, 284 [28: 145, 148], where the Statute of Indiana regulating the process of attachment provided that, after the institution of the suit and before final judgment, any creditor of the defendant might file and prove his claim with the right to participate in the distribution of the proceeds of the attached property, it was said that in an action rightly instituted in the circuit court, in which the property of the common debtor was attached, all other creditors might appear in pursuance of the state law and share in the distribution, although citizens of the same State with the defendant, and although the amounts due them were less than the jurisdictional sum of $500.

In the case of *Bates* v. *Days*, 17 Fed. Rep. 167, decided by the Circuit Court of the United States for the Western District of Missouri, it was held, first by *Judge* Krekel, and affirmed by the Circuit Judge, McCrary, on a motion for a rehearing, that questions of priority between attaching creditors, some of whom were plaintiffs in that court and some in the state court, might be determined on proceedings for distribution of the proceeds of sale of the attached property made by the marshal, who had the actual custody by virtue of the first seizure, upon the ground that section 915 of the Revised Statutes incorporated, as a part of the practice of the courts of the United States for that district, section 447 of the Statutes of Missouri, which provided that: "Where the same property is attached in several actions, by different plaintiffs against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and priority, validity, good faith, and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require;" it being held in that State that if the writs issue from different courts of co-ordinate jurisdiction, such controversies shall be determined by that court in which the first writ of attachment was issued and levied. In the case referred to, the first attachment was issued out of the Circuit Court of the United States, the marshal having possession of the property by virtue of a seizure under that writ. The writ of attachment issued out of the state court was returned by the sheriff, stating that he had levied the same on the stock of goods of the defendant, subject to

the attachment of the plaintiff, in the United States Court, and that he notified the marshal of the attachment and levy, and summoned him as garnishee. In deciding the case, it was said by the district judge that "The executive officers of courts should understand that when writs issue from state and federal courts against the same property, the officer first obtaining possession, on being notified that a state court officer, as in this case, has a writ against the same property, all reasonable facilities should be offered such officer to make a full return, and the officer holding the property should show in his return whatever was done by such state court officer. Federal and state courts are not foreign courts, or in hostility to each other, in administering justice between litigants. The citizen of the State in the federal court is as much in his own court as in the courts of the State. The rights he has he cannot be deprived of in a federal court. The citizen of another State has the same claim to a debtor's property in the State of Missouri as a resident, but no more."

The same principle is asserted by the Supreme Court of the State of Missouri in the case of *Patterson* v. *Stephenson*, 77 Mo. 331, as between co-ordinate state courts. It was there said: "On principle and reason, the validity of successive levies by the same officers on the same property is a recognition of the practical fact that there may be, after a taking into custody of the law the property of the debtor, an effectual imposition of another writ without an actual caption, or a taking away of the property, or an appropriation of it for the time being, to the attaching creditor's claim. It is held in such case that the second writ in the hands of the same officer is executed by him *sub modo*, so 'it will be available to hold the surplus after satisfying the previous attachment, or the whole, if that (the first) attachment should be dissolved. In such case no overt act on the part of the officer is necessary to effect the second levy, but a return of it on the writ will be sufficient. So, where the property is in the hands of the bailee, the officer who placed it there may make another attachment, without the necessity of an actual seizure, by making return thereof, and giving notice to the bailee.' Drake, Attach. § 269. In *Tomlinson* v. *Collins*, 20 Conn. 364, it is held in such case that the second attachment is valid even without any notice to the bailee."

"Evidently the making of a second levy by the same officer is recognized because it does not disturb his custody of the property. If the rule which prevents one officer from levying on goods seized by another officer rests mainly on the prevention of conflict of jurisdiction and the interference of one officer with the prior custodianship of another, then, on the maxim, *Cessante ratione legis, cessat ipsa lex*, I can see no reason for the operation or recognition of the rule, where the second levy does not produce such conflict or interference. For it must be borne in mind that the other requirement of the law, that the levying of an attachment is an actual seizure of the property, is satisfied in the case of successive levies by the same officer, by a constructive application of the succeeding writ 'to the surplus after satisfying the previous attachment.' Why, then, was not the act of the sheriff in the case now under consideration, in taking the invoice of the goods in connection with the constable, 'available to hold the surplus after satisfying the previous attachment,' made by the constable? The constable had the requisite notice. It in nowise interfered with the prior custody. It produced no conflict, and would lead to no confusion."

Upon this reasoning it is contended, on behalf of the plaintiff in error, that he was entitled to the benefit of section 1942 of the Revised Statutes of 1870 of Louisiana, which provides that "Whenever a conflict of privileges arises between creditors, all the suits and claims shall be transferred to the court by whose mandate the property was first seized, either on mesne process or on execution, and the said court shall proceed to class the privileges and mortgages according to their rank and privilege, in a summary manner, after notifying the parties interested."

There are difficulties in the literal application of such a statutory provision, intended, of course, to regulate the practice between themselves of co-ordinate state courts, to cases of conflicting rights arising between suitors in the federal and state courts where the systems are independent. It is impossible to transfer suits pending in the state courts into the Circuit Courts of the United States, except as provided by Act of Congress for the removal of such causes. Nevertheless, the substance of the provision may be applied to the practice of the courts in attachment proceedings in such a way as to promote and secure that comity which ought to prevail between federal and state tribunals exercising concurrent jurisdiction, and to administer justice in a conflict of rights growing out of their independent action. Where, under a writ of attachment, the Marshal of the United States has first seized property and taken it into custody, the exclusive jurisdiction of the circuit court is established over it and over all questions concerning it; but it ought not to follow that the property is thereby withdrawn from the assertion and enforcement of claims against it by those who must necessarily pursue their remedy in the first instance in a state court. A creditor residing in the same State with the defendant and, therefore, required to institute proceedings in the state tribunal, ought to be enabled, by his writ of attachment, to subject the property of the debtor in due course and according to the order of priority, even though when the sheriff proceeds to execute the writ he finds that property in the possession of the marshal of the United States, and, therefore, subject to the jurisdiction of the federal court. In that case no rule of law or of convenience is violated if he is permitted, by service of notice upon the marshal to make a constructive levy upon the property, subject to all prior liens, and without disturbing the marshal's possession. This of course, would not have the effect of subjecting the marshal personally or officially to answer as garnishee to the state court as custodian of the property for the purposes of its jurisdiction, but would entitle the attaching creditor in the state court to acquire a right in the property and to appear in the proceeding in the circuit court to enforce it on a motion to distribute the proceeds of the sale of the at-

tached property in its custody. This is the recognized practice in those States where successive attachments are authorized to be served by the same officer, acting as the executive of different courts, or by different officers each acting independently of the other. There seems to be no reason why a similar practice should not be adopted as between federal and state tribunals acting concurrently in the administration of the same laws. Indeed, every consideration of justice and convenience might be adduced to support it. And such a practice in the courts of the United States, when authorized by law in the administration of attachment proceedings as between state courts, seems to us to be justified as a reasonable implication from section 915 of the Revised Statutes. That section expressly secures to plaintiffs in common-law causes in Circuit and District Courts of the United States similar remedies by attachment against the property of the defendant to those provided by laws of the State in which such court is held for the courts thereof, and authorizes the courts of the United States, by general rules, to adopt from time to time such state laws as may be in force in the States where they are held in relation to the same subject. The remedies here spoken of, of course, are to be understood as they are defined in the state laws, and subject to the same conditions and limitations. The authority thus conferred is ample to authorize and sanction the practice of permitting the constructive levy by attaching creditors under state process upon the property in possession of the marshal and their intervention in proceedings in the Circuit Court of the United States for the same district where, as between state courts of concurrent jurisdiction, a similar method of acquiring and adjusting conflicting rights is prescribed.

Under such a practice, if in the present case the marshal had acquired and held possession of the attached goods, by virtue of a valid writ first levied, the plaintiff in error, by making his constructive levy, subject to the prior right and possession of the marshal, by giving him the appropriate notice of his claim to hold him as a garnishee in possession of the property for his benefit as to any surplus that might remain after payment of prior claims, would have thereby acquired the right, after establishing his claim by judgment in the state court and presenting proper proof thereof, to appear in the circuit court as an intervener and secure his right to share in the proceeds of the sale of the attached property in his proper order.

But the case, as actually presented upon the circumstances disclosed in this record, is much stronger for such an intervention. When the sheriff of the civil district court undertook to levy upon the goods in question, and served the marshal with notice as garnishee holding actual possession of the property, the latter was in fact, as we have already seen, in possession illegally under a writ, which protected his official possession only so far as to prevent the property from being forcibly withdrawn from the jurisdiction of the circuit court by judicial process, that court having acquired jurisdiction, by virtue of the seizure under color of its authority, to decide all questions concerning it. That writ, though illegally issued and levied, was not void on its face. In a certain sense, therefore, the property was *in custodia legis*, and not subject to a levy under process which would have the effect of taking it out of his possession and control. But when, in the exercise of jurisdiction by the circuit court in the determination of the question raised by the petition of intervention, the nature of the marshal's title and possession came to be inquired into, it was made apparent that he held the property illegally as a trespasser, and in that forum could be treated as holding it in a private and not an official capacity. It was subject, therefore, in the view of that court, to the consequences of the notice served upon the marshal as garnishee. It was held by the marshal as if it had been a surplus arising from the sale of the property of a defendant on execution, which, as is well established, may be attached in his hands. Drake, Attachment, § 251.

The case, therefore, stands thus: for the reasons growing out of the peculiar relation between federal and state courts exercising coordinate jurisdiction over the same territory, the circuit court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto; the plaintiff in error having pursued his remedy by action against his debtor in the state court, to which alone by reason of citizenship he could resort, attempted the levy of his writ of attachment upon the goods in the possession of the marshal; not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee; not being able by this process to subject the marshal to answer personally to the state court, he made himself a party to the proceedings in the circuit court by its leave, and proceeded in that tribunal against its officer and the creditors for whom he had acted; on a regular trial it appeared as a fact that at the time of the notice the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual. It was competent for the circuit court, and having the power it was its duty, to hold the marshal liable as garnishee, and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties on the footing of these rights, and give to the plaintiff in error the priority over all other creditors, to which by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled.

On these grounds, the judgment of the Circuit Court is reversed and the cause remanded, with directions, upon the facts found in the Circuit Court, to award judgment in favor of the intervener, Gumbel, in conformity with this opinion; and it is so ordered.

ISAAC C. BAKER ET AL., *Appts.*,
v.
THOMAS C. POWER, ET AL.

(See S. C. Reporter's ed. 167–169.)

Decree entered by direction of district judge.

Although a district judge of the district may have no right to a vote in a cause, while sitting in the circuit court, he is rightfully a member of that court, and a decree of that court, entered under his supervision and by his direction, is a decree of the court, good until reversed or otherwise vacated, and from such a decree an appeal may be taken.

[No. 307.]

Submitted Jan. 9, 1888. Decided Jan. 16, 1888.

APPEAL from the Circuit Court of the United States for the District of Minnesota. On motion to dismiss. *Motion denied.*

Mr. **William H. Bliss,** in support of motion of appellees to dismiss:

The judgment from which this appeal was taken is not a final judgment, and the appeal must be dismissed.

Rev. Stat. § 614; *Rodd* v. *Heartt*, 84 U. S. 17 Wall. 354 (21:627).

Messrs. **James H. Davidson** and **Henry L. Williams,** in opposition.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. If it be true, as is alleged but which is by no means clear, that the decree appealed from was rendered by the district judge when he had no vote in the cause, we still have jurisdiction of the appeal. Although the district judge may have had no right to a vote, he was rightfully a member of the circuit court, *Rodd* v. *Heartt*, 84 U. S. 17 Wall, 357 [21:627], and a decree of that court entered under his supervision and by his direction would be a decree of the court, good until reversed or otherwise vacated. From such a decree an appeal can be taken.

NEW ORLEANS PACIFIC RAILWAY COMPANY, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 124-131.)

Land grant—Act of 1876—exception—cost of survey—power of Congress—payment of cost.

1. The statutory provision, enacted July 31, 1876, chap. 246, 19 Stat. at L. 121,—that before any land, granted to any railroad company by the United States, shall be conveyed to said company or any person entitled thereto under any Act relating to said company, unless such company is exempted by law from the payment of such costs, there shall first be paid into the Treasury of the United States the costs of surveying, selecting and conveying the same, by said company or person in interest—controls the present case, and is conclusive against the right of the Petitioner to recover the money sued for in this action, which has been paid for the costs aforesaid.

2. Congress had a right, at the time of the passage of the Act of 1876, to impose upon the grant the new condition of the payment of such cost, the Company having failed to complete the whole of the road by March 3, 1876, and the Petitioner having accepted the conveyance from its grantor with full knowledge of the provision of the Act of 1876.

3. The restriction in the Act of 1876, that the provision for the payment of the cost of surveying the land shall not apply to a company which is exempted by law from the payment of such cost, does not apply to the case of the Petitioner.

4. The terms of the provision of the Act of 1876 are intended to apply to then existing grants and are not restricted to future grants or future surveys; they apply to all lands theretofore granted to any railroad company by the United States and to the cost of surveying such land, whether previously incurred or not.

5. Congress had power on the failure of the Company to complete its road within the time limited and after the lapse of the time during which the right to any conveyance could have been earned, to impose a new condition upon which such right could be earned in the future.

6. The payment of these costs of surveying the land is a condition precedent to the right to receive the title from the Government; and until that is done the equitable title of the Company is incomplete.

[No. 575.]

Submitted Jan. 6, 1888. Decided Jan. 16, 1888.

APPEAL from a judgment of the Court of Claims, dismissing the petition of the appellant on a demurrer thereto after it had failed to amend the petition in accordance with leave granted by the court. *Affirmed.*

The facts of the case are fully stated in the opinion.

Messrs. **John S. Blair, John F. Dillon** and **Wager Swayne,** for appellant:

The court below erred in sustaining the demurrer and in dismissing the petition.

The question presented by the petition and demurrer is whether the secretary of the interior rightfully demanded from the plaintiff the cost of surveying lands that had been granted to it by the Act of March 3, 1871, such cost having been incurred and paid prior to the grant.

Proviso to the Act of July 31, 1876, 19 Stat. at L. 121; Act of March 3, 1871; *McElwen* v. *Den*, 65 U. S. 24 How. 244 (16: 672); *The Twenty Per Cent Cases*, 87 U. S. 20 Wall. 187 (22: 341); *Chew Heong* v. *U. S.* 112 U. S. 559 (28: 778).

This court has held, in *Union Pacific R. R. Co.* v. *U. S.* 99 U. S. 700 (25: 496) and *Chicago & N. W. R. Co.* v. *U. S.* 104 U. S. 680 (26: 891), that the United States is as much bound by its contracts as individuals are.

In the two statutes passed prior to 1876, requiring other railroad companies to pay these costs, such companies themselves have acquiesced. Indeed, they have gone further; and in *Kansas Pac. R. Co.* v. *Prescott*, 88 U. S. 16 Wall. 603 (21: 373); *Union Pac. R. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 (22: 747), and *Northern Pac. R. R. Co.* v. *Traill County*, 115 U. S. 600 (29: 477) have invoked that provision to aid them in the resistance of the payment of taxes.

What was our interest in these lands, and what rights were conferred upon our assignor by the Act of 1871? "There is hereby granted" are the words used, and they are words of absolute donation. They impart an immediate transfer of interest, a grant *in præsenti* and not one *in futuro*, or the promise of a grant; and when our railroad was ultimately constructed and the precise sections designated, our titles related to the date of the grant.

Schulenberg v. *Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 733 (23: 634); *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491 (24: 1095); *St. Joseph & D. C. R. R. Co.* v. *Baldwin*, 103 U. S. 426 (26: 578).

The Act of February 2, 1887, 24 Stat. at L. 391, recognizes this, for it confirms to us all the lands which it does not forfeit.

The right of forfeiture is one which must always be exercised with strictness.

Jones v. *Carter*, 15 Mees. & W. 718; *Croft* v. *Lumley*, 6 H. L. Cas. 672.

It was laid down by the supreme court in *U. S.* v. *Babbitt*, 66 U. S. 1 Black, 61 (17: 96), that what is implied in a statute or contract is as much a part of it as what is expressed; and this rule has never been questioned.

Wilson County v. *Third Nat. Bank*, 103 U. S. 770 (26: 488).

The object of the proviso was to require prepayment, by the railroad companies, of the costs of survey of any lands for which appropriation was then being made.

U. S. v. *Dickson*, 40 U. S. 15 Pet. 165 (10: 698); *Ryan* v. *Carter*, 93 U. S. 78 (23: 807).

Messrs. **A. H. Garland,** *Atty-Gen.*, and **Robert A. Howard,** *Asst. Atty-Gen.*, for appellee:

The court of claims was right in sustaining the demurrer.

Act of March 3, 1871, § 22; 16 Stat. at L. 579; Act of July 31, 1876, 19 Stat. at L. 121; *Farnsworth* v. *Minn. & P. R. R. Co.* 92 U. S. 49 (23: 580).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the New Orleans Pacific Railway Company from a judgment of the court of claims dismissing its petition, on a demurrer thereto, after it had failed to amend the petition in accordance with leave granted to it by the court.

The substantial allegations of the petition are these: the petitioner is a Corporation of Louisiana. The New Orleans Baton Rouge and Vicksburg Railroad Company was incorporated by Louisiana in 1869. By section 22 of an Act of Congress passed March 3, 1871, chap. 122 (16 Stat. at L. 579), there were granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in aid of the construction of its railroad from New Orleans to Baton Rouge, thence by the way of Alexandria, in the State of Louisiana, to connect with the Texas Pacific Railroad Company at its eastern terminus, the same number of alternate sections of public lands per mile, in the State of Louisiana, as were, by the same Act, granted in the State of California to the Texas Pacific Railroad Company; and it was provided that said lands should be withdrawn from market, selected, and patents issued therefor, and opened for settlement and preemption upon the same terms and in the same manner and time as was provided for and required from the Texas Pacific Railroad Company within the State of California: "*Provided*, That said company shall complete the whole of said road within the five years from the passage of this Act."

By section 9 of the same Act, there was granted to the Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad in California.

Section 12 of the same Act provided as follows: "That whenever the said company," the Texas Pacific Railroad Company, "shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first class road in all its appointments, it shall be the duty of the secretary of the interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this Act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the department of the interior; and, when the map is so filed, the secretary of the interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from preemption, private entry and sale."

On the 11th of November, 1871, the New Orleans, Baton Rouge and Vicksburg Company filed in the department of the interior a map of the general route of its road from Baton Rouge to Shreveport, and, on the 13th of February, 1873, a like map showing the general route of its road from New Orleans to Baton Rouge. In 1871 and 1873, the lands along said general route, within the grant of the Act of March 3, 1871, were withdrawn from entry and sale by order of said Department. On the 5th of January, 1881, the petitioner became the owner, by conveyance from the New Orleans, Baton Rouge and Vicksburg Company, of all its interest in such grant of public lands; and the conveyance and its acceptance by the Petitioner were duly recognized by the department of the interior. After January 5, 1881, the Petitioner constructed 260 miles of the railroad from Shreveport, by way of Alexandria and West Baton Rouge, to White Castle, in Louisiana, within the limits of the lands withdrawn for its grantor, and substantially upon the course, direction, and general route of the road filed by such grantor.

On the 13th of March, 1883, the secretary of the interior transmitted to the President of the United States a report in writing of the commissioner appointed by the President to examine said 260 miles, and recommended that they be accepted, and that patents for such lands as might have been earned by their construction be issued to the Petitioner. This recommendation was approved in writing by the President, and on the third of March, 1885, patents were issued to the Petitioner for 679,284.64 acres of land in Louisiana, as earned by the Petitioner. Before issuing the patents, the secretary of the interior exacted from it $14,713.63, alleging the same to be due for the cost of surveying the lands, although such cost had been incurred and expended by the United States prior to March 3, 1871. The Petitioner denied the right of the United States to that sum, and paid it under protest. The Petitioner prayed judgment for that sum.

The question in the case is as to the effect of a statutory provision enacted July 31, 1876, chap. 246, 19 Stat. at L. 121, in "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1877, and for other purposes," in these words: "*And provided further*, That before any

land granted to any railroad company by the United States shall be conveyed to such company, or any person entitled thereto under any of the Acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest.

We are of opinion that this provision of the Act of 1876 controls the present case, and is conclusive against the right of the Petitioner to recover the money in question. At the time this Act was passed, neither the Petitioner nor its grantor had acquired any right to claim the lands granted. The five years from March 3, 1871, within which, as a condition, the whole of the road was to be completed, had elapsed without the commencement of any part of the work of construction. That was not begun until nearly ten years after the Act of March 3, 1871, was passed. The Petitioner accepted the conveyance from its grantor with full knowledge of the provision of the Act of 1876. Congress had a right at that time to impose upon the grant the new condition, the Company having failed to complete the whole of the road by March 3, 1876.

The restriction in the Act of 1876, that the provision for the payment of the cost of surveying the land shall not apply to a company which is "exempted by law from the payment of such cost," does not apply to the case of the Petitioner. There is no express statutory provision exempting the grantor to the Petitioner from the payment of the cost of surveying the land. All that can be said is that the Act of March 3, 1871, was silent on the subject. It neither exempted the beneficiary from paying the cost of surveying, nor did it expressly require it to pay such cost. It and its grantee, therefore, fall within the provision of the Act of 1876, because not within the exception contained in that provision.

It is urged for the appellant, that, in the present case, the surveys had been made and paid for by the United States prior to the passage of the Act of March 3, 1871, and that, as section 12 of that Act provided for the issuing of patents without requiring the payment of the cost of surveying, the Company was therefore exempted by law from the payment of such cost, within the meaning of the provision of the Act of 1876; and it is suggested that no statute in respect to the granting of public lands to either a State or a railroad company, passed prior to 1876, contained a provision expressly exempting the grantee from the payment of the cost of surveying. It is further urged, that the terms of the provision of the Act of 1876 are not intended to apply to then existing grants, but only to future grants and to the cost of surveys to be made thereafter.

But we are of opinion that the provision is a general one, and that, although it is enacted in connection with an appropriation of money for the survey of public lands and of private land claims, and follows a requirement that no patent shall issue for a private land claim until the cost of survey and platting shall have been paid into the Treasury by the party in interest, yet it is not controlled by those circumstances. It is manifestly general legislation, applying, as to the past, to all land theretofore granted to any railroad company by the United States, and to the cost of surveying such land, whether that cost had been previously incurred or expended, or was to be incurred or expended in the future. The exception created, that the provision is not to apply to a company exempted by law from the payment of the cost, is general in its language. If such a company is to be found, the exception applies to it; if it is not to be found, the provision applies to it.

It is urged for the appellant, that, inasmuch as section 17 of the Act of March 3, 1871, provided, in regard to the Texas Pacific Railroad Company, that, upon the failure to complete its road within the time limited by that Act, Congress might adopt such measures as it might deem necessary and proper to secure the speedy completion of the road, and, inasmuch as that Act contained no reservation of a power to add to, alter, amend or repeal its provisions, Congress was restricted, on a failure of the New Orleans, Baton Rouge and Vicksburg Company to complete the whole of its road within five years from the passage of the Act, to the adoption of measures for the securing of a speedy completion of the road, and that the imposition upon the company of the cost of surveying the land was not such a measure.

But we are of opinion that while, on the failure of the Company to complete its road within the time limited, Congress might adopt measures to secure its speedy completion, no limitation was imposed on the right and power of Congress, the Company having failed even to commence the construction of any part of its road within the time limited, to virtually renew the grant and extend the time within which the land might be earned, with the imposition of a new condition, that, before any patent should be issued, the cost of surveying the land patented should first be paid into the Treasury.

In the case of *Farnsworth* v. *Minnesota & P. R. R. Co.* 92 U. S. 49 [23:580], it was held by this court that where a grant of land and connected franchises is made to a corporation, for the construction of a railroad, by a statute which provides for their forfeiture upon failure to perform the work within the prescribed time, the forfeiture may be declared by legislative Act, without judicial proceedings to ascertain and determine the failure of the grantee; and that any public assertion by legislative Act of the ownership of the State after the default of the grantee is equally effective and operative. See, also, *McMicken* v. *U. S.* 97 U. S. 204, 217, 218 [24:947, 952].

In the present case, it is true that the statute did not provide for the forfeiture of the grant on failure to complete the whole of the road within the five years; but, within the principle of the case referred to, Congress was left free, on a failure of the grantee to do any of the work within the five years, to impose the condition it did upon the grant of the lands. As was said in *Farnsworth* v. *Minnesota & P. R. R. Co.*, the Act having made the construction of the whole of the road within five years a condition precedent to a patent for any of the land granted, no conveyance in disregard of that condition could pass any title to the company, as was held in *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44

[22:551]. It follows that Congress had the power, after the lapse of the time during which the right to any conveyance could have been earned, to impose a condition upon which such right could be earned in the future. The application by the Petitioner for a conveyance or patent must be taken as an assent by it to the condition imposed by the Act of 1876.

The same principle was applied in *U. S.* v. *Repentigny*, 72 U. S. 5 Wall. 211 [18:627]. In *Kansas Pac. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 [21:373], it was held by this court, that the 21st section of the Act of July 2, 1864, 18 Stat. at L. 365, amendatory of the Act of July 1, 1862, 12 Stat. at L. 489, to aid the Kansas Pacific Railway in the construction of its road by the grant of lands, which amendatory section required the prepayment of the cost of surveying, selecting, and conveying the lands, required the prepayment as to lands granted by the original Act, as well as to those granted by the amendatory Act. It was contended by counsel in that case that, as the original Act required no such prepayment, the United States could not, in disregard of the statute which made the grant, annex new conditions to it by a subsequent enactment. But this court said, p. 608 [874]: "We are of opinion that no patent could rightfully issue in any case until the cost of survey had been paid. None of the road had been built when the amendatory Act was passed. No right had vested in any tracts of land, and the power, as well as intent, of Congress to require such payment cannot be contested."

The same statutory provisions were under consideration in *Union Pac. R. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 [22:747]. In that case, in reference to the provision of section 21 of the Act of 1864, this court said, p. 462 [751]: "That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the Government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done, without which the company is not entitled to a patent."

This view was affirmed in respect to like statutory provisions concerning the Northern Pacific Railroad Company, in the case of *Northern Pac. R. R. Co.* v. *Traill County*, 115 U. S. 600 [29:477], where, by an Act passed in 1870, Congress had provided that before any land granted to the company by the United States should be conveyed there should first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same.

These views seem to us to be decisive in the present case, and the judgment of the Court of Claims is affirmed.

JAMES F. WHITNEY ET AL., *Plffs. in Err.*,
v.
WILLIAM H. ROBERTSON, Collector of the PORT of NEW YORK.

(See S. C. Reporter's ed. 190-195.)

Dominican Treaty—effect of—infractions of—obligation of—statutory law—effect of on Treaty.

1. The 9th article of the Treaty with the Dominican Republic, which provides that no higher duty shall be imposed, on the importation into the United States, of any article, the produce of that country, than is imposed on like articles from any other foreign country, is a pledge that there shall be no discriminating legislation against the importation of articles which are the produce of that country in favor of articles of like character imported from any other country; but it has no greater extent.

2. Such Treaty was never designed to prevent special concessions, upon sufficient consideration, touching the importation of specific articles into this country, from another foreign country.

3. A treaty is primarily a contract between two independent Nations; and for the infraction of its provisions a remedy must be sought by the injured party, through reclamations upon the other. Whether the complaining Nation has just cause of complaint is not matter for judicial cognizance.

4. By the Constitution of the United States, a treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land; and no superior efficacy is given to either, over the other.

5. When a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty, not already executed.

6. So far as a treaty, made by the United States with any foreign Nation, can be made the subject of judicial cognizance, in the courts of this country it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal.

[No. 108.]

Argued Dec. 13, 14, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of defendant in error in an action brought by plaintiff in error to recover duties paid under protest. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. J. Willard, H. E. Tremain** and *M. W. Tyler*, for plaintiffs in error:

Treaties are the supreme law of the land.

U. S. Const. art. VI; *Ware* v. *Hylton*, 3 U. S. 3 Dall. 239 (1:585); *Foster* v. *Neilson*, 27 U. S. 2 Pet. 314 (7:435); *U. S.* v. *Rauscher*, 119 U. S. 408 (30:425); *U. S.* v. *Percheman*, 32 U. S. 7 Pet. 88 (8:618); *Garcia* v. *Lee*, 37 U. S. 12 Pet. 523 (9:1181); *Edye* v. *Robertson*, 112 U. S. 598 (28:803); *Chew Heong* v. *U. S.* 112 U. S. 536 (28:770).

By the 9th article of the Treaty of the United States with the Dominican Republic, no other or higher duty shall be imposed upon the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country.

U. S. v. *Forty-Three Gallons of Whisky*, 93 U. S. 196 (23:847); *Hauenstein* v. *Lynham*, 100 U. S. 483 (25:628).

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred.

Shanks v. *Dupont*, 28 U. S. 3 Pet. 242 (7:666); *Re Quong Woo*, 13 Fed. Rep. 229; *Re Parrott*, 1 Fed. Rep. 481.

The relief claimed by the plaintiff calls for the exercise of the powers pertaining solely to the Judicial Department of the Government and not for the exercise of its political powers.

R. I. v. *Massachusetts*, 37 U. S. 12 Pet. 657

(9: 1233); *Cherokee Nation* v. *Ga.* 30 U. S. 5 Pet. 1 (8: 25); *Ga.* v. *Stanton*, 73 U. S. 6 Wall. 50 (18: 721); *Head Money Cases*, 112 U. S. 598 (28: 803); *U. S.* v. *Rauscher*, 119 U. S. 426 (30: 481).

Our government has, from the beginning of our national existence, advocated equal and reciprocal international relations with every foreign Nation with whom it made a treaty.

Oldfield v. *Marriott*, 51 U. S. 10 How. 162 (13: 370); Dip. Cor. U. S. 1867, part 1, p. 287.

As the government has established these principles, it becomes the duty of the judicial department to conform to them.

Act of Aug. 15, 1876, 19 Stat. at L. 200; Act of March 3, 1883, 22 Stat. at L. 491; *U. S.* v. *Rauscher*, *supra;* 1 Kent, Com. 166; Woolsey, Internat. Law, 186.

In interpreting treaties regard should be had to the occasion which produced them, the subject matter of their stipulations, the object for which and the epoch during which they were contracted.

2 Phil. Internat. Law, 56; Vattell, Internat. Law, 107; Note to Dana's Wheat. Internat. Law, § 266; 1 Kent, Com. 175; *U. S.* v. *D'Auterive*, 51 U. S. 10 How. 609 (13: 560); *U. S.* v. *Auguisola*, 68 U. S. 1 Wall. 352 (17: 613); *Hauenstein* v. *Lynham*, 100 U. S. 487 (25: 629).

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for defendant in error:

The Dominican Treaty is not self executing, but requires legislative action to give it effect.

Foster v. *Neilson*, 27 U. S. 2 Pet. 314 (7: 435); *Netherclift* v. *Robertson*, 27 Fed. Rep. 741; *Taylor* v. *Morton*, 2 Curtis, 462; *Bartram* v. *Robertson*, 21 Blatchf. 211; *Same* v. *Same*, 122 U. S. 120 (30: 1120).

Reply brief for plaintiffs in error.

That the Dominican Treaty is self executing, see *Edye* v. *Robertson*, 112 U. S. 598 (28: 808).

Mr. Justice **Field** delivered the opinion of the court:

The plaintiffs are merchants, doing business in the City of New York; and in August, 1882, they imported a large quantity of "centrifugal and molasses sugars," the produce and manufacture of the Island of San Domingo. These goods were similar in kind to sugars produced in the Hawaiian Islands, which are admitted free of duty under the Treaty with the King of those Islands, and the Act of Congress, passed to carry the Treaty into effect. They were duly entered at the custom house at the Port of New York, the plaintiffs claiming that by the Treaty with the Republic of San Domingo the goods should be admitted on the same terms, that is, free of duty, as similar articles, the produce and manufacture of the Hawaiian Islands. The defendant, who was at the time Collector of the Port, refused to allow this claim, treated the goods as dutiable articles under the Acts of Congress, and exacted duties on them to the amount of $21,936. The plaintiffs appealed from the Collector's decision to the secretary of the treasury, by whom the appeal was denied. They then paid under protest the duties exacted, and brought the present action to recover the amount.

The complaint set forth the facts as to the importation of the goods, the claim of the plaintiffs that they should be admitted free of duty because like articles from the Hawaiian Islands were thus admitted, the refusal of the Collector to allow the claim, the appeal from his decision to the secretary of the treasury and its denial by him, and the payment under protest of the duties exacted, and concluded with a prayer for judgment for the amount. The defendant demurred to the complaint; the demurrer was sustained, and final judgment was entered in his favor; to review which the case is brought here.

The Treaty with the King of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those Islands, in consideration, among other things, of like exemption from duty, on the importation into that country, of sundry specified articles which are the produce and manufacture of the United States. 19 Stat. at L. 625. The language of the first two articles of the Treaty, which recite the reciprocal engagements of the two countries, declares that they are made in consideration of the rights and privileges and as an equivalent therefor, which one concedes to the other.

The plaintiffs rely for a like exemption of the sugars imported by them from San Domingo upon the 9th article of the Treaty with the Dominican Republic, which is as follows:

"No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce or manufacture of any other foreign country, or its fisheries." 15 Stat. at L. 475.

In *Bartram* v. *Robertson*, 122 U. S. 116 [30: 1118], we held that brown and unrefined sugars, the produce and manufacture of the Island of St. Croix, which is part of the dominions of the King of Denmark, were not exempt from duty by force of the Treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the Treaty with Denmark provided that the contracting parties should not grant any particular favor to other Nations, in respect to commerce and navigation, which should not immediately become common to the other party, who should enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional. 11 Stat. at L. 719. The fourth article provided that no higher or other duties should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "Those stipulations, even if conceded to be self executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that in the

imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

The counsel for the plaintiffs meet this position by pointing to the omission in the Treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the Treaty with that Republic, in the clause quoted, is substantially like the 4th article in the Treaty with the King of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The Act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the Treaty with the Dominican Republic; and if there be any conflict between the stipulations of the Treaty and the requirements of the law the latter must control. A Treaty is primarily a contract between two or more independent Nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the Treaty contains stipulations which are self executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self executing. If the country with which the Treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining Nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In *Taylor* v. *Morton*, 2 Curtis, 454, 459, this subject was very elaborately considered at the circuit by *Mr. Justice* Curtis, of this court, and he held that whether a Treaty with a foreign Sovereign had been violated by him; whether the consideration of a particular stipulation of the Treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign Sovereign had given just occasion to the Legislative Department of our Government to withhold the execution of a promise contained in a Treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the Executive and Legislative Departments of our Government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed, as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the Act assailed it has departed from the Treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.

In these views we fully concur. It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous Treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases*, 112 U. S. 580 [28: 798], it was objected to an Act of Congress that it violated provisions contained in treaties with foreign Nations, but the court replied that so far as the provisions of the Act were in conflict with any Treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that "So far as a Treaty made by the United States with any foreign Nation can be the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal."

Judgment affirmed.

HUGH KELLY, *Plff in Err.*,
v.
EDWARD HEDDEN, Late Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 196, 197.)

Case followed—Dominican Treaty.

1. *Whitney* v. *Robertson*, *ante*, followed.
2. The Treaty with the Dominican Republic, which provides that no higher duty shall be imposed on the importation into the United States of any article from that Republic than is or shall be payable on like articles from another foreign country, does not prevent special concessions, upon sufficient consideration, as to the importation of specific articles, from another country into this.

[No. 1012.]

Argued Dec. 13, 14, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of defendant in an action brought by the plaintiff in error to recover back duties paid under protest. *Affirmed.*

The same counsel appeared for the respective parties in this case as in *Whitney* v. *Robertson*, *ante*.

Mr. Justice **Field** delivered the opinion of the court:

This case, except in one particular, presents the same questions considered and determined in *Whitney* v. *Robertson*. The exceptional circumstance is this, that the Act of 1883, under which the duties were levied and collected, to recover which the action is brought, declares that nothing in it "shall in any way change or impair the force and effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this Act." 22 Stat. at L. 525. The most that can be conceded to this provision is that it leaves a previous Treaty relating to the same subjects unaffected by the Act. Our observations in the former case, as to the effect of subsequent legislation in conflict with the stipulations of a treaty, are therefore inapplicable to the present case. But all other considerations as to specific exemptions in return for special concessions remain, in answer to the alleged contention of the plaintiffs that articles, the produce and manufacture of the Island of San Domingo should be admitted free of duty because similar articles, the produce and manufacture of the Hawaiian Islands, are thus admitted.

Judgment affirmed.

UNITED STATES, *Plff. in Err.*,
v.
HARRISON JOHNSTON.

(See S. C. Reporter's ed. 286-255.)

Captured and abandoned property- Secretary of Treasury's approval of expenses—construction of statute—settled accounts.

1. The entire administration of the system, devised by Congress for the collection of captured and abandoned property within the insurrectionary districts, and its sale thereafter, was committed, by the Acts of Congress, to the secretary of the treasury, with full authority to decide what expenses were fairly chargeable against the proceeds of such property, and subject to no restriction but that the expenses, charged upon the proceeds of sales, be "proper and necessary," and be approved by him.
2. The approval of the Secretary of the Treasury of an account of expenses, in relation to the collection and sale of a lot of captured and abandoned property, is conclusive evidence that such expenses were proper and necessary, unless it appears that the allowance of such expenses was procured by fraud, or that the expenses were incurred in violation of some positive statute, or of public policy. The allowance of such expenses by the secretary is not subject to review, as to amount, by the courts or by another officer.
3. The contemporaneous construction of a statute, by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned, except for cogent reasons, and unless it be clear that such construction is erroneous.
4. It would be a dangerous doctrine that settled accounts, where the United States had acted on the settlement, and paid the balance due, could be opened or set aside, merely because some prescribed step in the accounting, which it was the duty of the head of the department to see, had been taken, had been in fact omitted, or because of technical irregularities in the allowance of expenses, years afterward, when the remedy of the party against the United States has become barred by the Statute of Limitations, the remedies of the United States not being subject to any limitation.

[No. 112.]

Argued Dec. 15, 16, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for defendant in error in an action against him to recover the value of cotton which came to his hands as an Assistant Special Agent of the Treasury Department, and which it was alleged he had converted to his own use. *Affirmed.*

Statement of the case by *Mr. Justice* **Harlan:**

This writ of error brings up for review a judgment for the defendant in error in an action brought against him on the 29th day of April, 1879, for the value of certain cotton which came to his hands, as an assistant special agent of the treasury department, in the year 1865, and which, it is alleged, he has not accounted for to the plaintiff, but converted to his own use. The defendant became such agent on the 8th of May, 1865, under a written appointment by the secretary of the treasury. He was charged with the duty of receiving and collecting such cotton in the Counties of Lowndes, Monroe, Oktibbeha, and Noxubee, in the State of Mississippi, as had been purchased by or was held on account of the so called Confederate States Government, and of forwarding the same to agents of the department at Memphis or Mobile, as, in his judgment, was best for the Government.

His commission was accompanied by a letter of instructions, requiring him, with as little delay as possible, to ship the cotton received or collected to Wm. W. Orme, supervising special agent at Mobile, "sending forward with each lot an account of expenses (which will be paid by them), together with a full record of the cotton shipped, etc., as required by the fourth regulation concerning captured, abandoned, and confiscable personal property." He was informed that his compensation would be thereafter fixed, and would depend, in great meas-

ure, upon the result of his efforts; but that it should be reasonable and liberal for the services performed.

The defendant, in his answer, denied that he had omitted to account for any cotton received or collected by him, as such agent. For further defense, he alleged that after the times mentioned in the complaint, and on or about March 15, 1866, a just, true and full accounting of his acts, as such agent, was had with the United States, upon which he surrendered all papers, documents, and vouchers in his hands relating to his agency; that upon such accounting the sum of $33,972.59 was awarded to him, of which $2,186.69 represented his per diem allowance, and the balance his commissions; that said per diem allowance was paid on the 15th of May, 1866, and said commissions on the 15th of January, 1868; and that he was thereupon fully released, acquitted, and discharged from liability of every kind to the Government.

By agreement of the parties, the issues were heard and determined, in the first instance, by Hon. William G. Choate, as referee, who made a report of his special findings of fact and law, accompanied by an elaborate opinion, in support of the conclusion that the defendant was entitled to a judgment dismissing the complaint on the merits. The case was subsequently tried by the court—the parties, by written stipulation filed, having waived a jury. The court adopted the special findings of fact made by the referee, as its own findings, and dismissed the complaint.

The several lots of cotton in question were delivered to one Stewart, of Mobile, in the latter part of the year 1865. The circumstances under which they were delivered were, according to the findings of fact, as follows: the cotton in the counties constituting defendant's district was stored at various points more or less remote from the Mobile and Ohio Railroad; much of it in very bad condition, requiring rebaling, or new covering and ropes. In consequence of many impediments, arising from the unsettled state of the country, to the successful execution by the defendant of his duties by agents of his own selection, he obtained special authority from the secretary of the treasury to make contracts with responsible persons, for collecting cotton, putting it in shipping order, and delivering it at the railroad; the contractors to be paid *in kind* at the time of delivery, or in money after the cotton had been sold, and the proceeds realized by the Government. The first lots of cotton were shipped to Dexter, the supervising agent at Mobile. Afterwards, the defendant was directed by the secretary to ship, and he did ship, the cotton directly, through his own agents at Mobile, to Simeon Draper, at New York, who had been appointed as the general agent of the treasury department to sell all the cotton collected in the South. Defendant's first agents at Mobile were Weaver & Stark; but, on August 14, 1865, he appointed one Cuny. The Government did not furnish money to pay the expenses attending the collection, transportation and shipping. But Cuny undertook with the defendant to settle all bills for railroad freights, the weighing and pressing of the cotton, and other incidental expenses connected therewith up to the time of shipment to New York; and he also agreed with the defendant to furnish the means necessary to cover such expenses. He arranged with Stewart at Mobile to provide means for these purposes, the latter to be reimbursed from time to time by government cotton, at the market value. Stewart accordingly made large advances to Cuny between September 4, 1865, and January 26, 1866. These advances included $9,807.21 of expenses, which Dexter, supervising special agent for the Treasury Department for the district in which Mobile was situated, incurred, on cotton from Johnston's district, and which expenses Dexter insisted should be paid by the defendant. The latter at first declined to pay that bill, but subsequently, upon the advice of Mellen, a general agent of the Treasury Department, he sold cotton to meet it. Under the arrangement between Cuny and Stewart, the latter received between October 17, 1865, and December 16, 1865, different lots of cotton aggregating 483 bales, which is the cotton now in question, and gave credit therefor, at its market value, in his account with Cuny for advances. The total value of this cotton was $82,300.24. Stewart paid the internal revenue tax of two cents per pound—$3,486.64—on all except the last one-hundred bales, leaving $79,813.60 as the net value of the cotton. The first of these transfers to Stewart was without the knowledge of the defendant, but he subsequently approved or acquiesced in what Cuny did. This disposition of the 483 bales was without authority from the plaintiff, except as to the part used in meeting Dexter's bill.

The following additional facts were found by the court below:

"August 18, 1865, the secretary of the treasury issued a general letter of instructions directing all cotton to be forwarded to Simeon Draper, at New York, for sale, and that all money required by supervising agents to defray expenses should be sent upon their estimates therefor made to the secretary on the first of each month. In September, 1865, Mr. Johnston had made an arrangement to draw against Simeon Draper, at New York, for the expenses on the cotton incurred at Mobile, including the cost of transportation to Mobile, and such drafts were drawn accordingly to the amount of upwards of $150,000 between the 29th of November, 1865, and the 31st of January, 1866. The drafts included $1 a bale commission, which defendant paid to Cuny on the cotton shipped by him after the drafts were paid. To carry out his instructions, that these drafts should be accompanied by vouchers, showing the details of the expenses drawn for, the receipted bills of the railroad company paid by Cuny through the advances made by Stewart, and other bills so paid were surrendered, and duplicate receipts were taken to conform to the shipments to Draper against which drafts were drawn, and these duplicate vouchers accompanied the drafts. The same expenses which had thus been paid out of the cotton transferred to Stewart, to the amount of about $68,000, were included in the drafts upon Draper, and by him paid to Johnston, so that as to these 483 bales the defendant had been a second time paid by the Government to that extent, the expenses for the payment of which they had been transferred to Stewart.

"On the 11th of January, 1866, the secretary of the treasury, by letter, called upon the defendant to make up and forward a full statement of his transactions, and some time in the month of February, 1866, the defendant and his chief clerk, Dr. Vaughan, went to Washington with their books and papers, and an account current or summary statement which had been made up at Columbus, purporting to show the whole amount of cotton collected by the defendant and the disposition thereof. They were referred, by the subordinate in the secretary's office in charge of the captured and abandoned property division, to the commissioner of customs, who, at that time, under direction of the secretary, had charge of the examination and passing of similar accounts. Meanwhile, however, certain charges against the defendant had been received in the treasury department from the war department, and the secretary directed that these charges should be answered before the defendant's account was passed upon, and a special reference of these charges was made by the secretary for examination to a clerk in his office named Parker, since deceased. These charges were satisfactorily answered, and the examination of his accounts by the commissioner of customs followed. Some objections were made to the form of the account of cotton collected, and a new account was made up upon blanks furnished by the office of that part of the transactions. In the account current or summary statement made up at Columbus, the 483 bales of cotton in question were stated as follows:

'Sold by R. H. Cuny, to pay bills of Dexter and others..... 488'

"At the suggestion of the examining officer in the commissioner's office, a new summary statement was made up by Dr. Vaughan, dividing this item into two, namely:

'Sold by consent of General Agent Mellen, by R. H. Cuny, to pay Dexter's bill of expenses..... 55

'Sold and proceeds paid to officers and garrisons to secure protection to cotton in their charge, and to repel thieves..... 428'

"The only vouchers now remaining on file in the treasury department in support of this last item are two affidavits, one by the defendant and the other by Dr. Vaughan, the defendant's clerk and chief assistant, sworn to at Washington, during the pendency of this examination, showing payments to military officers for extra vigilance in guarding the cotton, protecting it against thieves and raids; copies of which are hereto annexed, marked schedules C and D. The number of bales assigned to the item of Dexter's bill does not conform to any particular lot of cotton, part of the 483 bales transferred to Stewart, but is substantially correct as representing upon an average of the net proceeds of the cotton the amount of Dexter's bill.

"There was exhibited to the officers appointed by the secretary to examine his accounts some proofs of large expenditures of money which, together with the payments to military officers, they held to be sufficient to justify them in passing this item. These expenses, aside from the payments to military officers, aggregated about $68,000, and the military payments about $29,000. These expenses, other than the military payments, were properly and necessarily incurred by the defendant in the discharge of his duty as assistant special agent in the care and protection of the cotton after its delivery by the contractors, and all these payments, including the military payments, were made necessary by the unsettled state of the country, the great accumulation of the cotton which the railroad company was unable to transport, the danger of theft and robbery, and the interference of other agents or persons claiming to be agents of the treasury department and of military officers. The military payments included $10,000 paid out for Colonel Young, which, however, was not proved to have been received by him, and which the defendant collected from the contractors. These military payments were all made in the *bona fide* belief that they were necessary to protect the interest of the United States in the cotton, to secure increased vigilance, or to prevent connivance with parties interfering with or attempting to interfere with the cotton.

"The result of the examination of the account in the office of the commissioner of customs was that the commissioner wrote to the defendant a letter dated the 15th March, 1866, as follows: 'Your property accounts as Assistant Special Agent of the Treasury at Columbus, Mississippi, from May 8, 1865, to March 15, 1866, have this day been examined in this office and passed, there being no difference.'

"Upon the receipt of this letter the defendant wrote to the secretary, communicating to him the contents of the letter received from the commissioner of customs, and stating that he had presented to Mr. Parker written answer to the military charges, and that Mr. Parker expressed himself entirely satisfied, and that he would so report to the secretary; and requested an instruction to Mr. Draper, at New York, to pay him his commissions allowed under the regulations on the sales of such cotton as Mr. Draper had received of his collecting, when the secretary should receive a report from Mr. Parker.

"To this the secretary replied under the same date, March 15, 1866, as follows: 'I have received your letter of this date, advising me that the commissioner of customs had favorably reported on your property account, and that your explanation of charges made by certain military officers against you has shown them to be without substantial foundation, and asking me to instruct the cotton agent at New York to pay you the commissions allowed by the regulations of August the 18th last, on the sales of such property of your collection as he has received. It affords me great pleasure to receive so gratifying a statement in regard to your affairs, and I have accordingly this day instructed the commissioner of customs to issue a requisition for your per diem compensation, at the rate of $6 per day, from the date of your appointment, and for such milage as you may be entitled to at the rate of ten cents per mile. At present no payments on account of commissions or percentage are made to any of the agents of the department, and I deem

it inexpedient to make an exception to this rule in any case till sufficient time has elapsed to enable me to examine and understand the whole matter connected with the collection and forwarding of government cotton. Just now my time is too much occupied with other matters of vital importance, to afford me an opportunity to give your case that consideration which justice to yourself, no less than to the department, requires.'

"On the same day, the secretary by letter instructed the commissioner of customs as follows: 'The compensation of Harrison Johnston, Assistant Special Agent to this department, whose appointment is dated May 8, 1865, has been fixed at $6 per day, with an allowance to cover traveling expenses of 10 cents per mile for all distances actually traveled by him, and commissions on the cotton collected by him at the same rate as is allowed to other assistant agents, in accordance with general letter of instructions dated August 18, 1865. You are accordingly hereby authorized to issue a requisition in the usual form for his per diem allowance at that rate to date, and for such milage as he may be entitled to. For the present no payments on commissions or percentage account are made to any agents.'

"On the 16th March, 1866, the defendant was directed by the secretary to answer certain charges made in letters received by the department from General Agent Mellen, to which the defendant replied in a letter to the Secretary on the same day containing the following passage: 'I had the honor on yesterday to request you to instruct Mr. Draper to pay me my commissions, basing that request on the assurance that my answers to all charges were satisfactory and my property account correct, not knowing then of these letters from Mr. Mellen. I now beg leave to withdraw the request until you are fully satisfied of my every official act.'

"No further direct action was taken by the secretary with reference to these charges of General Agent Mellen, or the defendant's reply thereto.

"On the 6th September, 1866, the defendant wrote to the secretary of the treasury: 'If there are no longer any reasons for withholding the commissions due me from the sale of cotton collected by me and forwarded to Mr. Draper, I will thank you for an order upon Mr. Draper to pay over to me commissions due me under regulations of August 18, 1865.' To which the secretary replied on the 17th September, 1866: 'The numerous undecided claims upon the cotton collected by you make it inexpedient to award you at present the promised commissions on the net proceeds of sale of the amount of your collections.'

"On the 8th January, 1867, the secretary wrote the commissioner of customs as follows: 'Hereafter, in the adjustment of accounts of agents of the department who have been engaged in the collection of captured and abandoned property, you will make no requisition in favor of any of them for any balance that may be found due until the details of such account have been referred to me, and you have received further instructions relative thereto.'

"On the 9th March, 1867, the secretary wrote to the commissioner of customs as follows: 'As the various supervising and assistant special agents lately in office are claiming the amounts to which they deem themselves entitled as commissions on the proceeds of property collected by them under my general letter of instructions of August 18, 1865, you will please report to me the names of those whose property accounts, as well as money accounts, have been satisfactorily adjusted;' to which the commissioner replied, on the 12th March, as follows: 'In reply to your inquiry of the 9th inst., received this A. M., asking for the names of those agents whose property accounts have been examined and adjusted, I have to report that up to the present only money accounts have been adjusted.'

"On the 13th March, 1867, the secretary wrote to the commissioner of customs as follows: 'Referring to your reply of yesterday to my inquiry of the 9th inst., relative to the property accounts of supervising and assisting special agents, I now request that you will transmit them to the first auditor for immediate examination and adjustment.'

"On the 4th June, 1867, the defendant wrote the secretary as follows: 'I desire to be informed whether all claims for proceeds of cotton from my district have been adjusted, and whether there is any further objection to the payment of my commissions as assistant special agent of the treasury department.' To which, on the 12th June, 1867, the assistant secretary of the treasury replied: 'The secretary directs me to say that nothing can be done in the matter until the accounts of the New York agency and the various property accounts of the supervising special agents are collected and settled, which he has ordered to be done as speedily as practicable.'

"On the 15th of January, 1868, the secretary wrote to the commissioner of customs as follows: 'You are hereby authorized and instructed to issue a requisition on F. E. Spinner, Treasurer and United States Special Agent, in favor of Harrison Johnston, late Assistant Special Agent, for the sum of $26,785.90, being the balance in full found due to him for commissions on the net proceeds of cotton collected by him and sold in New York on government account in accordance with my letter of August 18, 1865. The total amount earned by him under that letter is $31,785.90, on which he has had previously an advance of $5,000. The present requisition is for the balance. This requisition followed an adjustment of the balance at that sum communicated to the secretary by the commissioner of customs in a letter dated January 15, 1868, and requesting a remittance to cover the same, and this amount was thereupon paid to Mr. Johnston.'

"On the 16th of August, 1868, the first auditor addressed to the commissioner of customs a letter containing a detailed statement of the defendant's property account, stating that he had examined and adjusted the same charging him with 30,610 bales collected and crediting him with the cotton shipped to Draper, paid to contractors in kind, and various other items of credit as in the previous account rendered by the defendant and passed by the commissioner of customs, and included the following credits:

'By cotton sold to pay expenses....55 bales.
Do. do. and proceeds paid military officers for protecting cotton from being burned and stolen by raiders.....428 bales'

"At the foot of this account so stated the commissioner added:

'Admitted and certified. N. Sargent.
'Commissioner of Customs.'

"On the 27th of February, 1869, the commissioner of customs wrote the defendant as follows: 'Your account as Assistant Special Agent of the Treasury Department at Columbus, Mississippi, on account of captured and abandoned property, for cotton received and disposed of has been adjusted and closed on the books of the department.'"

Mr. **Wm. A. Maury,** *Asst. Atty-Gen.*, for plaintiff in error:

Mandamus is no remedy for the control of a judge in the exercise of judicial power. Yet, when a judge abuses his power, *mandamus* does lie to keep him within the limits of the law.

Virginia v. *Rives*, 100 U. S. 313 (25:667); *Ex parte Bradley*, 74 U. S. 7 Wall. 377 (19:219); *Ex parte Secombe*, 60 U. S. 19 How. 13 (15:565); *Ex parte Burr*, 22 U. S. 9 Wheat. 530 (6:152); *Wilkes* v. *Dinsman*, 48 U. S. 7 How. 89 (12:618); *Dinsman* v. *Wilkes*, 53 U. S. 12 How. 390 (13:1036).

The settlement or adjustment of an account by the accounting officers of the treasury is not binding on the United States, save as a mere executive act.

Chorpenning v. *U. S.* 94 U. S. 399 (24:127); *U. S.* v. *Jones*, 33 U. S. 8 Pet. 375 (8:979); *Mc Knight* v. *U. S.* 13 Ct. Cl. 309; *U. S.* v. *McKee*, 97 U. S. 233 (24:911).

Congress alone can dispose of public property, in whatever form it may be, tangible or intangible.

Seabury v. *Field*, 1 McAll. 1; *Friedman* v. *Goodwin*, Id. 142; *U. S.* v. *Hare*, 4 Sawy. 653; *Knote* v. *U. S.* 10 Ct. Cl. 397; *Flores* v. *U. S.* 18 Ct. Cl. 352; *U. S.* v. *Nicoll*, 1 Paine, 646; 4 Ops. Attys-Gen. 487; 16 Ops. Attys-Gen. 477, 152; *Ex parte Moir*, L. R. 21 Ch. Div. 64.

Messrs. **B. H. Bristow** and *David Willcox*, for defendant in error:

Where a public agent is held out as possessing authority to act, the Government will be bound by his action.

Story, Ag. § 307, a; *Whiteside* v. *U. S.* 93 U. S. 257 (23:885); *People* v. *Stephens*, 71 N. Y. 527.

The account has been finally closed. The intermediate steps are mere matters of departmental accounting.

Chorpenning v. *U. S.* 94 U. S. 397 (24:126); *Miller* v. *Mayor of N. Y.* 109 U. S. 385, 394 (27:971, 974).

The accounting officers acted immediately under the secretary's direction. Even if this did not appear, his authority would be presumed from their action.

Wilcox v. *Jackson*, 38 U. S. 13 Pet. 498 (10:264); *Confiscation Cases*, 87 U. S. 20 Wall. 92 (22:320); *Rankin* v. *Hoyt*, 45 U. S. 4 How. 327 (11:996); *Minter* v. *Crommelin*, 59 U. S. 18 How. 87 (15:279); *Soule* v. *U. S.* 100 U. S. 8 (25:536); *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 436, 450 (10:235, 242); *U. S.* v. *Farden*, 99 U. S. 10 (25:267); *Wolsey* v. *Chapman*, 101 U. S. 755, 770 (25:915, 920); *U. S.* v. *Bachelder*, 2 Gall. 15; *U. S.* v. *Cutter*, 2 Curt. 617; *Thompson* v. *U. S.* 9 Ct. Cl. 187; *U. S.* v. *Humason*, 8 Fed. Rep. 71.

The secretary had power to dispose of the property. Provisions regarding the manner in which that power was to be exercised were merely directory.

French v. *Edwards*, 80 U. S. 13 Wall. 506 (20:702); *People* v. *Cook*, 14 Barb. 259; *Cunningham* v. *Cassidy*, 17 N. Y. 276; *Miltenberger* v. *Cooke*, 85 U. S. 18 Wall. 421 (21:864); *People* v. *Peck*, 11 Wend. 604; *Re Mohawk & H. R. R. Co.* 19 Wend. 143; *Marchant* v. *Langworthy*, 6 Hill, 646; *Striker* v. *Kelly*, 7 Hill, 9; *Rex* v. *Loxdale*, 1 Burr. 447; *Pearse* v. *Morrice*, 2 Ad. & E. 94; Potter's Dwarris, Stat. 222, 226, note; Bishop, Written Law, § 225; *Lamar* v. *McCulloch*, 115 U. S. 168 (29:360).

Contemporaneous construction by the officer charged with executing the provisions of the Act is controlling.

Edwards v. *Darby*, 25 U. S. 12 Wheat. 206, 210 (6:603, 604); *U. S.* v. *Moore*, 95 U. S. 760 (24:588); *U. S.* v. *Pugh*, 99 U. S. 265 (25:322); *U. S.* v. *Philbrick*, 120 U. S. 52 (30:559); *U. S.* v. *Gilmore*, 75 U. S. 8 Wall. 330 (19:396); *U. S.* v. *Alexander*, 79 U. S. 12 Wall. 177 (20:381); *Peabody* v. *Stark*, 83 U. S. 16 Wall. 240 (21:311); *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374 (23:47); *Hahn* v. *U. S.* 107 U. S. 402 (27:527); *Brown* v. *U. S.* 113 U. S. 568 (28:1079).

Executive officers have power to bind the Government within the general scope of their duties by their approval of action had by inferior officers.

Cooke v. *U. S.* 91 U. S. 389 (23:237); *Miltenberger* v. *Cooke*, 85 U. S. 18 Wall. 421 (21:864); *McKee* v. *U. S.* 97 U. S. 233 (24:911); *Buron* v. *Denman*, 2 Exch. 167; *Rankin* v. *Hoyt*, 45 U. S. 4 How. 327, 335 (11:996, 999); *Fremont* v. *U. S.* 2 Ct. Cl. 461; *Tenney* v. *U. S.* 10 Ct. Cl. 269; *Neal* v. *U. S.* 14 Ct. Cl. 280; *People* v. *Stephens*, 71 N. Y. 549, 560.

The settlement is conclusive as an account stated.

Hager v. *Thomson*, 66 U. S. 1 Black, 80 (17:41); *Standard Oil Co.* v. *Van Etten*, 107 U. S. 325 (27:319); *U. S.* v. *McKnight*, 98 U. S. 179 (25:115); *U. S.* v. *Smith*, 94 U. S. 214 (24:115); *U. S.* v. *Corliss Steam Engine Co.* 91 U. S. 321 (23: 397); *People* v. *Stephens*, 71 N. Y. 549, 560.

Settlements of the character of this have even greater force. If they are subject to re-examination at all, it is only for fraud or mistake.

U. S. v. *Jones*, 33 U. S. 8 Pet. 375 (8:979); *U. S.* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 377 (10:774); *Chorpenning* v. *U. S. supra; McKee* v. *U. S.* 12 Ct. Cl. 504; *U. S.* v. *Kuhn*, 4 Cranch, C. C. 401; *Haddock* v. *Kelsey*, 3 Barb. 100; *Mullett* v. *U. S.* 21 Ct. Cl. 485.

Discretion conferred upon an executive officer is exclusive, and cannot be collaterally reviewed by the courts.

Martin v. *Mott*, 25 U. S. 12 Wheat. 19 (6:537); *Dorsheimer* v. *U. S.* 74 U. S. 7 Wall. 166 (19:187); *U. S.* v. *Speed*, 75 U. S. 8 Wall. 77 (19:449); *U. S.* v. *Wright*, 78 U. S. 11 Wall. 648 (20:188); *Hall* v. *U. S.* 91 U. S. 559 (23:446); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20:485); *U. S.* v. *Throckmorton*, 98 U. S. 61 (25:93), affg. 4 Sawy. 42; *Vance* v. *Burbank*, 101 U. S. 514

(25:929); *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636 (26:875); *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447 (27:226); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 (10:559); *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 (2:60); *U. S.* v. *Seaman*, 58 U. S. 17 How. 225 (15:226); *Mississippi* v. *Johnson*, 71 U. S. 4 Wall. 475 (18:437); *Holloway* v. *Whiteley*, 71 U. S. 4 Wall. 522 (18:335); *U. S.* v. *Edmunds*, 72 U. S. 5 Wall. 563 (18:692); *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 (19:62); *Ross* v. *Reed*, 14 U. S. 1 Wheat. 482 (4:141); *U. S.* v. *Morris*, 23 U. S. 10 Wheat. 246 (6:314); *Patterson* v. *Winn*, 24 U. S. 11 Wheat. 380 (6:500); *Phila. & T. R. R. Co.* v. *Stimpson*, 39 U. S. 14 Pet. 448 (10:535); *Wilkes* v. *Dinsman*, 48 U. S. 7 How. 89 (12:618); *U. S.* v. *Kaufman*, 96 U. S. 571 (24:793); *Gould* v. *Hammond*, 1 McAll. 235; *The Acorn*, 2 Abb. U. S. 434; *Buckley* v. *U. S.* 45 U. S. 4 How. 251 (11:961); *Chorpenning* v. *U. S.* 8 Ct. Cl. 140; *Fairchild* v. *U. S.* 12 Ct. Cl. 226; *Marshall* v. *U. S.* 21 Ct. Cl. 307; *Vanderheyden* v. *Young*, 11 Johns. 151; *Walker* v. *Devereaux*, 4 Paige, 229; *Rex* v. *Mayor etc. of London*, 3 Barn. & Ad. 271; *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327.

Mr. Justice **Harlan** delivered the opinion of the court:

By the Act of March 13, 1863, providing for the collection of abandoned property, it was made lawful for the secretary of the treasury, as from time to time he should see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property—other than property used or intended to be used for carrying on war against the United States—in any portion of any State or Territory designated as in insurrection against the lawful Government of the United States, by the President's Proclamation of July 1, 1862. The second section provided that "Any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal States as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the Treasury of the United States." *Id.* The third section directed the secretary to cause a book or books of account to be kept, showing from whom such property was received, and the cost of transportation, and the proceeds of the sale thereof. The owner was given the right, within a prescribed period, to prefer his claims to the proceeds in the court of claims, and on proof of his right to the same, and that he had not given any aid or comfort to the rebellion, "to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expenses of transportation and sale of said property, and any other lawful expenses attending the disposition thereof." 12 Stat. at L. 820.

But the Act of July 2, 1864, greatly enlarged the powers of the secretary of the treasury in reference to captured and abandoned property. The first section authorized sales of such property, under the Act of 1863, to be made "at such places, in States declared in insurrection, as may be designated by the secretary of the treasury, as well as at other places," authorized by the original Act. 13 Stat. at L. 375. In addition to the property to be received, collected, and disposed of as provided in the Act of 1863, the agents, approved by the secretary, were required to take charge of and lease the abandoned lands, houses, and tenements within the districts therein named, and provide in such leases or otherwise, for the employment and general welfare of all persons, within the lines of national military occupation in the insurrectionary States, formerly held as slaves, who are or shall become free. Sec. 2. It was also provided that all moneys arising from the leasing of abandoned lands, houses and tenements, or from sales of captured and abandoned property, collected and sold in pursuance of the Act of 1863, or of the Act of 1864, "shall, after satisfying therefrom all proper and necessary expenses to be approved by the secretary of the treasury, be paid into the Treasury of the United States; and all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the treasury." Sec. 3. By the eleventh section of the same Act it is provided that "The secretary of the treasury, with the approval of the President, shall make such rules and regulations as are necessary to secure the proper and economical execution of the provisions of this Act, and shall defray all expenses of such execution from the proceeds of fees imposed by said rules and regulations, of sales of captured and abandoned property, and of sales hereinbefore authorized."

It is quite clear that while the approval of the President was made essential to the validity of all rules and regulations in relation to captured and abandoned property, the entire administration of the system devised by Congress for the collection of such property, within the insurrectionary districts, and its sale thereafter, was committed to the secretary of the treasury. Upon him alone was imposed the responsibility, in the first instance, of making rules and regulations for the proper and economical execution of the statutes in question, through agents whom he should designate. Congress was aware of the unsettled condition of that part of the country dominated by the military power of the insurrectionary Government, and recognized the necessity of investing some one officer with full authority to decide what expenses were fairly chargeable against the proceeds of captured and abandoned property. Such authority was conferred upon the secretary of the treasury, subject to no other restriction than that the expenses charged upon the proceeds of sales be proper and necessary, and be approved by him. But no rule was prescribed for his guidance in determining what expenses were to be regarded as of that character; for the reason, perhaps, that as each collection and sale of captured and abandoned property must depend upon its special circumstances, it was not practicable to establish a rule that would control every case. As no expenses could be charged against the proceeds of any sale except upon the approval of the secretary of the treasury, and as his discretion must have been exercised with reference to the special facts of each case, his approval of an account of expenses in relation to the collection

and sale of any particular lot of captured and abandoned property should be deemed conclusive evidence that such expenses were proper and necessary, unless it appeared that the allowance of such expenses was procured by fraud, or that the expenses were incurred in violation of some positive statute, or of public policy. It is impossible to suppose that Congress intended that every such account—after being approved by the secretary—should be subject to review by some subordinate officer of the treasury, or even by the courts, and to be disallowed, merely because, in the judgment of that officer, or of the courts, such expenses should not have been incurred.

It is, however, contended that the words in the third section of the Act of 1864: "All accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the treasury," negative the supposition that those officers cannot disallow expenses incurred in the collection and sale of captured and abandoned property, which the secretary may have approved as proper and necessary. By "proper accounting officers of the treasury," in that statute, it is contended, is meant the first auditor and the first comptroller. It is consequently argued that the settlement upon which the defendant relies constitutes no obstacle to the examination of the items of his accounts.

The Act of March 3, 1817, chap. 45, § 2, 3 Stat. at L. 366, provides that "All claims and demands whatever by the United States, or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the department of the treasury." By the same Act, it was made one of the duties of the first comptroller to examine all accounts settled by the first auditor, and certify the balances arising thereon to the register. And among the duties of the first auditor is that of receiving and examining all accounts accruing in the treasury department, certifying the balance due on such accounts, and transmitting the same, with the vouchers and certificates, to the first comptroller, for his decision thereon. These provisions have been preserved, and constitute sections 236, 269 and 277 of the Revised Statutes. It is contended in behalf of the defendant, that the accounts which the third section of the Act of 1864 required to be audited by the proper accounting officers of the treasury were strictly money accounts, as distinguished from property accounts; whereas, the accounts of the defendant, in respect of the 483 bales of cotton in question belong, it is insisted, to the latter class. The referee in his opinion says:

"What took place in this case was this: the defendant, having finished the work of his agency, was called upon by the secretary of the treasury to settle his property accounts. The defendant presented himself at the treasury department, appeared before the officers designated by the secretary for the purpose of adjusting accounts of that character, and put in a claim to be credited with the 483 bales in question. As to this he claimed that he had expended on behalf of the Government, and as necessary disbursements in the execution of the duties of his agency, a sum considerably exceeding the value of the 483 bales for which he acknowledged himself liable to account. It would have been competent and proper for the secretary, or the accounting officer, to have treated this claim for disbursements as a money account, which would then, according to the routine of the office at that time, have gone to the first auditor for examination. That this was not done is, however, at most an irregularity. The secretary had authority and jurisdiction, however, to settle and adjust the defendant's property account, and this he did, making this offset or allowance. He thereby necessarily passed and approved the expenses in question, both as to their nature as necessary and proper and as to their amount; and by the statute this question was confided to his exclusive determination. Upon the basis of this adjustment of the property account the defendant's account for commissions was duly adjusted and paid by order of the secretary. In fact, the department twice thus acted on the basis of the adjustment of the defendant's property account."

While there is much force in this view of the case, we do not deem it necessary to decide whether the accounts of defendant, in respect to the 483 bales of cotton, were required by the Statute of 1864 to be audited by the first auditor and transmitted to the first comptroller for his decision thereon. If the Act of 1864 should be held to have required this, it would not follow that those officers could have disregarded the action of the secretary of the treasury in allowing the expenses in question. In auditing those accounts, they would have been bound to regard such action of the secretary as final. What was said in *United States* v. *Jones*, 59 U. S. 18 How. 96 [15:276] may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the secretary of the navy in approving certain disbursements made by an officer of the navy in conformity with the orders of the secretary. This court said: "The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments." See *McKnight* v. *U. S.* 13 Ct. Cl. 298, 309.

But, waiving any decision as to the power of accounting officers, under the Act of 1864, it is sufficient for this case to say that the secretary of the treasury proceeded upon the ground that the defendant's accounts in reference to this cotton were property accounts, the settlement of which belonged to him exclusively, and that such settlement could be made by him personally, or through such of his subordinates as he might designate for that purpose. In *Rice* v. *United States*, 21 Ct. Cl. 419, it was said by Richardson, *C. J.*, who was entirely familiar with the mode of conducting business in the treasury department, that "While Mr. Chase was secretary of the treasury, and for some time afterwards, the money received from captured and abandoned property was merely deposited with the treasurer, and was not technically, in departmental language, 'covered into the treasury;' and so, according to the construction then given by the department, was

not subject to the constitutional provision that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.' Const. art. I, § 9, par. 6. More than two and a half millions of it was paid out by Secretaries Chase, Fessenden, and McCulloch (*Hodges* v. *U. S.* 18 Ct. Cl. 704) without any appropriations therefor, when Congress interposed and passed the Joint Resolution of March 31, 1868, 15 Stat. at L. 251." By that Joint Resolution, it was provided that "All moneys which have been received by any officer or employé of the Government, or any department thereof, from sales of captured and abandoned property in the late insurrectionary districts, under or under color of the several Acts of Congress providing for the collection and sale of such property, and which have not already been actually covered into the treasury, shall immediately be paid into the Treasury of the United States, together with any interest which has been received or accrued thereon." The language of this Resolution affords some evidence that Congress was aware of the manner in which the several Acts relating to captured and abandoned property had been executed, and did not intend to disturb what had been previously done under the practice prevailing in the treasury department.

In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206, 210 [6:608, 604]; *U. S.* v. *Moore*, 95 U. S. 760 [24:588]; *Hahn* v. *U. S.* 107 U. S. 402 [27:527]; *U. S.* v. *Philbrick*, 120 U. S. 52, 59 [30:559, 561].

We have said that the approval by the secretary of the treasury of an agent's account of expenses in the collection and sale of captured and abandoned property would not be conclusive, if it appeared either that such approval was procured by fraud, or that such expenses were incurred in violation of some positive statute, or in contravention of public policy. Much was said at the argument to the effect that the transactions of the defendant were based upon fraud; that he withheld or suppressed evidence that it was in his power to produce; and that what he did was calculated to debauch military officers to whom money was paid by him for the performance of services, in respect to which they were forbidden by law to accept compensation. It is only necessary to say that the findings of fact do not sustain these propositions. The record contains nothing to justify this court in holding that the defendant had been guilty of any fraud that would invalidate the settlement of his accounts with the Government. Taking the findings of fact to be correct, as is our duty to do, we must assume that the payments made by the defendant, of the allowance of which complaint is now made, were made necessary by the unsettled state of the country, the great accumulation of the cotton which the railroad company was unable to transport, the danger of theft and robbery, and the interference of other agents or persons claiming to be agents of the treasury department, and of military officers: and, in respect to what are called military payments, that they were all made in the *bona fide* belief that they were necessary to protect the interests of the United States in the cotton, to secure increased vigilance, or to prevent connivance with parties interfering with or attempting to interfere with the cotton. The utmost that the record establishes is that there were irregularities, perhaps carelessness, in the final closing of defendant's account with the Government. It may be that he should have been required to present more satisfactory evidence than it may be supposed from the record he did in fact present. These considerations, however, even, if entitled to weight as matter of law, lose much force after the lapse of years without action upon them by the Government. The defendant ought not now to be held to the same strictness of proof that might justly have been required of him when all the circumstances connected with the cotton in question could have been readily established by competent evidence. We are of opinion that no case is made by the Government to invalidate the settlement of defendant's accounts. We concur with the referee when he says that "It would be an exceedingly dangerous doctrine that settled accounts where the United States had acted on the settlement and paid the balance found due on the basis of that settlement, could be opened or set aside, merely because some of the prescribed steps in the accounting which it was the duty of a head of a department to see had been taken, had been in fact omitted; or, if they could be so opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party against the United States is barred by the Statute of Limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any Act of limitation."

The facts found being sufficient to support the judgment, it is affirmed.

ALFRED RICHARDS, *Appt.*,
v.
BROOKE MACKALL, JR.

(See S. C. Reporter's ed. 188–189.)

Laches in equity cases—effect of—sale of property.

1. To let in the defense in equity that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of defendants. If the case at the hearing appears liable to the objection of laches the court will refuse relief.

2. These principles, applied to the present case, lead to a reversal, upon the ground that the appellee, upon his own showing, has been guilty of gross laches in applying for relief, and the record shows no excuse for the laches.

3. Where the plaintiff knew that the premises in dispute were, in fact, levied upon and sold for his debt, he cannot, after the property had largely increased in value, and after sleeping upon his rights for nearly twelve years with information during that period of every fact now relied upon by him, ask the aid of a court of equity to set aside the sale and conveyance, and adjudge him to be the owner of the property, because of a mistake of the officer

in not properly describing the premises in the advertisement of sale, and in the conveyance.

[No. 106.]

Argued Dec. 13, 1887. Decided Jan. 3, 1888.

APPEAL from a decree of the Supreme Court of the District of Columbia, in favor of appellee, setting aside as void a sale and conveyance by the marshal, of property sold on execution, and declaring the appellee to be the owner of the property. *Reversed.*

The facts and case are fully stated in the opinion.

Messrs. Wm. B. Webb and **Enoch Totten,** for appellant:

The complainant is not entitled to equitable relief.

Story, Eq. Pl. §§ 10, 28, 257; Barton, Suits Eq. 44; *Munday* v. *Knight*, 3 Hare, 497; *Uxbridge* v. *Staveland*, 1 Ves. Sr. 56; *Dilly* v. *Barnard*, 8 Gill & J. 171, 185; *Wright* v. *Dame*, 22 Pick. 55; *Harrison* v. *Nixon*, 34 U. S. 9 Pet. 503 (9: 209); *Slater* v. *Maxwell*, 73 U. S. 6 Wall. 276 (18: 799).

The grounds upon which a court of equity obtains cognizance must be distinctly set out.

Hipp v. *Babin*, 60 U. S. 19 How. 276 (15: 633).

Where the answer of defendant denies the facts set forth in the bill, such denial must be overcome by the testimony of two witnesses, or by one witness and corroborating circumstances.

Vigel v. *Hopp*, 104 U. S. 441 (26: 765); Story, Eq. Jur. § 1528.

A judicial sale cannot be impeached in a collateral proceeding.

Story, Eq. Jur. 1574a; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 163 (7: 383); *Ludlow* v. *Ramsey*, 78 U. S. 11 Wall. 587 (20: 218); *Cooper* v. *Reynolds*, 77 U. S. 10 Wall. 308 (19: 931); *Griffith* v. *Bogert*, 59 U. S. 18 How. 164 (15: 307); *Grignon* v. *Astor*, 43 U. S. 2 How. 343 (11: 292); Rorer, Judicial Sales, 202, § 480; *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 328 (7: 164); *Davis* v. *Helbig*, 27 Md. 452; *Voorhees* v. *Jackson*, 35 U. S. 10 Pet. 474 (9: 500); *Blaine* v. *The Charles Carter*, 8 U. S. 4 Cranch, 328 (2: 636); *Sumner* v. *Moore*, 2 McLean, 59.

The complainant has been guilty of gross laches.

Harwood v. *Cincinnati etc. R. R. Co.* 84 U. S. 17 Wall. 78 (21: 558); *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587 (23: 328); *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178 (22: 482).

The parties to the original actions at law are indispensable to this. Without them no decree can be made, and the bill must be dismissed.

Harwood v. *Cincinnati etc. R. R. Co. supra.*

That the price was inadequate and insufficient is no ground for setting aside a sale, if fraud is not alleged.

Johnson v. *Dorsey*, 7 Gill, 287; *House* v. *Walker*, 4 Md. Ch. 62; *Warfield* v. *Ross*, 38 Md. 85; *Cooper* v. *Galbraith*, 3 Wash. C. C. 546; *Clark* v. *Eaton*, 100 U. S. 149 (25: 573); *Erwin* v. *Parham*, 53 U. S. 12 How. 197 (13: 952).

The executions were properly issued.

Remington v. *Linthicum*, 39 U. S. 14 Pet. 84 (10: 364); *Barney* v. *Lemon*, 6 Har. & J. 204; *Wheaton* v. *Sexton*, 17 U. S. 4 Wheat. 503 (4: 626).

The description of the property was not ambiguous.

Mackall v. *Richards*, 112 U. S. 369 (28: 737).

A deed will not be declared void for uncertainty, as long as it is possible, by any reasonable rules of construction, to ascertain from the deed what property was intended to pass.

Abbott v. *Abbott*, 51 Me. 582; *Bond* v. *Fay*, 12 Allen, 88; *Crafts* v. *Hibbard*, 4 Met. 452; *Stone* v. *Stone*, 116 Mass. 279; *Harvey* v. *Mitchell*, 31 N. H. 575; *Kruse* v. *Wilson*, 79 Ill. 233; *Andrews* v. *Murphy*, 12 Ga. 431; *Mulford* v. *LeFranc*, 26 Cal. 88; *Stevens* v. *Mayor of N. Y.* 14 Jones & S. 274; *Wendell* v. *Jackson*, 8 Wend. 183; *S. C.* 22 Am. Dec. 635; *Bass* v. *Mitchell*, 22 Tex. 285; *Bosworth* v. *Sturtevant*, 2 Cush. 392; *Newsom* v. *Pryor*, 20 U. S. 7 Wheat. 7 (5: 382); *Hart* v. *Hawkins*, 3 Bibb. 502; *S. C.* 6 Am. Dec. 666.

Where one execution has been issued and returned *nulla bona* an *alias* execution may be issued at any time thereafter.

Thomson v. *Beveridge*, 3 Mackey, 170; *Horsey* v. *Beveridge*, 4 Mackey, 291.

Real estate cannot be taken into custody by the marshal, so as to give him an interest in the property.

Bellingall v. *Duncan*, 8 Ill. 480; *Holmes* v. *McIndoe*, 20 Wis. 689; *Sumner* v. *Moore*, 2 McLean, 59; *Tarkinton* v. *Alexander*, 2 Dev. & B., L. 87; Freem. Executions, § 291.

Equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession and the donee, induced by the promise to give it, has made improvements in the property.

Neale v. *Neale*, 76 U. S. 9 Wall. 1 (19: 590); Am. note to *Lester* v. *Foxcroft*, 1 White & T. Lead. Cas. Eq. 4th Am. ed. pt. II. 1042.

Mr. **W. Willoughby,** for appellee:

The conveyance of the father to the son in 1880 was not invalid, for the reason that at the time the property was in the adverse possession of Richards.

Cresap v. *Hutson*, 9 Gill, 269; *Schaferman* v. *O'Brien*, 28 Md. 565; *Hadduck* v. *Wilmarth*, 5 N. H. 188; *Hall* v. *Ashby*, 9 Ohio, 96; *Roberts* v. *Cooper*, 61 U. S. 20 How. 483 (15: 974); *Fraser* v. *Hunter*, 5 Cranch, C. C. 470; *Bank of U. S.* v. *Benning*, 4 Cranch, C. C. 81; 2 Coke, Inst. 563, 564; 1 Bac. Abr. 576; 7 Yerg. 390; 10 Yerg. 664; 1 Dana, 17; 2 J. J. Marsh. 606.

When sufficient evidence has been given of the loss of a deed, it must be shown that the deed existed as a genuine instrument.

Clarke v. *Courtney*, 30 U. S. 5 Pet. 319 (8: 140); *Goodier* v. *Lake*, 1 Atk. 446; *Taylor* v. *Riggs*, 26 U. S. 1 Pet. 600 (7: 279); *Metcalf* v. *Van Benthuysen*, 3 N. Y. 424; *Jackson* v. *Vail*, 7 Wend. 125.

As to estoppel by covenant of warranty, see: *Mc Carthy* v. *Mann*, 86 U. S. 19 Wall. 20 (22: 49); *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358 (20: 430); 4 Kent, Com. marg. p. 262; *Pelletreau* v. *Jackson*, 11 Wend. 116, and cases there cited.

The deed was not recorded within six months from its execution.

Greenleaf v. *Birth*, 31 U. S. 6 Pet. 313 (8:410).

The father and son were tenants in common; the sale was void, because it was for a specific portion by metes and bounds.

4 Conn. 510; 28 Conn. 184; 9 Mass. 34; 7 Cush. 184; 28 Tex. 51; 7 Cush. 368; 12 Mass.

347; 24 Pick. 332; 18 Maine, 229; 38 N. H. 133; 20 N. H. 17; 9 Vt. 138.

When a sale is made upon several executions, and one of them is unlawful, the sale is void. *Brown* v. *McKay*, 16 Ind. 484.

Executions which purport to be *in rem* are not authorized by judgments which are personal.

Tidd, Pr. 913; 1 Term. Rep. 80; 6 Ill. 525; 2 Tucker, Com. 339.

The sale was void because the executions were issued to one marshal, while the sale and conveyance upon the same executions were by his successor.

McFarland v. *Gwin*, 44 U. S. 3 How. 717 (11: 799); *Purl* v. *Duvall*, 5 Har. & J. 69.

The description in the alleged levies and in the advertisement were so vague and ambiguous that no proper sale could be made.

Freeman, Executions, § 281; 11 Barb. 173; 4 Pet. 201; 22 Ala. 437; 4 McLean, 329; 13 Johns. 550; 18 Johns. 107; 2 Hill. 552; 44 Mo. 267; 3 Barb. 215; 15 Pet. 184, 215, 275, 319.

Courts of equity are governed by the Statute of Limitations applicable to analogous cases at law.

Godden v. *Kimmell*, 99 U. S. 210 (25: 434); *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); 12 Am. Dec. 368, note, and cases cited; *Etting* v. *Marx*, 4 Hughes, 312.

The assignment of error, that there is a defect of parties, cannot be made here for the first time.

Story v. *Livingston*, 38 U. S. 13 Pet. 375 (10: 208); 52 Am. Dec. 185, 412; Story, Eq. Pl. 541; 1 Dan. Ch. Prac. 286–295; *Hooey* v. *Wilson*, 76 U. S. 9 Wall. 501 (19: 762); *Lewis* v. *Darling*, 57 U. S. 16 How. 1 (14: 819).

Mr. Justice **Harlan** delivered the opinion of the court:

This case is the one referred to in the last clause of the opinion of this court in *Mackall* v. *Richards*, 112 U. S. 369, 376 [28:737, 739].

In the year 1859 Brooke Mackall, Sr., made a verbal gift to his son, Brooke Mackall, Jr., of lot 7, in square 228, in the City of Washington; the father, at the time, promising that he would thereafter make a formal conveyance of the property. The son, relying upon such promise, took possession of the lot and commenced the erection of a building thereon, at the southwest corner of New York Avenue and Fourteenth Street. The lot was of irregular shape, its line on Fourteenth Street being about 152 feet long, and on New York Avenue about 160 feet.

The Marshal of the District of Columbia advertised in 1869 that in virtue of three writs of *fieri facias* and one writ of *venditioni exponas*, issued from the clerk's office of the Supreme Court of the District, he would, on a named day, sell at public sale, for cash, "all defendant's right, title, claim and interest in and to part of lot 7, in square 228, in the City of Washington, D. C., beginning at the northeast corner of said square and running thence south forty-four feet; thence west to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; thence with said north line to the place of beginning, together with all and singular the improvements thereon, seized and levied upon as the property of Brooke Mackall, Jr., and will be sold to satisfy executions Nos. 3477, 3478, 4117, and 3708, in favor of Matthew G. Emery, George H. Plant, A. & T. F. Richards, and Owen & Wilson."

Before the sale took place, Mackall, Jr., brought a suit in equity against said execution creditors and the marshal. He stated in his bill that although he was equitably entitled to the whole of lot 7, under the before-mentioned gift of his father, he had not received a conveyance therefor, and consequently did not hold the legal title. Referring to the description of the property as given in the levies and in the advertisement of sale, he alleged that it was both an indefinite and an impossible description, and that a sale in the mode proposed would prejudice his rights in the remainder of the lot. He therefore prayed that the sale be enjoined. The execution creditors severally answered, each averring that the legal title to the property was in Mackall, Jr., in virtue of a sale in 1862, to one Hyde, for taxes assessed upon it by the Corporation of Washington, and that Mackall, Jr., as assignee of the purchaser, had received and then held a tax deed for the lot, dated October 6, 1865.

It does not appear from the record that any motion for an injunction was made, or that an injunction was issued, or that any further steps were taken, in that cause, beyond the filing of the bill and answer. The sale under the before-mentioned executions, levies and advertisement, occurred June 13, 1870. The present appellant became the purchaser at the sum of $2,500, all of which, except $646.89, was required to pay judgments prior in time to that recovered by A. & T. F. Richards. On the 7th of October, 1870, he received a deed containing the following description of the property conveyed: "Part of lot 7 in square 228, beginning at the northeast corner of square and running thence south forty-four feet; thence westerly to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; thence with said north line to the beginning." This deed was duly recorded February 3, 1871. Richards took possession under his purchase, and expended large sums upon the property in order to make it available.

On the second of April, 1873, Brooke Mackall, Sr. (his wife uniting and relinquishing her contingent right of dower), made a conveyance of lot 7, in square 228, to Joseph B. Hill in trust, to permit the grantor to hold, occupy and enjoy the premises, with the rents, issues and profits thereof, and to convey them to such persons, and upon such terms, as the grantor might in writing direct, and with authority in the latter to incumber the premises or any part thereof as he or his heirs and assigns might direct. This deed was recorded September 29, 1873. When it was made Mackall, Sr., knew that his son held the tax deed of 1865; indeed, the tax deed was made to the son by the direction or procurement of the father.

On the 30th of January, 1874, by a deed, in which Brooke Mackall, Sr., and Joseph B. Hill, individually and as trustee, united as grantors, lot 7, with all the buildings and improvements thereon, and all the rights appertaining thereto, was conveyed to Leonard

Mackall, in trust, to hold the same for the use and benefit of Brooke Mackall, Sr., "and subject to his absolute control and disposal, and to sell and dispose of the same as the said Brooke Mackall, Sr., may in writing direct and require." This deed, for some reason, was not recorded until June 8, 1878.

By deed of February 27, 1880, Brooke Mackall, Sr., conveyed the same lot, including his interest in a pending claim for mesne profits against Alfred Richards, together with all the buildings and improvements thereon, and with all rights in law or in equity appertaining thereto, to Brooke Mackall, Jr., his heirs and assigns forever, for their sole use and benefit.

Mackall, Sr., died March 7, 1880.

The present suit was brought by Brooke Mackall, Jr., on the 11th day of April, 1882—nearly twelve years after Richard's purchase—for the purpose of having the sale of June 13, 1870, the conveyance of October 7, 1870, and all transfers depending thereon, adjudged to be void and of no effect. The sale and conveyance are attacked as invalid upon the following grounds: the price paid for it was grossly inadequate; the executions on which the sale was made were issued without authority, other previous executions not having been returned; the judgments on which the executions were issued were personal judgments only, while the executions directed the sale of specific property described therein; the executions did not sufficiently describe the nature of the debtor's interest in the property, whether legal, equitable or otherwise, nor define its boundaries, so that it could be identified, nor conform to the description of the property as given in the declarations; the court in two of the cases was without jurisdiction to render any other than personal judgments, the proper tribunal for the enforcement of mechanics' liens being a court of equity; that Brooke Mackall, Sr., held the legal title to the property, and was not a party to any of the said suits; that a sale of an equitable interest in real estate could not be made at law, whether for the enforcement of a mechanic's lien or otherwise; that at the time of the sale Mackall, Jr., had no interest in the property except that arising from a verbal promise to convey and his action thereon; that the alleged levies and sale were made long after the return day of the writs; that the executions were issued and delivered to D. S. Gooding, who was then the Marshal of the District of Columbia, whereas the advertisement, sale and conveyance purport to have been made by Alexander Sharp, who was marshal at the time of sale; that the advertisement of sale does not sufficiently describe the property, nor the nature of the interest to be sold, or agree with the other proceedings; and that the conveyance by the marshal does not conform to any of the proceedings in said causes.

The court below, in special term, dismissed the bill. But that decree was reversed in general term, the sale and conveyance by the marshal to Richards, and all transfers depending thereon, being set aside as void and of no effect. As between the parties to the suit, the appellee was declared to be the owner of the property, with a right to have the legal title conveyed to him, upon his paying appellant's claim as judgment creditor, as well as his disbursements in connection with said premises. The ground upon which the court below, in general term, proceeded was, that "On account of the patent, and palpable ambiguity and uncertainty in the description of the property, both in the advertisement and in the marshal's deed," the sale could not be sustained. *Mackall* v. *Richards*, 3 Mackey, 271.

1. Is appellee entitled to relief in a court of equity in respect to the sale of June 13, 1870? In *Badger* v. *Badger*, 69 U. S. 2 Wall. 95 [17:838], it was said that a party who makes an appeal to the conscience of the chancellor should "set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or a formal plea of the Statute of Limitations in his answer." So in *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 811 [24:326]: "To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief." In the latter case, it was said that equity would sometimes refuse relief where a shorter time than that prescribed by the statute had elapsed without suit. See also *Hume* v. *Beale*, 84 U. S. 17 Wall. 336 [See *sub. nom. Crosby* v. *Beale*, 21: 602]; *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 184-5 [22: 485]; *Hayward* v. *Eliot Nat. Bank*, 96 U. S. 617 [24: 857]; *Speidel* v. *Henrici*, 120 U. S. 387 [30: 719].

These principles, applied to the present case, lead to a reversal, upon the ground that the appellee, upon his own showing, has been guilty of gross laches in applying for relief. When the sale to Richards was made the appellee had in his possession a tax deed to himself conveying the legal title to the whole of lot 7. While he says he was advised by counsel that that deed was of no value, and for that reason he did not put it upon record, he fails to suggest in his pleadings any reason why it was not sufficient to invest him with the legal title to the premises. The evidence fairly justifies the conclusion that he was induced, by reason of his embarrassed financial condition, to keep it from record in order thereby to confuse the title to the property, and increase the difficulties in the way of creditors reaching it for his debts. Be that as it may, and assuming that the tax deed was invalid, the appellee having gone into possession of lot 7, and improved it, with the consent of his father, and under the latter's promise to convey it to him, he was entitled at any time after the sale to Richards, to raise the identical questions now presented, as to the invalidity of the sale and conveyance. He made, as we have seen, an effort, before the sale, to have it stopped; but he did not prosecute the suit brought for that purpose; and after the sale, so far as the record shows, he took no

legal steps whatever to prevent a conveyance being made to the purchaser or to have the sale set aside. It is true he alleges that he complained to Richards of the injustice done by the sale, and endeavored to procure a compromise with him; that the latter repeatedly promised to do what was right, and to release his claim on the property when he was reimbursed by rents and profits for the money he had expended; that Richards promised to render an account of his claim, but no account was ever rendered, except one so extravagant that it could not be considered; and that he has never been able to effect any arrangement with him. The evidence does not sustain these allegations. Appellee testifies that in August, 1878, his father tendered to Richards the amount of his judgment, together with all the expenses and costs of all kinds. But he admits that the appellant declined to accept the money. While appellant was, perhaps, willing to surrender his purchase, shortly after it was made, if he had been reimbursed his expenditures in connection with the property, there is no satisfactory proof that he ever recognized the legal or equitable right of the appellee or of any one else to deprive him of the full benefit of that purchase. We find nothing whatever in the record to excuse the failure of the appellee to institute legal proceedings, in due time, to have the sale set aside. He knew that the appellant relied upon the sale, and upon the faith of it expended large sums. He knew that the premises here in dispute were in fact levied on for his debts, and were intended to be sold in satisfaction of those debts. But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information, during the whole of that period, of every fact now relied upon by him, appellee asks the aid of a court of equity to set aside the sale and conveyance, and adjudge him to be the owner of the property; and, chiefly, because of a mistake of the officer in not so describing the premises in the advertisement of sale and in the conveyance, as to properly identify them. In our judgment, he is not in a position to claim the interference of a court of equity.

For that reason alone, the judgment must be reversed and the cause remanded, with direction to dismiss the bill. It is so ordered.

THEODORE H. VETTERLEIN ET AL., *Appts.*, *v.* DEMAS BARNES, Assignee in Bankruptcy of THEODORE H. VETTERLEIN ET AL.

(See S. C. Reporter's ed. 169–173.)

Void transfer of policies—necessary parties— cestui que trust.

1. Upon the evidence in this case, *held*, that the court below correctly decided that a transfer of certain policies of life insurance to trustees, for the wife and children of the assignor, was made in contemplation of the insolvency of the assignor, and was void as to his assignee in bankruptcy, and that the assignee was entitled to receive the insurance moneys.

2. *Held further*, that the wife and children of the assignor were not necessary parties defendant to an action brought by his assignee in bankruptcy, against the bankrupt and the insurance companies, to enjoin the assignor from collecting the policies, and for the recovery of the moneys due thereon.

3. Where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same, on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee who is the holder of the legal estate, in the property, without joining the *cestui que trust*.

[No. 104.]

Argued Dec. 8, 1887. Decided Jan. 9, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, affirming a decree of the District Court in favor of the appellee, restraining appellants from collecting certain policies and decreeing that the appellee is entitled to the insurance moneys. *Affirmed.*

The facts and case are fully stated in the opinion.

Messrs. **T. M. Tyng**, *John D. McPherson*, and **Calderon Carlisle**, for appellants:

A sale or transfer of a policy on the life of a living person to one not having an insurable interest in the life of such person, is absolutely inoperative to pass the policy.

Cammack v. *Lewis*, 82 U. S. 15 Wall. 643 (21:244); *Warnock* v. *Davis*, 104 U. S. 775 (26:924).

Taylor was a necessary party, for in the absence of the debtor or his personal representative the amount of the debt could not be determined.

Mallow v. *Hinde*, 25 U. S. 12 Wheat. 193 (6:599); *Caldwell* v. *Taggart*, 29 U. S. 4 Pet. 190 (7:828); *Shields* v. *Barrow*, 58 U. S. 17 How. 130 (15:158); *Story* v. *Livingston*, 38 U. S. 13 Pet. 359 (10:200); *Carey* v. *Brown*, 92 U. S. 171 (23:469); *Robertson* v. *Carson*, 86 U. S. 19 Wall. 94 (22:178); *Williams* v. *Bankhead*, 86 U. S. 19 Wall. 563 (22:184); *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280 (18:825).

The beneficiaries, the wife and children of Theodore H. Vetterlein, are indispensable parties.

Williams v. *Bankhead*, *supra*.

Messrs. **Harrington Putnam**, *Jas. K. Hill* and *Henry T. Wing*, for appellee:

But little, if any, reliance can be placed upon the statement of the assignor: that he had no reason to believe himself insolvent.

Graham v. *Stark*, 3 Nat. Bank. Reg. 93; *Kehr* v *Smith*, 87 U S. 20 Wall. 31 (22:313).

The assignment is void as against creditors.

Sedgwick v. *Place*, 12 Blatchf. 163; *Spaulding* v. *McGovern*, 10 Nat. Bank. Reg. 188; *Case* v. *Phelps*, 39 N. Y. 164.

Mr. Justice **Harlan** delivered the opinion of the court:

In and prior to the year 1867 the firm of Vetterlein & Co., composed of Theodore H. Vetterlein, Bernhard T. Vetterlein, Theodore J. Vetterlein, and Charles A. Meurer, and doing business in Philadelphia, assisted one J. Kinsey Taylor by lending him money and acceptances. In the summer of that year for the security of the firm, Taylor caused his life to be insured, the policies taken out by him being assigned to Theodore H. Vetterlein as security for Taylor's liability to the firm. In July, 1869, Meurer retired from the firm, Taylor's indebtedness to it being, at that time, nearly $50,000.

In December, 1869, Theodore J. Vetterlein also left the firm. The remaining partners went on with the business, at the same place, under the same name, and with the same stock of merchandise, taken at valuation.

On or about the 18th of July, 1870, the policies (which, under some arrangement, had been reduced in amount) were assigned by Theodore H. Vetterlein to Bernhard T. Vetterlein and Theodore J. Vetterlein, as trustees for the wife and children of the assignor.

In the District Court of the United States for the Southern District of New York, sitting in bankruptcy, Theodore H. Vetterlein and Bernhard T. Vetterlein were adjudged bankrupts. The adjudication was made February 7, 1871, upon a petition of certain creditors of the bankrupts, filed December 28, 1870.

Taylor died July 1, 1871. Due proof of his death was made by B. T. Vetterlein and T. J. Vetterlein, and they were proceeding to collect the insurance moneys, when the present suit was brought in the district court, August 10, 1871, by Barnes, assignee in bankruptcy of Theodore H. Vetterlein and Bernhard T. Vetterlein, against the bankrupts, Theodore J. Vetterlein, and the insurance companies. The principal object of the suit was to enjoin B. T. and T. J. Vetterlein from collecting the amounts due on the policies. Barnes contended that, as assignee in bankruptcy, he was entitled to receive these insurance moneys, which is less in amount than Taylor's indebtedness to the bankrupts. His claim was sustained by the district court, and, upon appeal to the circuit court, the decree of the former court was affirmed.

1. The district court correctly held, upon the evidence, that at the time of the transfer by Theodore H. Vetterlein of the policies in question for the benefit of his wife and children, neither Meurer nor Theodore J. Vetterlein had any valuable pecuniary interest in the assets of the former firms, and that the firm of Vetterlein & Co., composed of Theodore H. Vetterlein and Bernhard T. Vetterlein, held the entire beneficial interest in the policies taken out to secure Taylor's debts. That interest passed to their assignee in bankruptcy.

2. Such transfer, which was within six months before the filing of the petition in bankruptcy, was made in contemplation of the insolvency of Theodore H. Vetterlein and Bernhard J. Vetterlein; and according to the weight of evidence the transferees, at that time, not only had reasonable cause to believe that Theodore H. Vetterlein was acting in contemplation of insolvency, but that such transfer was made with a view to prevent the moneys due on the policies from coming into the hands of an assignee in bankruptcy.

3. It is contended that the wife and children of Theodore H. Vetterlein were indispensable parties, and that it was error to proceed to a final decree without having them made defendants. The general rule undoubtedly is that all persons materially interested in the result of a suit ought to be made parties so that the court may finally determine the entire controversy, and do complete justice by adjudging all the rights involved in it. *Story* v. *Livingston*, 38 U. S. 13 Pet. 359, 375 [10:200, 208]; *Shields* v. *Barrow*, 58 U. S. 17 How. 130, 139 [15:158, 160]. But in a suit brought against a trustee by a stranger, for the purpose of defeating the trust altogether, the beneficiaries are not necessary parties, if the trustee has such powers or is under such obligations, with respect to the execution of the trust, that "those for whom he holds will be bound by what is done against him, as well as by what is done by him." In such cases of representation by trustees, the beneficiaries will be bound by the judgment, "unless it is impeached for fraud or collusion between him and the adverse party" *Kerrison* v. *Stewart*, 93 U. S. 155, 160 [23:843, 845].

In *Sears* v. *Hardy*, 120 Mass. 529, the court, after observing that who shall be made parties to a suit in equity cannot always be determined by definite rules, but rests to some degree in the discretion of the court, said: "Generally speaking, however, to a suit against trustees to enforce the execution of a trust, *cestuis que trust*, claiming present interests directly opposed to those of the plaintiff, should be made parties, in order that they may have the opportunity themselves to defend their rights, and not be obliged to rely upon the defense made by the trustees, or to resort to a subsequent suit against the trustees or the plaintiff, or to take the risk of being bound by a decree rendered in their absence." But the rule is different where the claim of the plaintiff antedates the creation of the trust, and the suit is brought, not in recognition or furtherance of the trust, but in hostility to it, as fraudulent and void. In *Rogers* v. *Rogers*, 3 Paige, 379 (which was a suit by a judgment creditor to set aside as fraudulent an assignment by the debtor of his personal estate in trust for the payment of a debt to a particular bank, and to pay the residue of the proceeds thereof to other creditors of the assignor) it was objected, at the hearing, that the bank was not made a party defendant. The objection was held to be untenable, the chancellor observing: "As a general rule, the *cestui que trust*, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust. But where the complainant claims in opposition to the assignment or deed of trust, and seeks to set aside the same, on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property, without joining the *cestui que trust*." *Wakeman* v. *Grover*, 4 Paige, 33; *Irwin* v. *Keen*, 3 Whart. 344, 355; *Therasson* v. *Hickok*, 37 Vt. 464; *Hunt* v. *Weiner*, 39 Ark. 70; *Winslow* v. *Minnesota & P. R. Co.*, 4 Minn. 816; *Tucker* v. *Zimmerman*, 61 Ga. 601.

The assignment of the policies in question in trust for the wife and children of the assignor, the trust having been accepted, carried with it, by necessary implication, authority in the trustees, by suit or otherwise, to collect the insurance moneys for the beneficiaries. Indeed, they could not otherwise have fully discharged the obligations they assumed as trustees. They were entitled to represent the beneficiaries in their claim for the insurance money, and were under a duty to defend any suit, the object of which was to prevent the discharge of that duty, and set aside the transfer of the policies as fraudulent and void. It results that

the wife and children of Theodore H. Vetterlein were not necessary parties defendant.

We perceive no error in the record, and the decree is affirmed.

Ex Parte:

In the Matter of ANDREW J. SAWYER ET AL., *Petitioners.*

(See S. C. Reporter's ed. 200-225.)

Jurisdiction of court of chancery—of circuit court—amendments to the Constitution—ex-post facto *laws—injunction to stay state court—order of court, when void.*

1. A court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, to try the same right that is in issue there; nor has such court any jurisdiction over the appointment and removal of public officers; the right to a municipal office cannot be determined by bill in equity.
2. The Circuit Court of the United States has no jurisdiction to entertain a bill in equity, filed by a police judge against the mayor and councilmen of a city, to prevent his removal from the office of police judge, and cannot in such suit restrain, by injunction, the officers of the city, nor adjudge parties guilty of contempt in disregarding its order.
3. The Fifth and Sixth Amendments to the Constitution of the United States which provide that no person shall be deprived of life, liberty or property, without due process of law, and secure to the accused in criminal prosecutions trial by jury, and compulsory process for obtaining witnesses in his favor, apply to the United States only, and not to laws or proceedings under the authority of a State.
4. That provision of the same Constitution which prohibits any State to pass *ex post facto* laws applies only to legislation concerning crimes.
5. A writ of injunction cannot be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt act.
6. Where a court acts without jurisdiction its judgments and orders are regarded as nullities; they are not voidable, but simply void.

[No. 10 Orig.]

Argued Dec. 12, 1887. *Decided Jan. 9, 1888.*

PETITION for writ of *habeas corpus*, in behalf of the Mayor and Members of the Council of the City of Lincoln in the State of Nebraska. *Granted.*

Statement of the case by *Mr. Justice* **Gray:**

This was a petition for a writ of *habeas corpus*, in behalf of the Mayor and eleven members of the City Council of the City of Lincoln in the State of Nebraska, detained and imprisoned in the jail at Omaha in that State by the Marshal of the United States for the District of Nebraska, under an order of attachment for contempt, made by the Circuit Court of the United States for that district, under the following circumstances:

On September 24, 1887, Albert F. Parsons presented to the circuit judge a bill in equity against said mayor and councilmen, the whole of which, except the title, the address and the signature, was as follows:

"Your petitioner is, and for more than fifteen years last past has been, a citizen of the United States, and a resident and citizen of the State of Nebraska, and as such citizen has been and is entitled to the equal protection of the laws, and to life, liberty and property; nor could he be deprived thereof without due process of law, nor denied the same within the jurisdiction of the United States or of the State of Nebraska.

"On the —— day of April, 1886, this complainant was duly and legally elected to the office of Police Judge of the City of Lincoln, in Lancaster County, Nebraska, and soon thereafter did duly qualify and enter into the discharge of his duties as such police judge; and ever since, and yet at this time, complainant has held and exercised all the functions and performed all the duties of the said office; and for the last six months and more all of the respondents except the said Andrew J. Sawyer have been and yet are the duly elected, qualified and acting councilmen of the said city, and the said Sawyer has been and yet is the duly elected, qualified and acting mayor of the said city.

"On the —— day of August, 1887, and for a long time prior thereto, there was a certain ordinance in the said city in full force, relating to the removal from office of any official of the said city, and which said ordinance provided that no officer of said city should be put upon trial for any offense charged against him, except before all the members of the said city council.

"On the —— day of August, 1887, one John Sheedy, Gus. Saunders and A. J. Hyatt filed in writing with the city clerk of said city certain charges against this complainant, charging this complainant with appropriating the moneys of the said city, and a copy of which is hereto attached and made a part hereof;* and said mayor thereupon referred the said

*To the Honorable Mayor and Council of the City of Lincoln:

Your petitioners, John Sheedy and A. Saunders, respectfully represent to this honorable body, that they are citizens and resident taxpayers of the City of Lincoln; and your petitioners would further represent that on the 18th day of July, 1887, they employed a skillful accountant, one M. M. White, a resident and taxpayer of this city, to examine into the dockets and files and reports of A. L. Parsons, Police Judge of this City of Lincoln, to learn whether said A. L. Parsons, Police Judge, was making true and proper statements to the city of the business done by him as police judge, and to further ascertain whether or not said A. L. Parsons, Police Judge, had turned over to the city and county treasurers all moneys coming into his hands as fines and properly belonging to the city and county.

And your petitioners say that after a proper and careful examination of the files and dockets and reports of said A. L. Parsons, Police Judge, they have ascertained beyond question that said A. L. Parsons, Police Judge, has appropriated to his own use and benefit large sums of money which is the property of the City of Lincoln, and that he now has and keeps for his own use moneys which he has collected as fines from persons brought before him as police judge for violating the city ordinances.

And your petitioners say that the said A. F. Parsons, as Police Judge, collected fines for the violation of the city ordinances, in the months of August, September, October, November and December, 1886, which fines and moneys he has appropriated to his own use, and has utterly failed to keep any record or account of the same or to account to the city, or turn over to the city treasurer any of the moneys so appropriated, as is required by law.

And your petitioners say that in the months of April, May and June, 1887, the said A. F. Parsons received fines from divers persons, as Police Judge, which he has appropriated to his own use, and had wholly failed to keep any record of said fines or to account to the city for the same.

And your petitioners say that the said A. F. Parsons, as Police Judge, collected fines from divers persons in the month of May, 1887, and the months of March and April, 1887, and the month of Sep-

matter to a committee of only three of the members of the said council, to make a finding of fact and law upon the said charges; and said committee of three caused a notice to be served upon your complainant, requiring him to appear and defend himself before them; and complainant did appear before said committee, and then objected to the jurisdiction of the said committee, that they had no right or authority to render a verdict of the fact against him, or give judgment of law upon the said charges, or to hear or determine the said trial; and thereupon the said committee reported back the said charges to said mayor and council, that the said committee, under the charter to the said city, had no right or authority to render a verdict or judgment upon the said charges. But the said Sheedy and Saunders, who are, and for more than ten years have been, common gamblers in the said city, and are men of large wealth and influence in said city council, at once and on the —— day of August, 1887, and long after said complaint against this complainant had been filed, and long after said committee had reported back to said mayor and city council that they had no right, power or authority to hear said trial or to render either verdict or judgment in said proceedings, did procure the passage of another and different and *ex post facto* ordinance, granting to the said committee of three, instead of the council of twelve members, as by said ordinance required, the right and power to try the facts as alleged in said charges and make a report thereon, and, if in their judgment they saw fit, to report to said mayor and city council that the office of the police judge should be declared vacant, and that the said mayor should fill the office of the said police judge, now occupied by your complainant, with some other person.

"And after the passage of this *ex post facto* law, said committee of three assumed jurisdiction to render a verdict of fact, and to hear and determine the said charges, and add thereto a conclusion of law, and notified this complainant to again appear and defend himself before the said committee, and this complainant then and there again objected to the jurisdiction of said committee to make any finding of facts against him, or to render any judgment or report thereon, upon the ground that said new ordinance was *ex post facto*, and that said committee had no jurisdiction.

"On the 19th day of September, 1887, the said committee, having heard before themselves, denying to complainant a trial to a jury, and the evidence for the prosecution of the said action by certain gamblers and pimps, no material evidence for the prosecution being offered to them otherwise, did render a finding of fact against this complainant, and recommending to said mayor and city council that the office of police judge should be declared vacant, and that the said mayor should fill the said office by the appointment of some other person than complainant, and found that said ordinance was not *ex post facto;* and the said mayor and city council have set the matter for final vote on Tuesday, the 27th day of September, 1887, and threaten and declare that on the said day they will declare the office of the said complainant vacant, without hearing or reading the evidence taken before said committee, and appoint some other person to fill the same, and which report untruthfully states that all their evidence is filed therewith and fraudulently so, to suppress a certain book offered in evidence by complainant, which book is in the handwriting of said Gus. Saunders and which is done to favor and aid and protect said gamblers, and to fraudulently obtain the removal of complainant from his said office.

"This complainant says that all of the said proceedings, trial, verdict, and other acts and doings of the said city council, and the ordinance approved ————, as well as the said ordinance approved August ——, 1887, were and are illegal and void, and contrary to, and in conflict with, and prohibited by, the Constitution of the United States, whereby among other things it is provided that no person shall be deprived of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law, nor be adjudged of or tried for any offense by an *ex post facto* law; and complainant says that forasmuch as by the Constitution of the United States it is provided that no person shall be deprived of life, liberty or property without due process of law, and that in all criminal prosecutions the accused shall have the right of process to compel the attendance of witnesses in his behalf, and a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed, and that no *ex post facto* law shall be passed, and that all of said rights shall remain inviolate; but such rights being denied by said ordinance and proceedings aforesaid to this complainant, he has been and is, and is threatened to be, deprived of such rights without due process of law, and that the same is *ex post facto* law, within the meaning of the Constitution of the United States, and which protection has nor is not accorded to this complainant, he has been by said proceedings, and yet is, deprived of the equal protection of the laws.

"All of which illegal and oppressive acts and

tember, 1886, which fines he has appropriated to his own use and benefit, and has wholly failed to keep any record of the said fines, or to make any report to the city of the same.

And your petitioners say that the said A. F. Parsons has been police judge since April, 1886, and that during that time he has collected fines for the violation of statutes of Nebraska to the amount of $329, according to his dockets, and up to the 19th day of July, 1887, he had turned in to the County Treasurer of Lancaster County but the sum of $15; whereas he had in his possession on the first day of July, 1887, the said sum of $314, which properly belonged to the county.

And your petitioners say that on said 19th day of July, 1887, the day on which the accountant M. M. White completed the investigation of the said police judge's dockets, said Parsons paid into the county treasury the sum of $195, which leaves due the county the sum of $119, which was in his possession on the 19th day of July, 1887.

Your petitioners, therefore, ask that the honorable Mayor and Council may appoint a committee of your honorable body, and that a time and place be mentioned on which to take testimony inquiring into the conduct of A. F. Parsons as Police Judge and to investigate the management of his office, and to give the said A. F. Parsons and your petitioners notice of such time and place, and your petitioners will appear with the evidence and testimony proving the facts hereinbefore stated.

A. Saunders.
John Sheedy.
A. J. Hyatt.

things are in violation of and in conflict with the Constitution of the United States, and ought to be redressed by the judicial powers thereof.

"Wherefore, complainant prays that a writ of injunction may be allowed by Your Honor to be issued out of this honorable court, under the seal thereof, directed to the respondents and all thereof, that they proceed no further with the charges against this complainant, and that no vote be had by the city council or the said defendants upon the pretended findings of the facts, verdict or report, and filed September 19th, 1887, with the said city clerk, handed in by Councilman Billingsley, and that said defendants nor any of them do not declare said office vacant, or in any way or manner proceed further with said charges, nor appoint any person to fill said office; that said defendants may appear and answer this your complainant's bill, but answer under oath being expressly waived; that on the final hearing of this action said injunction be made perpetual, and that the defendants pay the costs of this action, and that the complainant have such other, further and different relief as justice may require."

Annexed to the bill was an affidavit of Parsons that he had read it, and knew all the facts therein set forth, and that the same were true.

On reading the bill, the circuit judge ordered that the defendants show cause before the circuit court, why a preliminary injunction should not issue as prayed for, "and that in the mean time, and until the further order of the court, they be restrained from doing any of the matters sought to be enjoined."

In accordance with the prayer of the bill and the order of the judge, an injunction was forthwith issued and served upon the mayor and councilmen.

After this, at a meeting of the city council held for the purpose, the mayor and councilmen proceeded to take up and consider the charges against Parsons, and, after considering the evidence, passed a resolution by which they "find that said Parsons received a number of fines for the violation of the city ordinances, which he failed to turn in to or report to the city treasurer at times required by law, and specified in the charges against said Parsons," and "that his arrangement with the gamblers and prostitutes, that if they would pay a fine monthly they would not otherwise be molested, was in direct violation of law, and calculated to bring the city government into disgrace;" and "therefore confirm the report of the committee who reported to this council on the charges against said Parsons, and declare the office of Police Judge of the City of Lincoln vacant, and request the mayor to fill the office with some competent person." Thereupon the mayor nominated, and the council on motion confirmed, H. J. Whitmore, to be Police Judge, to fill the vacancy; and the mayor issued an order to the city marshal, informing him that Whitmore had been duly qualified and given bond and been commissioned as police judge and directing him to see that he be duly installed in his office. Parsons declining to recognize the action of the city council, or to surrender the office, the city marshal forcibly ejected him and installed Whitmore.

Upon an affidavit of Parsons, charging the mayor and councilmen with willful and contemptuous violation of the injunction, stating the above facts, and accompanied by a copy of a notice to him from the city clerk, setting forth the resolution of the city council and the nomination and confirmation of Whitmore, as well as by a copy of the mayor's order to the city marshal, the circuit court issued a rule to the mayor and councilmen to show cause why they should not be attached for contempt. Upon their answer to that rule, under oath, producing copies of the ordinances under which they acted (the material parts of which are set forth in the margin*) admitting and justifying their disregard of the injunction, and suggesting a want of jurisdiction in the circuit court to make the restraining order, the court granted an attachment for their arrest; and, upon a hearing, found them guilty of violating the injunction,

*The original ordinance contained these sections:

"Sec. 1. Whenever any officer of the City of Lincoln, whose office is elective, shall be guilty of any willful misconduct or malfeasance in office, he may be removed by a vote of two thirds of all the members elected to the council; *Provided*, That no such officer shall be removed from office unless charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant, to support such charges, shall be filed with the city clerk, president of the council, or mayor, which charge and specifications shall be read at a regular meeting of the council, and a copy thereof, certified by said clerk, president of the council, or mayor, accompanied with a notice to show cause, at the next regular meeting of said council, why he shall not be removed from office, shall be served upon the officer so accused at least five days before the time fixed to show cause.

"Sec. 2. In case the said accused officer shall neglect to appear and file a denial in writing, or render a reason for not doing so, at the first regular meeting of said council after being duly notified, the said charge and specifications shall be taken as true, and the council shall declare the office vacant.

"Sec. 3. In case said officer shall file a denial of said charge and specifications in writing, the council shall adjourn to some day for the trial of said officer; and if upon the trial of said officer said council shall be satisfied that he is guilty of any misconduct willfully, or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance.

"Sec. 4. All proceedings and notice in the matter of such charges may be served by the marshal or any policeman, and the return of any such officer shall be sufficient evidence of the service thereof; service and return shall be in the manner provided by law for the service of summonses in justice's courts."

By the Ordinance of August 24, 1887, section 3 of the former ordinance was repealed, and the following amendment substituted:

"In case said officer shall file a denial of the said charges and specifications in writing, the council, or the committee of the council, to whom said charges shall have been referred, shall appoint some day for the trial of said officer, and if upon the trial of said officer said council or said committee shall be satisfied that he is guilty of any misconduct willfully, or malfeasance or misfeasance in office, the council shall cause its findings, or the findings of said committee, to be entered upon the minutes of the council, and the council shall declare the said office vacant and the said officer removed therefrom. The council shall then forthwith cause the mayor to be notified that the said office is vacant and that said officer is so removed. When the mayor is so notified, the said office shall be filled by appointment of the mayor by the assent of the council; and such person so appointed shall hold said office until the next general election, and as in such case by statute and ordinance made and provided. If the officer against whom said charges are made shall appear and defend against the same, he shall be held and deemed to have waived all irregularities of proceedings, if any, as do not affect the merits of his defense."

and adjudged that six of them pay fines of $600 each, and the others fines of $50 each, beside costs, and in default of payment thereof stand committed to the custody of the marshal until the fines and costs should be paid, or they be otherwise legally discharged. They did not pay the fines or costs, and were therefore taken and held in custody by the marshal.

The petition for a writ of *habeas corpus* alleged "That the court had no jurisdiction of said suit commenced by the said Albert F. Parsons against your petitioners, and that said restraining order was not a lawful order, and that said judgment of said court that your petitioners were in contempt, and the sentence of said court, that your petitioners pay a fine and suffer imprisonment for violating said restraining order is void and wholly without the jurisdiction of the Circuit Court of the United States, and in violation of the Constitution of the United States;" and further alleged "as special circumstances, making direct action and intervention of this court necessary and expedient, that it would be useless to apply to the Circuit Court of the United States for the District of Nebraska for a writ of *habeas corpus*, because both the circuit and district judges gave it as their opinion in the contempt proceedings that the said restraining order was a lawful order and within the power of the court to make."

Mr. **G. M. Lambertson,** for the petitioners:

A court cannot punish as for contempt when there is no jurisdiction to make the order violated.

Ex parte Rowland, 104 U. S. 604 (26:861); *Ex parte Fisk*, 113 U. S. 713 (28:1117); High, Injunctions, §§ 1286, 1425; *Dickey* v. *Reed*, 78 Ill. 262; *Walton* v. *Develing*, 61 Ill. 201; *Darst* v. *People*, 62 Ill. 306; *People* v. *Kidd*, 28 Mich. 440; *Andrews* v. *Knox Co.* 10 Ill. 65.

A person imprisoned under a void judgment, or for the violation of an order beyond the power of the court to make, will be released by writ of *habeas corpus*.

Ex parte Rowland, supra; Ex parte Lange, 85 U. S. 18 Wall. 163 (21:872); *Ex parte Carll*, 106 U. S. 521 (27:288); *Ex parte Wilson*, 114 U. S. 417 (29:89).

The circuit court has no jurisdiction.

Ex parte Smith, 94 U. S. 455 (24:165); *Rosenbaum* v. *Supervisors*, 28 Fed. Rep. 228; *Kurts* v. *Moffitt*, 115 U. S. 487 (29:458); *Stewart* v. *Va.* 117 U. S. 613 (29:1006); *Nashville* v. *Cooper*, 78 U. S. 6 Wall. 247 (18:851); *N. O. & B. S. Mail Co.* v. *Fernandez*, 79 U. S. 12 Wall. 130 (20:249).

The matters set forth in the bill are not cognizable by a court of equity.

High, Injunctions, §§ 1311, 1312, 1313, 1328; *Delahanty* v. *Warner*, 75 Ill. 185; *Beebe* v. *Robinson*, 52 Ala. 66.

Nor will state officers be restrained from enforcing a law of a State, merely upon the ground of its unconstitutionality.

High, Injunctions, 1325, 1242, 1243; *Gibbs* v. *Green*, 54 Miss. 593; *Thompson* v. *Canal Fund Comrs.* 2 Abb. Pr. 248; *Dickey* v. *Reed*, 78 Ill. 267.

A court of equity will never enjoin a criminal prosecution, on the ground that the law or ordinance authorizing the prosecution is illegal or unconstitutional.

High, Injunctions, §§ 1242–1244; *Spink* v. *Francis*, 19 Fed. Rep. 671; *Same* v. *Same*, 20 Fed. Rep. 567.

The complainant has a complete remedy at law.

State v. *Sheldon*, 10 Neb. 454; *State* v. *Oleson*, 15 Neb. 247; *Minkler* v. *State*, 14 Neb. 181; *State* v. *Meeker*, 19 Neb. 444; *Peck* v. *Jenness*, 48 U. S. 7 How. 625 (12:846).

The term *ex post facto*, as employed in our National and State Constitutions, has reference exclusively to criminal laws.

Wade, Retroactive Laws, § 271 and cases cited, § 283; *Gut* v. *Minn.* 76 U. S. 9 Wall. 35 (19:573); *Donahue* v. *Will County*, 100 Ill. 94.

Mr. **L. C. Burr,** in opposition:

The writ of *habeas corpus* cannot be made to subserve the purpose of a writ of error, and the court will only grant the writ to examine into the authority of the court below to act at all.

People v. *Sturtevant*, 9 N. Y. 266 and cases cited; *Ex parte Va.* 100 U. S. 339 (25:676).

Habeas corpus will not lie, for the order of commitment is in the nature of a final judgment, which the supreme court has no power to review.

1 Curtis, Com. § 204; *Ex parte Kearney*, 20 U. S. 7 Wheat. 38 (5:391); *Ex parte Fisk*, 113 U. S. 713 (28:1117); *N. O.* v. *N. Y. Mail Steamship Co.* 87 U. S. 20 Wall. 387 (22:354).

This is not an interference with the local concerns of the municipal power.

Ex parte Va. supra; Huber v. *Reily*, 53 Pa. 112.

It is the duty of the court to enforce the law and protect its citizens.

Va. v. *Rives*, 100 U. S. 313 (25:667); *Ex parte Royall*, 117 U. S. 241 (29:868); *Strauder* v. *W. Va.* 100 U. S. 312 (25:667).

Mr. Justice **Gray** delivered the opinion of the court:

The question presented by this petition of the Mayor and Councilmen of the City of Lincoln for a writ of *habeas corpus* is whether it was within the jurisdiction and authority of the Circuit Court of the United States, sitting as a court of equity, to make the order under which the petitioners are held by the marshal.

Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn* v. *Holme*, 62 U. S. 21 How. 481, 484–487 [16:198–200]; *Thompson* v. *Central Ohio R. R. Co.* 73 U. S. 6 Wall. 134 [18:765]; *Heine* v. *Levee Comrs.* 86 U. S. 19 Wall. 655 [22:223].

The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the Executive and Administrative Department of the Government.

Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of *habeas corpus* for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; *Gee* v. *Pritchard*, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; *Atty-Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. 371, 378.

From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process.

Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it part of the rule to show cause that he should not move for an injunction in chancery in the mean time, said: "Sure, chancery would not grant an injunction in a criminal matter under examination in this court; and if they did, this court would break it, and protect any that would proceed in contempt of it." *Holderstaffe* v. *Saunders*, Cas. *temp.* Holt. 136; *S. C.* 6 Mod. 16.

Lord Chancellor Hardwicke, while exercising the power of the court of chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: "This court has not originally, and strictly, any restraining power over criminal prosecutions;" and again: "This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus;* nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of." *Mayor, etc., and Corporation of York* v. *Pilkington*, 2 Atk. 302; *S. C.* 9 Mod. 278; *Montague* v. *Dudman*, 2 Ves. Sr. 396, 398.

The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Atty-Gen.* v. *Cleaver*, 18 Ves. Jr. 211, 220; *Turner* v. *Turner*, 15 Jur. 218; *Saull* v. *Browne*, L. R. 10 Ch. 64; *Kerr* v. *Preston*, L. R. 6 Ch. D. 463.

Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story, Eq. Jur. § 893. And in the American Courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State, or under municipal ordinances. *West* v. *Mayor of N. Y.* 10 Paige, 539; *Davis* v. *Am. Society etc.* 75 N. Y. 362; *Tyler* v. *Hamersley*, 44 Conn. 419, 423; *Stuart* v. *La Salle Co.* 88 Ill. 341; *Devron* v. *First Municipality*, 4 La. Ann. 11; *Levy* v. *Shreveport*, 27 La. Ann. 620; *Moses* v. *Mobile*, 52 Ala. 198; *Gault* v. *Wallis*, 53 Ga. 675; *Phillips* v. *Stone Mountain*, 61 Ga. 386; *Cohen* v. *Goldsboro Comrs.* 77 N. C. 2; *Waters Peirce Oil Co.* v. *Little Rock*, 39 Ark. 412; *Spink* v. *Francis*, 19 Fed. Rep. 670, and 20 Fed. Rep. 567; *Suess* v. *Noble*, 31 Fed. Rep. 855.

It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case, and the mode of procedure established by the common law or by statute.

No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the court of chancery for the regulation of Harrow School, within its undoubted jurisdiction over public charities, was dismissed, so far as it sought a removal of governors unlawfully elected, *Sir* William Grant saying: "This court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description." *Atty-Gen.* v. *Clarendon*, 17 Ves. Jr. 491, 498.

In the courts of the several States, the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well considered cases.

Upon a bill in equity in the Court of Chancery of the State of New York by a lawfully appointed inspector of flour, charging that he had been ousted of his office by one unlawfully appointed in his stead by the Governor, and that the new appointee was insolvent, and praying for an injunction, a receiver, and an account of fees, until the plaintiff's title to the office could be tried at law, *Vice Chancellor* McCoun said: "This court may not have jurisdiction to determine that question, so as to render a judgment or decree of ouster of the office;" but he overruled a demurrer, upon the ground that the bill showed a *prima facie* title in the plaintiff. *Tappen* v. *Gray*, 8 Edw. Ch. 450. On appeal *Chancellor* Walworth reversed the decree, "Upon the ground that at the time of the filing of this bill the court of chancery had no jurisdiction or power to afford him any relief." 9 Paige, 507, 509, 512. And the chancellor's decree was unanimously affirmed by the court of errors, upon *Chief Justice* Nelson's statement that he concurred with the chancellor respecting the jurisdiction of courts of equity in cases of this kind. 7 Hill, 259.

The Supreme Court of Pennsylvania has decided that an injunction cannot be granted to restrain a municipal officer from exercising an office which he has vacated by accepting another office, or from entering upon an office under an appointment by a town council, alleged to be illegal; but that the only remedy in either case is at law by *quo warranto*. *Hagner* v. *Heyberger*, 7 Watts & S. 104; *Updegraff* v. *Crans*, 47 Pa. 103.

The Supreme Court of Iowa, in a careful opinion delivered by *Judge* Dillon, has adjudged that the right to a municipal office cannot be determined in equity upon an original bill for an injunction. *Cochran* v. *McCleary*, 22 Iowa, 75.

In *Delahanty* v. *Warner*, 75 Ill. 185, it was decided that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets, and appointing a successor; but that the remedy was at law by *quo warranto* or *mandamus*.

In *Sheridan* v. *Colvin*, 78 Ill. 237, it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of commissioner of police; and the court, repeating in great part the opening propositions of Kerr on Injunctions, said: "It is elementary law that the subject matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political nature come within the jurisdiction of a court of chancery. Nor has the court of chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances, and when necessary for the protection of rights of property." 78 Ill. 247.

Upon like grounds, it was adjudged in *Dickey* v. *Reed*, 78 Ill. 261, that a court of chancery had no power to restrain by injunction a board of commissioners from canvassing the results of an election; and that orders granting such an injunction, and adjudging the commissioners guilty of contempt for disregarding it, were wholly void. And in *Harris* v. *Schryock*, 82 Ill. 119, the court, in accordance with its previous decisions, held that the power to hold an election was political and not judicial, and therefore a court of equity had no authority to restrain officers from exercising that power.

Similar decisions have been made, upon full consideration, by the Supreme Court of Alabama, overruling its own prior decisions to the contrary. *Beebe* v. *Robinson*, 52 Ala. 66; *Moulton* v. *Reid*, 54 Ala. 320.

The Statutes of Nebraska contain special provisions as to the removal of officers of a county or of a city.

"All county officers, including justices of the peace, may be charged, tried and removed from office for official misdemeanors" of certain kinds, by the board of county commissioners, upon the charge of any person. "The proceeding shall be as nearly like those in other actions as the nature of the case admits, excepting where otherwise provided in this chapter." "The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the State that he believes the charges to be true." No formal answer or replication is required; "but if there be an answer and reply, the provisions of this [the?] statute relating to pleadings in actions shall apply." "The questions of fact shall be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book." Nebraska, Comp. Stat. chap. 18, art. 2.

The nature of this proceeding before county commissioners has been the subject of several decisions by the supreme court of the State.

In the earliest one, the court declared: "The proceeding is quasi criminal in its nature, and the incumbent undoubtedly may be required to appear without delay and show cause why he should not be removed. But questions of fact must be tried as in other actions, and are subject to review on error. The right to a trial upon distinct and specific charges is secured to everyone thus charged with an offense for which he is liable to be removed from office." "Neither is it sufficient for the board to declare and resolve that the office is vacant. There must be a judgment of ouster against the incumbent." *State* v. *Sheldon*, 10 Neb. 452, 456. The authority conferred upon county commissioners to remove county officers has since been held not to be an exercise of strictly judicial power, within the meaning of that provision of the Constitution of Nebraska, which requires that "the judicial power of this State shall be vested in a supreme court, district courts," and other courts and magistrates therein enumerated. Constitution of Nebraska, art. 6, § 1; *State* v. *Oleson*, 15 Neb. 247. But it has always been considered as so far judicial in its nature that the order of the county commissioners may be reviewed on error in the district court of the county, and ultimately in the supreme court of the State. *State* v. *Sheldon*, above cited; *Minkler* v. *State*, 14 Neb. 181; *State* v. *Meeker*, 19 Neb. 444, 448. See also *Sioux City & P. R. R. Co.* v. *Washington County*, 8 Neb. 30, 41; Nebraska Code of Civil Procedure, §§ 580–584, 599; Criminal Code, ed. 1885, § 572.

This view does not substantially differ from that taken in other States, where similar orders have been reviewed by writ of *certiorari*, as proceedings of an inferior tribunal or board of officers, not commissioned as judges, yet acting judicially, and not according to the course of the common law. *Charles* v. *Hoboken*, 27 N. J. L. 208; *People* v. *N. Y. Fire Comrs.* 72 N.Y. 445; *Donahue* v. *Will County*, 100 Ill. 94.

In Nebraska, as elsewhere, the validity of the removal of a public officer, and the title of the person removed, or of a new appointee, to the office, may be tried by *quo warranto* or *mandamus*. Nebraska, Comp. Stat. chap. 19, §§ 13, 24, chap. 71; Code of Civil Procedure, §§ 645, 704; *Cases of Sheldon*, *Oleson* and *Meeker*, above cited; *Reg.* v. *Saddlers' Co.* 10 H. L. Cas. 404; *Osgood* v. *Nelson*, L. R. 5 H. L. Cas. 636.

The provisions of the Statutes of Nebraska as to the removal of officers of cities of the first class (of which the City of Lincoln is one) are more general, simply conferring upon the mayor and council "power to pass any and all ordinances not repugnant to the Constitution and laws of the State, and such ordinances to alter, modify or repeal;" and "to provide for removing officers of the city for misconduct;" and to fill any vacancy, occurring in the office of police judge or other elective office, by appointment by the mayor with the assent of the council. Nebraska, Comp. Stat. chap. 18, §§ 11, 15; Stat. 1887, chap. 11, §§ 8, 68, 114.

The original Ordinance of the City Council of Lincoln, made part of the record, appears to have been framed with the object that the rules established by statute for conducting proceedings for the removal of county officers should be substantially followed in the removal of city officers elected by the people.

After ordaining that whenever any such officer "shall be guilty of any willful misconduct or malfeasance in office, he may be removed by a vote of two thirds of all the members elected to the council," it provides that no such officer shall be removed unless "charges in writing, specifying the misconduct or nature of the malfeasance, signed by the complainant, and giving the name of at least one witness besides the complainant, to support such charges, shall be filed with the city clerk, president of the council, or mayor," and be read at a regular meeting of the council, and a certified copy thereof, with a notice to show cause against the removal, be served upon the officer five days before the next meeting; that if he does not then appear, and file a denial in writing, "The said charge and specifications shall be taken as true, and the council shall declare the office vacant;" but if he does, the council shall adjourn to some day for his trial; "And if upon the trial of said officer said council shall be satisfied that he is guilty of any misconduct willfully, or malfeasance in office, they shall cause such finding to be entered upon their minutes, and shall declare said office vacant, and shall proceed at once to fill such vacancy in the manner provided by statute and ordinance;" and that all proceedings and notices in the matter of such charges may be served by the city marshal or by a policeman, and the "service and return shall be in the manner provided by law for the service of summonses in justice's courts."

The only material change made in that ordinance by the Ordinance of August 24 is that the trial of the officer and the finding of his guilt may be either by the whole council, or by a "committee of the council, to whom such charges shall have been referred." In either case, the finding is to be entered upon the minutes of the council, "And the council shall declare the said office vacant and the said officer removed therefrom," and certify the fact to the mayor; whereupon the vacancy shall be filled by appointment by the mayor with the assent of the council.

The whole object of the bill in equity filed by Parsons, the Police Judge of the City of Lincoln, against the mayor and councilmen of the city, upon which the Circuit Court of the United States made the order, for the disregard of which they are in custody, is to prevent his removal from the office of police judge. No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.

The case stated in the bill is that charges in writing against Parsons for appropriating to his own use moneys of the city were filed, as required by the original ordinance, by Sheedy and Saunders (Hyatt, not otherwise named in those charges, would seem to have signed them as the additional witness required by that ordinance); that the charges were referred by the mayor to a committee of three members of the council; that upon notice to the accused, and his appearance before that committee, he objected, that the committee had no authority to try the charges, and the committee so reported to the council; that thereupon Sheedy and Saunders procured the passage of the amended ordinance, giving a committee, instead of the whole council, power to try the charges and report its finding to the council; that after the passage of this ordinance, and against his protest, the committee resumed the trial, and in order to favor and protect his accusers, and fraudulently to obtain his removal from office, made a report to the city council, falsely stating that they reported all the evidence, and fraudulently suppressing a book which he had offered in evidence, and finding him guilty, and recommending that his office be declared vacant, and be filled by the appointment of some other person; and that the mayor and city council set the matter down for final vote at a future day named, and threatened and declared that they would then, without hearing or reading the evidence taken before the committee, declare the office vacant and appoint another person to fill it.

The bill prays for an injunction to restrain the Mayor and Councilmen of the City of Lincoln from proceeding any further with the charges against Parsons, or taking any vote on the report of the committee, or declaring the office of police judge vacant, or appointing any person to fill that office.

The matters of law suggested in the bill as grounds for the intervention of the circuit court are that the amended ordinance was an *ex post facto* law, and that all the proceedings of the city council and its committee, as well as both ordinances, were illegal and void, and in conflict with and violation of those articles of the Constitution of the United States which provide that no person shall be deprived of life, liberty or property, without due process of law; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, and to have compulsory process for obtaining witnesses in his favor; and that no State shall pass any *ex post facto* law; or deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

The Fifth and Sixth Amendments to the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property without due process of law, and secure to the accused in criminal prosecutions trial by jury, and compulsory process for obtaining witnesses in his favor, apply to the United States only, and not to laws or proceedings under the authority of a State. *Spies* v. *Ill.* 123 U. S. 131 [*ante*, 80]. And that provision of the Constitution, which prohibits any State to pass *ex post facto* laws, applies only to legislation concerning crimes. *Calder* v. *Bull*, 3 U. S. 3 Dall. 386 [1:648].

If the ordinances and proceedings of the city council are in the nature of civil, as distinguished from criminal proceedings, the only possible ground, therefore, for the interposition of the courts of the United States in any form is that Parsons, if removed from the office of police judge, will be deprived by the State of

life, liberty or property without due process of law, in violation of the Fourteenth Amendment to the Constitution, or that the State has denied him the equal protection of the laws, secured by that Amendment.

It has been contended by both parties in argument that the proceeding of the city council for the removal of Parsons upon the charges filed against him is in the nature of a criminal proceeding; and that view derives some support from the judgment of the Supreme Court of Nebraska in *State* v. *Sheldon*, 10 Neb. 452, 456, before cited. But if the proceeding is of a criminal nature, it is quite clear for the reasons and upon the authorities set forth in the earlier part of this opinion, that the case stated in the bill is wholly without the jurisdiction of any court of equity.

If those proceedings are not to be considered as criminal or quasi criminal, yet if, by reason of their form and object, and of the Acts of the Legislature and decisions of the courts of Nebraska as to the appellate jurisdiction exercised in such cases by the judicial power of the State, they are to be considered as proceedings in a court of the State (of which we express no decisive opinion), the restraining order of the circuit court was void, because in direct contravention of the peremptory enactment of Congress, that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt Act. Act of March 2, 1793, chap. 22, § 5, 1 Stat. at L. 335; *Diggs* v. *Wolcott*, 8 U. S. 4 Cranch, 179 [2: 587]; *Peck* v. *Jenness*, 48 U. S. 7 How. 612, 625 [12: 841, 846]; Rev. Stat. § 720; *Watson* v. *Jones*, 80 U. S. 13 Wall. 679, 719 [20: 666, 672]; *Haines* v. *Carpenter*, 91 U. S. 254 [23: 345]; *Dial* v. *Reynolds*, 96 U. S. 340 [24: 644]; *Sargent* v. *Helton*, 115 U. S. 348 [29: 412].

But if those proceedings are to be considered as neither criminal nor judicial, but rather in the nature of an official inquiry by a municipal board intrusted by the law with the administration and regulation of the affairs of the city, still, their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity.

The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States and the officers in question are officers of a State. If a person claiming to be such an officer is, by the judgment of a court of the State, either in appellate proceedings or upon a *mandamus* or *quo warranto*, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court.

In any aspect of the case, therefore, the Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction.

As this court has often said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 328, 340 [7: 164, 170]; *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498, 511 [10: 264, 270]; *Hickey* v. *Stewart*, 44 U. S. 3 How. 750, 762 [11: 814, 819]; *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457, 467 [21: 897, 901].

We do not rest our conclusion in this case, in any degree, upon the ground suggested in argument: that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the circuit court; because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. *Prigg* v. *Adams*, 2 Salk. 674; *S. C.* Carthew, 274; *Fisher* v. *Bassett*, 9 Leigh, 119, 131–133; *Des Moines Nav. & R. R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552 [*ante*, 202].

Neither do we say that in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate and complete remedy at law, will render its decree absolutely void.

But the ground of our conclusion is that whether the proceedings of the City Council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal or civil, judicial or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the State and city from trying and determining.

The case cannot be distinguished in principle from that of a judgment of the Common Bench in England in a criminal prosecution, which was *coram non judice;* or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. *Case of the Marshalsea*, 10 Rep. 68, 76; *Ex parte Wilson*, 114 U. S. 417 [29; 89]; *Ex parte Bain*, 121 U. S. 1 [30: 849].

The circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604 [26: 861]; *Ex parte Fisk*, 113 U. S. 713 [28: 1117]; *Ex parte Ayers*, 123 U. S. 443, 507 [*ante*, 216, 230].

Writ of habeas corpus *to issue.*

Mr. Justice **Field** concurring:

I concur in the judgment of this court, that the Circuit Court of the United States had no

jurisdiction to interfere with the proceedings of the Mayor and Common Council of Lincoln for the removal of the police judge of that city. The appointment and removal of officers of a municipality of a State are not subjects within the cognizance of the Courts of the United States. The proceedings detailed in the record in the present case were of such an irregular and unseemly character, and so well calculated to deprive the officer named of a fair hearing, as to cause strong comment. But, however irregular and violent, the remedy could only be found under the laws of the State and in her tribunals. The police judge did not hold his office under the United States, and in his removal the Common Council of Lincoln violated no law of the United States. On no subject is the independence of the authorities of the State, and of her municipal bodies, from federal interference in any form, more complete than in the appointment and removal of their officers.

I concur also in what is said in the opinion of the court as to the want of jurisdiction of a court of equity over criminal proceedings, but do not perceive its application to the present case. The proceedings before the common council were not criminal in the sense to which the principle applies. That body was not a court of justice, administering criminal law; and it is only to criminal proceedings in such a tribunal that the authorities cited have reference. In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity.

Mr. Chief Justice **Waite**, dissenting:

I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of *quo warranto*, *certiorari*, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient. If the court can take jurisdiction of such a case under any circumstances, it certainly must be permitted to inquire, when a bill of that character is filed, whether the case is one that entitles the party to the relief he asks, and, if necessary to prevent wrong, in the mean time, to issue in its discretion a temporary restraining order for that purpose. Such an order will not be void, even though it may be found on examination to have been improvidently issued. While in force it must be obeyed, and the court will not be without jurisdiction to punish for its contempt. Such, in my opinion, was this case; and I therefore dissent from the judgment which has been ordered.

Mr. Justice **Harlan**, dissenting:

I concur in the views expressed by the Chief Justice, and unite with him in dissenting from the opinion and judgment of the court.

The proceedings inaugurated by the defendants against Parsons are certainly not of a criminal nature; nor are they embraced by the provision of the statute which declares that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." R. S. § 720.

The Act of March 3, 1887, declares that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States of all suits of a civil nature, at common law, or in equity, arising under the Constitution of the United States.

Parson's suit is confessedly of a civil nature; and it proceeds upon the ground that what the defendants propose to do will violate rights secured to him by the Constitution of the United States. It is therefore a suit arising under the Constitution of the United States. Whether the circuit court, sitting *in equity*, could properly grant to the plaintiff the relief asked is not a question of jurisdiction within the rule that orders, judgments, or decrees are void, where the court which passed them was without jurisdiction. It is rather a question as to the exercise of jurisdiction. As this suit is one arising under the Constitution of the United States, and is of a civil nature, the inquiry in the mind of the circuit judge, when he read the bill was whether, according to the principles of equity, a decree could be properly rendered against the defendants. *Osborn* v. *U. S. Bank*, 22 U. S. 9 Wheat. 788, 858 [6:204, 232].

The statute provides that "Suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate and complete remedy may be had at law." But if one of those courts should render a final decree, in behalf of the plaintiff, notwithstanding he had a plain, adequate and complete remedy at law, would the decree be a nullity? Could it be assailed, collaterally, as void, upon the ground that no case was made justifying relief in equity? When a party has disregarded a preliminary injunction issued by a Circuit Court of the United States, has been fined for contempt, and is in custody for failing to pay the fine, must he be discharged upon *habeas corpus* in every case where it appears, upon the face of the bill, that the plaintiff has a plain, adequate and complete remedy at law? Those questions, it seems to me, should receive a negative answer. I do not understand the court to decide that the circuit court could not, under any circumstances, or by any mode of proceeding, enforce the rights which the plaintiffs contend are about to be violated by the defendants; but only that the court below, sitting in equity, had no authority to interfere with the proposed action of the defendants. It seems to me that this question would properly arise upon appeal from any final decree rendered in the cause, and is not determinable upon writ of *habeas corpus*.

CHARLES R. BISSELL, *Plff. in Err.*,
v.
TOWNSHIP OF SPRING VALLEY, CHEROKEE COUNTY, KANSAS.

(See S. C. Reporter's ed. 225-236.)

Judgment on demurrer—effect of on bonds—suit on other coupons.

1. A judgment rendered upon demurrer is equally as conclusive by way of estoppel of the facts confessed by the demurrer, as a verdict finding the same facts would have been; and facts thus established can never afterwards be contested between the same parties or those in privity with them.

2. Where a plaintiff brought an action against a municipality upon coupons of bonds purporting to have been issued by it, and upon demurrer the coupons in that action were adjudged to be invalid instruments, on the ground that the bonds to which they were attached were void for the reason that the county clerk whose signature appeared upon them had never signed them nor authorized anyone to sign his name to them, and never affixed or authorized anyone to affix the seal of the county, the final judgment entered upon that demurrer is a bar to a further and separate action by the same plaintiff upon different coupons afterwards becoming due attached to the same bonds.

3. The bonds having been adjudged, in the former action, void, as never having been signed by the proper officers, their invalidity affected not only the coupons then in suit but all others; and the fact that the law of the case, having been adjudged between the parties in that action, are not open to any further contest.

[No. 1261.]

Submitted Dec. 6, 1887. Decided Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the District of Kansas, to review a judgment in favor of the Township of Spring Valley, defendant, in an action brought against it, on coupons of bonds alleged to have been made by it. *Judgment affirmed.*

Statement of the case by *Mr. Justice* **Field:**

In October, 1880, the plaintiff below, who is also plaintiff in error here, commenced an action in the Circuit Court of the United States for the District of Kansas, to recover the amount due on several interest coupons of seventy-three bonds of $1 000 each, purporting to have been issued by Spring Valley Township, a municipal corporation of Kansas, to aid the Atlantic and Pacific Railway Company in the construction of a railroad through the limits of the Township. The petition alleged that pursuant to the Act of the Legislature of the State, entitled "An Act to Enable Municipal Townships to Subscribe for Stock in Any Railroad, And to Provide for the Payment of the Same," approved February 25, 1879, and in pursuance of an order of the Board of County Commissioners of the County of Cherokee, in the State of Kansas, and a vote of more than three fifths of the qualified voters of the Township, voting at an election held for that purpose, the Township issued, among others, seventy-three negotiable bonds, bearing date, December 15, 1871, by each of which it promised to pay fifteen years after date, to the railroad company, or bearer, $1,000, with interest at the rate of 7 per cent per annum, with coupons for the interest attached; that afterwards each of the bonds, with the coupons, was put upon the market, and sold and delivered to *bona fide* purchasers for full value; that in April, 1872, each of the said bonds, with the coupons attached, was registered in the office of the auditor of the State, and on each a certificate of such registration was endorsed; that after the issue and delivery of the bonds, and before their maturity, or the maturity of either of them, or of the coupons sued upon, they were sold and delivered to the plaintiff for the price of ninety cents on the dollar thereof; and that when said coupons became due, they were presented for payment at the place where they were made payable, and payment was refused. The plaintiff, therefore, asked judgment for the amount due upon them. Attached to the petition was a copy of one of the coupons and of one of the bonds, the several coupons and bonds being, except in their numbers, similar to the copies annexed. The bonds were signed "William H. Clark, Chairman Board of County Commissioners," and "J. G. Dunlavy, County Clerk." The coupons were signed in the same way, except that preceding the name of Dunlavy was the word "attest." The Act of Kansas, under which the bonds purported to be issued, required that they should "be signed by the chairman of the board of county commissioners, and attested by the clerk, under the seal of the county."

To that petition the defendant answered, setting up various matters of defense, and among others that J. G. Dunlavy, whose name appeared on the bonds as county clerk, never signed or authorized his name to be signed to the bonds or to the coupons; nor did he affix to them, or authorize to be affixed, the seal of the county. A demurrer was interposed to several of the defenses, and among others to the one containing this allegation respecting the alleged signature of Dunlavy. The circuit court overruled the demurrer so far as it related to this defense, holding that the municipality could not be bound upon any instrument of that character unless it was executed by the officers named in the statute; that a purchaser must inquire whether the bonds and coupons were so executed; that if the instruments were not signed by the proper officers, but by persons having no authority or color of authority, they were void; and that the allegation charged this in substance.

The defendant then filed an amended answer, setting up among other things the same matter—that Dunlavy, whose name appeared on the bonds as county clerk never signed or authorized his name to be signed to said bonds or coupons, nor did he affix or authorize to be affixed the seal of the county to them. To this answer the plaintiff replied, admitting that the bonds to which the interest coupons sued upon belonged, were not attested by J. G. Dunlavy, County Clerk of the County of Cherokee, in the State of Kansas, in person, but alleged the fact to be that, at the time of issuing the bonds, Dunlavy was sick and unable to discharge the duties of his office, and by reason thereof authorized his brother, John Dunlavy, to attest the bonds for him, by signing his name as county clerk and affixing the seal of the county to them. Subsequently, it was agreed between the parties, and the agreement was signed by their attorneys and filed as part of the record in the case, that this reply and the answer of the defendant should be withdrawn, and that

the defendant should file an answer, setting out the question of defense as to the signature of Dunlavy and the affixing of the county seal, and also a plea of the Statute of Limitations as to coupons barred, such answer to be verified; that the plaintiff should forthwith file his demurrer to this answer; and that the whole question should be submitted to the court, and judgment rendered in accordance with the pleadings, upon its sustaining or overruling the demurrer. This stipulation was carried out. An amended answer, duly verified, setting up those matters, was filed, to which the plaintiff demurred. The court overruled the demurrer, but the plaintiff refused further to plead and stood upon it. Final judgment was thereupon entered for the defendant. On appeal to this court this judgment was affirmed. See *Bissell* v. *Spring Valley Township*, 110 U. S. 162 [28:105].

In April, 1885, the plaintiff brought the present action in the circuit court against the Township on certain other of the coupons attached to the same seventy-three bonds, alleging an execution of the bonds and coupons and a complete registration in the office of the Auditor of the State. To this petition the defendant answered as follows:

"1. As a first defense, said defendant says that it ought not to be charged with said the supposed debt by virtue of said supposed bonds and coupons, because it, by its attorneys, says that J. G. Dunlavy, whose name appears on said bonds and coupons as county clerk, never signed his name thereto or thereon, nor ever authorized any party or parties to sign his name thereto or thereon, and that said signature is not his signature; nor did he affix or authorize to be affixed the seal of said County of Cherokee to said bonds or coupons.

"2. Said defendant, further answering and pleading in bar of this action, says that said plaintiff ought not to maintain his said action herein, because on the 13th day of October, 1880, the said plaintiff, Charles R. Bissell, filed his certain petition against this defendant in this court in debt, wherein and whereby he sought to charge this defendant with liability upon certain of the pretended bonds and coupons attached thereto, claimed by said plaintiff to have been issued by this defendant, and to recover judgment against this defendant thereon. Said pretended bonds so sued upon in said action begun in 1880 were the identical pretended bonds sued upon in this present action, and the said pretended coupons declared upon in this action were of the same series and detached from the identical pretended bonds sued upon in the said action begun in 1880 as aforesaid, said action being No. 3242, to the record of which reference is hereby made.

"That said defendant appeared and answered to the said first mentioned petition in substance and effect as it has answered herein, to which answer said plaintiff, admitting the same to be true, demurred, and thereupon the said cause was tried upon its merits, and by the consideration of said court said defendant obtained a judgment in said action against said plaintiff, which on appeal to the Supreme Court of the United States was duly affirmed.

"Wherefore, said defendant prays judgment and its costs herein expended."

To the first defense set up in this answer the plaintiff demurred, and the demurrer was sustained on the ground that a complete registration alleged in the petition was conclusive of the validity of the bonds, on the authority of *Lewis* v. *Barbour County*, 105 U. S. 739 [26: 993], the question of *res judicata*, presented in the second count, being unaffected. To the second defense the plaintiff replied by a general denial. Afterwards a trial by jury was waived, and the plaintiff withdrew from his petition the allegation concerning registration, thus leaving the issue to be tried on the plea of *res judicata*. In support of this plea on the part of the defendant the record of the former action was introduced, against the objection of the plaintiff. Testimony was also offered by the plaintiff to prove the due execution of the bonds, and their purchase by him before maturity, without notice of any defense to them by the township, but it was excluded against his objection. The court thereupon rendered judgment for the defendant, giving full effect to the evidence sustaining the plea of *res judicata*. To review this judgment the case is brought to this court.

Mr. **Wm. Burry**, for plaintiff in error:

When suit is brought upon other coupons, constituting different and separate causes of action, then the judgment in the first suit can only be insisted upon as an adjudication, between the parties, of the facts or claims actually litigated and tried.

Gould v. *Evansville & C. R. R. Co.* 91 U. S. 526 (23: 416); 2 Taylor, Ev. § 1, 513; *Henderson* v. *Henderson*, 3 Hare, 115; *Stafford* v. *Clark*, 2 Bing. 382; *Miller* v. *Covert*, 1 Wend. 487; *Bagot* v. *Williams*, 3 Barn. & C. 241; *Roberts* v. *Heim*, 27 Ala. 678; *Bouchaud* v. *Dias*, 3 Denio, 244; *Perkins* v. *Moore*, 16 Ala. 17; *Robinson* v. *Howard*, 5 Cal. 428; *Aurora* v. *West*, 74 U. S. 7 Wall. 99 (19: 48); *Goodrich* v. *Chicago*, 72 U. S. 5 Wall. 573 (18: 512); *Beloit* v. *Morgan*, 7 Wall. 619 (19: 205); *Cromwell* v. *Sac Co.* 94 U. S. 351 (24: 195); *Boileau* v. *Rutlin*, 2 Exch. 665, 681; *Hughes* v. *Alexander*, 5 Duer, 493; *Davis* v. *Brown*, 94 U. S. 423 (24: 204); *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 (25: 1074); *Campbell* v. *Rankin*, 99 U. S. 263 (25: 436); *Stewart* v. *Lansing*, 104 U. S. 510 (26: 868); *Elgin* v. *Marshall*, 106 U. S. 579 (27: 249); *Enfield* v. *Jordan*, 119 U. S. 691 (30: 528); *Russell* v. *Place*, 94 U. S. 606 (24: 214); *Merchants' Internat. Steamboat Line* v. *Lyon*, 12 Fed. Rep. 63; *Clark* v. *Blair*, 14 Fed. Rep. 814; *S. C.* 4 McCrary, 311; *Foye* v. *Patch*, 132 Mass. 110; *Outram* v. *Morewood*, 3 East, 346; *Merriam* v. *Whittemore*, 5 Gray, 317; *Norton* v. *Huxley*, 13 Gray, 290.

Coupons, when detached from the bonds, are separate and distinct causes of action; and suit can be sustained on them even if the original bonds were, for any reason, canceled.

Clark v. *Iowa City*, 87 U. S. 20 Wall. 589 (23: 429); *Evertsen* v. *Newport Nat. Bank*, 4 Hun, 692; *Knox Co.* v. *Aspinwall*, 62 U. S. 21 How. 544 (16: 210); *White* v. *Vermont & M. R. R. Co.* 62 U. S. 21 How. 575 (16: 221); *Aurora* v. *West*, 74 U. S. 7 Wall. 105 (19: 50); *Murray* v. *Lardner*, 69 U. S. 2 Wall. 121 (17: 859).

Messrs. **J. R. Hallowell, Chas. B. Smith** and **W. H. Rossington**, for defendant in error.

In all suits upon bonds a judgment in favor of a bondholder upon certain municipal bonds, part of a larger issue, against the town issuing them, is conclusive on a question of the validity of the issue on a suit brought by the same creditor against the same town, on other bonds, another part of the same issue.

Beloit v. *Morgan*, 74 U. S. 7 Wall. 619 (19: 205).

The converse of this is equally true: that a judgment against the validity of bonds made in any suit upon a part of the issue, or upon coupons, was conclusive against the bondholder and his privies in any subsequent proceeding by them upon bonds or coupons of the same issue.

Wilson v. *Deen*, 121 U. S. 525 (30: 980); *Cromwell* v. *Sac Co.* 94 U. S. 351 (24: 195); *Davis* v. *Brown*, 94 U. S. 423 (24: 204); *Elgin* v. *Marshall*, 106 U. S. 578 (27: 249); *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 (25: 1074).

A judgment *inter partes* is conclusive between them in any subsequent proceeding, although different as to all matters actually litigated in the first proceeding.

Louis v. *Brown Township*, 109 U. S. 162 (27: 892); *Bryan* v. *Kennett*, 113 U. S. 179 (28: 908); *Davis* v. *Brown*, *supra*; *Russell* v. *Place*, 94 U. S. 606 (24: 214); *U. S.* v. *Parker*, 120 U. S. 89 (30: 601); *Campbell* v. *Rankin*, 99 U. S. 261 (25: 435); *Orleans* v. *Platt*, 99 U. S. 676 (25: 404); *Lyons* v. *Munson*, 99 U. S. 684 (25: 451).

Every matter actually litigated between the parties in any proceeding in a court having jurisdiction of the persons and subject matter is perpetually set at rest between such parties by a judgment.

Hopkins v. *Lee*, 19 U. S. 6 Wheat. 109 (5: 218); *U. S.* v. *422 Casks of Wine*, 26 U. S. 1 Pet. 547 (7: 257); *Bank of U. S.* v. *Beverly*, 42 U. S. 1 How. 134 (11: 75); *Stockton* v. *Ford*, 59 U. S. 18 How. 418 (15: 395); *Ingraham* v. *Dawson*, 61 U. S. 20 How. 486 (15: 984); *Thompson* v. *Roberts*, 65 U. S. 24 How. 233 (16: 648); *Washington etc. Steam Packet Co.* v. *Sickles*, 65 U. S. 24 How. 333 (16: 650); *Gaines* v. *Hennen*, 65 U. S. 24 How. 553 (16: 770); *Wright* v. *Sill*, 67 U. S. 2 Black, 544 (17: 333); *Parrish* v. *Ferris*, 67 U. S. 2 Black, 606 (17: 317); *Miles* v. *Caldwell*, 69 U. S. 2 Wall. 35 (17: 755); *Minn. Mining Co.* v. *National Mining Co.* 70 U. S. 3 Wall. 332 (18: 42); *Goodrich* v. *Chicago*, 72 U. S. 5 Wall. 566 (18: 511); *Washington etc. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 (18: 550); *Aurora* v. *West*, 74 U. S. 7 Wall. 82 (19: 42); *Durant* v. *Essex Co.* 74 U. S. 7 Wall. 107 (19: 154); *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 619 (19: 205); *Williams* v. *Baker*, 84 U. S. 17 Wall. 144 (21: 561); *Tioga R. R. Co.* v. *Blossburg & C. R. R. Co.* 87 U. S. 20 Wall. 137 (22: 331); *Gould* v. *Evansville & C. R. R. Co.* 91 U. S. 526 (23: 416); *Gardner* v. *Buckbee*, 3 Cow. 127; *Bouchaud* v. *Dias*, 3 Denio, 238; *Burt* v. *Sternburgh*, 4 Cow. 559; *Clark* v. *Sammons*, 12 Iowa, 368; *Duchess of Kingston's Case*, 20 Howell, State Trials, 538; *Griffin* v. *L. I. R. R. Co.* 3 Cent. Rep. 740, 102 N. Y. 449; *Outram* v. *Morewood*, 3 East, 346.

A judgment upon a demurrer which goes to the merits is as conclusive as a judgment founded upon the verdict of a jury.

Johnson v. *Pate*, 90 N. C. 334; *Gould* v. *Evansville & C. R. R. Co.* 91 U. S. 533 (23: 418); *Goodrich* v. *Chicago*, 72 U. S. 5 Wall. 573 (18: 512); *Christmas* v. *Russell*, 72 U. S. 5 Wall. 303 (18: 479); *Bouchaud* v. *Dias*, 3 Denio, 244; *Perkins* v. *Moore*, 16 Ala. 17; *Robinson* v. *Howard*, 5 Cal. 428; *Commercial Bank* v. *Buckner*, 61 U. S. 20 How. 108 (15: 862); *Los Angeles* v. *Mellus*, 58 Cal. 16; *Felt* v. *Turnure*, 48 Iowa, 397; *Gray* v. *Gray*, 34 Ga. 499; *Wilson* v. *Ray*, 24 Ind. 156; *Estep* v. *Larsh*, 21 Ind. 190; *Campbell* v. *Hunt*, 1 West. Rep. 172, 921, 104 Ind. 210; *Keater* v. *Hock*, 16 Iowa, 23; *Coffin* v. *Knott*, 2 G. Greene, 582; *U. S.* v. *Parker*, 120 U. S. 89 (30: 601).

The county clerk did not sign the bonds, and he did not affix the seal; this is an act which cannot be done by a deputy.

Sec. 5, chap. 90, Laws 1870; *Thayer* v. *Montgomery Co.* 3 Dill. 389.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff was defeated in his former action against the municipality, because the coupons, upon which its liability was asserted, were adjudged to be invalid instruments. It appears from the record of that action, as well as from the opinion of the circuit court in passing upon the demurrer, and of this court in reviewing its decision, that their invalidity was adjudged because the seventy-three bonds, to which they were attached, were themselves void instruments, the county clerk, whose signature appears upon them, never having signed them or authorized anyone to sign his name to them, and never having affixed or authorized anyone to affix the seal of the county. By stipulation of the parties, the pleadings in that action were so amended and arranged as to present this defense, and obtain the decision of the court thereon. The new answer, as agreed, was verified, it evidently being designed by the parties to obtain the judgment of the court upon the validity of the bonds, notwithstanding the fact which existed, that they were not in truth signed by the county clerk, or by anyone authorized by him. The judgment of the court sustaining the demurrer to this answer was, therefore, an adjudication that the bonds thus defectively executed were not binding obligations of the municipality. The circuit court held that the allegation of the defendant was in substance that the bonds were not signed by the proper officers of the county, and, if so, that they were void. This court, in affirming the judgment of the circuit court, held that the Township had no power to bind itself for the purpose of aiding in the construction of a railroad by subscription to its capital stock and the issue of bonds to pay for the same, except as authorized by the statute of the State; that the board of county commissioners did not represent the Township for any other purpose, and could not execute its power to issue bonds by instruments not conforming to the substantial requirements of the law; that the law required the bonds to be executed in a particular manner; and that the signature of the clerk was essential to the valid execution of them, even though he had no discretion to withhold it.

The final judgment entered upon that demurrer is a bar to any further action upon the specific coupons in suit. This is conceded; their validity cannot be again litigated in any

form between the parties. The question for determination in this case relates to the effect of the former judgment upon the present action, which is upon different coupons, though attached to the same series of bonds. Does that judgment preclude any inquiry as to the validity of these latter coupons, that is, of the bonds to which they are attached? In *Cromwell* v. *Sac County*, 94 U. S. 351 [24:195], we drew a distinction between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or demand. In the latter case, which is the one now before us, we held, following numerous decisions to that effect, that the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. The inquiry in such case, therefore, we said, must always be as to the point or question actually litigated and determined in the original action, for only upon such matters is the judgment conclusive in another action between the parties upon a different demand. *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 [25:1078]; *Wilson* v. *Deen*, 121 U. S. 525 [30:980].

If the fact admitted by the demurrer in the former action—that the signature of the county clerk, appearing on the bonds of the Township, was not signed by him, or by anyone authorized by him—had been found by a jury, or been admitted in open court by the plaintiff, there is no doubt that the judgment thereon would have been conclusive in any other action between the same parties in which the validity of those bonds was drawn in question. It would have been an adjudication, both upon the fact established and upon the law applicable to the fact, concluding future litigation upon those matters. Is the litigation any the less concluded because the fact upon which the judgment rested was established by the demurrer? There are undoubtedly many cases where a final judgment upon a demurrer will not conclude as to a future action. The demurrer may go to the form of the action, to a defect of pleading or to the jurisdiction of the court. In all such instances the judgment thereon will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings. And it has been held that where a demurrer goes both to defects of form and also to the merits, a judgment thereon, not designating between the two grounds, will be presumed to rest on the former. But where the demurrer is to a pleading setting forth distinctly specific facts touching the merits of the action or defense, and final judgment is rendered thereon, it would be difficult to find any reason in principle why the facts thus admitted should not be considered for all purposes as fully established as if found by a jury, or admitted in open court. If the party against whom a ruling is made on a demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, he should seek to amend his pleading or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission, the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading. Courts are not established to determine what the law might be upon possible facts; but to adjudge the rights of parties upon existing facts, and when their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy.

The law on this subject is well stated in Gould's treatise on Pleading, a work of recognized merit in this country, as follows: "A judgment, rendered upon demurrer, is equally conclusive (by way of *estoppel*) of the facts confessed by the demurrer, as a verdict finding the same facts would have been, since they are established, as well in the former case as in the latter, by way of *record*. And facts, thus established, can never afterwards be contested, between the same parties, or those in privity with them." (Chap. 14, part 1, § 43.)

The case of *Bouchaud* v. *Dias*, 3 Denio, 239, decided by the Supreme Court of New York, is an authority upon this point. It appears, from the statement in the report of that case, that in 1822 one Castro had executed two bonds to the United States for payment of duties, in which the testator and the defendant were sureties, and bound themselves jointly and severally. The bonds were alike in penalty and condition, but were payable at different periods within the year. In 1838 the plaintiff, as executor of one of the sureties, paid to the United States one of the bonds and brought an action to recover one half of that sum from the defendant as cosurety with the testator. The defense was that the defendant, with the consent of the plaintiff, had been released from his obligation by the secretary of the treasury pursuant to Acts for the relief of certain insolvent debtors of the United States; and on the trial he produced a release under the hand of the secretary. He also gave in evidence a judgment record from which it appeared that the plaintiff had sued the defendant for contribution in the Superior Court of the City of New York, the declaration in the case being like that in the second case, except that the other bond was set out as a part of the ground of action. In that case the defendant pleaded in bar the foregoing release and consent. The plaintiff demurred to the plea, and the court rendered judgment thereon for the defendant. The plaintiff in the second case objected to the introduction of this record, because the bonds were not the same in both suits; but the court admitted the record and charged the jury that the judgment of the superior court upon the same matter, being on a bond for duties on the same importation with that which was in question in the second case, was a bar to the action. The case being taken to the supreme court of the State, the judgment was affirmed, that court holding that although there was a difference in the actions, as they were upon different bonds, yet as those bonds were parts of the same transaction, and the principal question in controversy was the same in the two cases, the matter which the plaintiff attempted to agitate in the second case was *res judicata*. A distinction was suggested between

the cases, on the ground that the former judgment between the parties was rendered on a demurrer to the defendant's plea. But the court answered that "It can make no difference in principle whether the facts upon which the court proceeded were proved by deeds and witnesses, or whether they were admitted by the parties. And an admission by way of demurrer to a pleading, in which the facts are alleged, must be just as available to the opposite party as though the admission had been made *ore tenus* before a jury. If the plaintiff demurred for want of form, or if for any other reason he wished to controvert the facts alleged in the plea, he might, after learning the opinion of the court, have asked leave to withdraw the demurrer and reply. But he suffered a final judgment to be entered against him. He probably thought that the facts were truly alleged in the plea, and therefore did not wish to amend. But however that may be, the judgment is a bar to this action." See also *Coffin* v. *Knott*, 2 G. Greene (Iowa) 582; *Birckhead* v. *Brown*, 5 Sandf. 134.

The plaintiff seems to consider the case of *Cromwell* v. *Sac County*, *supra*, as authority for his contention, that in the present action he is at liberty to show that the bonds issued were valid obligations of the municipality, notwithstanding the former adjudication against their validity. That case was brought on four bonds of the County of Sac, issued for the erection of a court house, and coupons for interest attached to them. To defeat the action the county relied upon the estoppel of a judgment rendered in its favor in a prior action brought by one Smith upon certain earlier maturing coupons upon the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit. It appeared on the trial in that action, and it was so found, that there were such fraudulent proceedings in the issue of the bonds to which the coupons were attached, followed by the failure of the contractor, to whom the bonds were delivered, to construct the court house, as, in the opinion of the court, to render them void as against the county; and there was no finding that the plaintiff had given any value for the coupons, although he had become their holder before maturity. Judgment, therefore, was given for the county; and on appeal it was affirmed, this court holding that the fraud and illegality in the inception of the bonds, disclosed by the findings, were sufficient to call upon the plaintiff to show that he had given value for the coupons; that the bonds were void as against the county in the hands of parties who did not acquire them before maturity, and give value for them; that the plaintiff, not having proved that he gave such value for the coupons, was not entitled to recover on them; for whatever illegality or fraud there was in the issue and delivery of the bonds equally affected those coupons. It was, therefore, adjudged that the finding and judgment in that case, upon the invalidity of the bonds as against the county, estopped the plaintiff in the second case from averring to the contrary, unless he obtained them for value before maturity. But the bonds being negotiable instruments, and their issue being authorized by a vote of the county, and they reciting on their face a compliance with the law providing for their issue, they were valid obligations against the county in the hands of a *bona fide* holder, taking them for value before maturity; and so this court said, that if the plaintiff received the bonds and coupons in suit in the second case before maturity for value, as he offered to prove he should have been permitted to show that fact; and that there was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case, which could preclude him from making such proof in the second case. The fact that a party may not have shown that he gave value for certain coupons before their maturity plainly was not conclusive evidence that he may not have given value before maturity for other coupons of the same bonds, or that he may not have given value for the bonds before they became due.

There is nothing in that decision which can be made to support the contention of the plaintiff in this case. In the former action against the present defendant the adjudication was that the bonds themselves were never signed by the proper officers required by the statute of the State to sign them, and therefore they were not legal obligations of the Township. Their invalidity equally affected the coupons attached to them, and not merely those in suit, but all others. If the plaintiff could give any evidence consistent with that adjudication there would be no objection to his doing so, and the former action would not estop him; but the bonds being found to be invalid and void, he is precluded from attempting to show the contrary, either of the fact of their wanting the signature of the county clerk, or of the law that for that reason they were not binding obligations of the municipality. The fact and the law are adjudged matters between the parties, and not open, therefore, to any further contest.

Judgment affirmed.

R. S. SEARL, *Plff. in Err.*

v.

SCHOOL DISTRICT NO. 2, LAKE COUNTY, COLORADO.

(See S. C. Reporter's ed. 197-200.)

Removal of cause to U. S. Court—Colorado Statutes.

1. A proceeding under the Statutes of Colorado for the appropriation of private property for public use, and to fix the compensation therefor, is a suit at law, within the meaning of the Constitution of the United States and the Acts of Congress conferring jurisdiction upon the Courts of the United States.

2. It is the right of a party to such a suit to have it removed, on the ground of citizenship, from the state to a federal tribunal for hearing and determination.

[No. 117.]

Argued Dec. 20, 1887. Decided Jan. 16, 1888.

IN ERROR to the Circuit Court of the United States for the District of Colorado, to review a judgment of said court remanding a cause to

the State Court. *Reversed, and cause remanded to the Circuit Court, with directions to proceed therein.*

The case and facts are fully stated in the opinion.

Messrs. A. T. Britton and *A. B. Browne*, for plaintiff in error:

The Circuit Court of the United States erred in remanding said cause to the state court.

The plaintiff below was a corporation created by the laws of Colorado, and therefore a citizen of that State.

Sec. 3035, Gen. Stat. Colorado; Gen. Stat. 1883, p. 890.

This proceeding is a suit.

Weston v. *Charleston*, 27 U. S. 2 Pet. 464 (7:486).

It is an attempt to enforce a legal right.

Kohl v. *U. S.* 91 U. S. 376 (23:452); *Gaines* v. *Fuentes*, 92 U. S. 19 (23:527); *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403 (25: 206); *Hess* v. *Reynolds*, 113 U. S. 73 (28: 927); *Pacific R. R. Removal Cases*, 115 U. S. 17 (29:324); *Mineral Range R. Co.* v. *Detroit, etc. Copper Co.* 25 Fed. Rep. 515.

Messrs. **Walter H. Smith**, *Sam. P. Rose* and *F. W. Owers*, also for plaintiff in error:

The procedure to condemn property is a suit at law.

Mississippi & Rum River Boom Co. v. *Patterson*, 98 U. S. 403 (25:206); *Gaines* v. *Fuentes*, 92 U. S. 20 (23:528); *Pacific R. R. Removal Cases*, 115 U. S. 19 (29:326); *Kohl* v. *U. S.* 91 U. S. 367 (23:449).

The right to remove the same from the state to the federal court should not have been refused.

Colorado Midland R. Co. v. *Jones*, 29 Fed. Rep. 193; *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 286 (20:576).

(No counsel appeared for defendant in error.)

Mr. Justice **Matthews** delivered the opinion of the court:

On June 2, 1884, School District No. 2, in the County of Lake and State of Colorado, filed a petition in the county court of that county against R. S. Searl, the owner of a certain lot of land in the City of Leadville, therein described, for the purpose of condemning the same to public use for school purposes, and praying that the amount to be paid as compensation therefor should be assessed according to the statute in such cases provided. On June 10, 1884, the defendant appeared and, being a citizen of the State of Kansas, filed his petition and bond for the removal of said cause to the Circuit Court of the United States for that district, on the ground that the controversy therein was between citizens of different States. An order for the removal of the cause was thereupon made by the state court. On June 28, 1884, the plaintiff moved to remand the same, which motion was granted, and the cause was thereby remanded. To review this judgment the present writ of error is prosecuted.

By section 3035 of the General Statutes of the State of Colorado, the plaintiff is a body corporate, and authorized to hold property and be a party to suits and contracts "the same as municipal corporations in this State." The Code of Civil Procedure of that State provides for the appropriation of private property for public use, and authorizes a judicial proceeding in the district or county court for the purpose of ascertaining and awarding the amount of compensation to be paid therefor. It requires the filing of a petition setting forth the authority of the plaintiff to acquire the property in that mode, the purpose for which it is sought to be taken, a description of the property, and the names of all persons interested therein, who are to be made defendants and brought into court by the service of a summons or other process, as in other cases is provided by law. It provides, in the first instance, for the ascertainment of the amount of compensation or damages by a commission of three freeholders, but also that before the appointment of such commissioners any defendant may demand a jury of six freeholders residing in the county, to ascertain, determine and appraise the damages or compensation to be allowed, and prescribes in such case the mode of trial, at which the court or judge shall preside in the same manner and with like power as in other cases; that evidence shall be admitted or rejected by the court or judge according to the rules of law; and at the conclusion of the evidence that the matters in controversy may be argued by counsel to the jury, and at the conclusion of the argument that the court or judge shall instruct the jury in writing in the same manner as in cases at law; that motions for a new trial, and to set aside the verdict, may be made and heard as in other cases; that an appeal may be taken to the supreme court in the same manner as provided by law for taking appeals from the district court to the supreme court; and that a writ of error from the supreme court shall lie in every such case to bring in review the final determination. Such a proceeding, according to the decision of this court in *Kohl* v. *U. S.* 91 U. S. 367 [23:449], is a suit at law within the meaning of the Constitution of the United States and the Acts of Congress conferring jurisdiction upon the Courts of the United States. In *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403, 406 [25:206, 207], speaking of a judicial proceeding to appropriate private property to a public use and to fix the compensation therefor, it was said: "If that inquiry take the form of a proceeding before the courts, between parties, the owners of the land on one side, and the company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit;" and among such incidents, it was held in that case, was the right, on the ground of citizenship, to remove it from a state to a federal tribunal for hearing and determination. The same point was ruled in the *Pacific Railroad Removal Cases*, 115 U. S. 1, 18 [29:319, 325]. In *Gaines* v. *Fuentes*, 92 U. S. 20 [23:528], it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pecuniary estimation is the subject of litigation and is presented by pleadings for judicial determination.

The fact that the Colorado Statute provides for the ascertainment of damages by a commission of three freeholders, unless at the hearing a defendant shall demand a jury, does not make the proceeding from its commencement

any the less a suit at law within the meaning of the Constitution and Acts of Congress and the previous decisions of this court. The appointment of the commissioners is not, as in the case of *Mississippi & R. R. Boom Co.* v. *Patterson* and the *Pacific Railroad Removal Cases* a step taken by the party seeking to make the appropriation *ex parte*, and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding. Because under the Colorado law the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is, therefore, a suit at law from the time of the filing of the petition and the service of process upon the defendant.

The precise question involved here was passed upon and satisfactorily dealt with by the Circuit Judge in the Circuit Court for the District of Colorado in the case of the *Colorado Midland Railway Co.* v. *Jones*, 29 Fed. Rep. 193, and by the Circuit Court for the Western District of Michigan, by the *District Judge* Brown, in the case of *Mineral Range R. Co.* v. *Detroit & L. S. Copper Co.* 25 Fed. Rep. 515.

The case was properly removed, and the motion to remand erroneously granted. The judgment of the Circuit Court thereon is accordingly reversed, and the cause remanded to the Circuit Court, with directions to proceed therein.

UNION RAILROAD COMPANY OF BALTIMORE, *Appt.*,
v.
JAMES J. DULL ET AL., Admrs. *c. t. a.* of SAMUEL M. SHOEMAKER; ET AL.

(See S. C. Reporter's ed. 178-183.)

Engineer, receiving benefit from contract—canceling an executed contract, in equity.

1. The mere acceptance of part of the profits, awarded to one interested in a contract for the construction of a portion of a railroad, by an assistant engineer of the railroad company, does not afford sufficient ground, in equity, for setting aside the award of a sum due on the contract, or the judgment entered pursuant thereto, where such assistant engineer had no interest in the contract when made, and did not represent the company in the making of the contract, and had no connection, while in the service of the company, with the supervision or control of the work, under the contract, or with the ascertainment of the amount due the contractor.

2. Canceling an executed contract is an exertion of the most extraordinary power of a court of equity, which ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.

[No. 68.]

Argued Nov. 15, 16, 1887. Decided Jan. 16, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Maryland, dismissing a bill filed by appellant to set aside a contract. *Affirmed.*

The facts and case are fully stated in the opinion.

Messrs. Thomas W. Hall, **Charles Marshall**, *Bernard Carter* and **William A. Fisher**, for appellant:

Contracts, to which officers or trusted employees of corporations are parties in their own behalf, are ordinarily not enforceable; but when the connection of such officers or employees with them has been concealed they are void to all intents and purposes, if the company elects so to treat them, without any inquiry whether the company has been in fact injured, and no rights can be maintained by the guilty parties under them.

Michoud v. *Girod*, 45 U. S. 4 How. 503, 533 (11: 1076, 1089); Story, Agency, §§ 210, 211 and notes; *Munson* v. *Syracuse, G. & C. R. R. Co.* 4 Cent. Rep. 191, 103 N. Y. 58; *Aberdeen R. W. Co.* v. *Blakie*, 1 McQueen, H. L. Cas. 461; *Gillett* v. *Peppercorne*, 3 Beav. 78, 84; *European & N. A. R. Co.* v. *Poor*, 59 Maine, 277, 281; *Ryan* v. *Leavenworth, A. & N. W. R. Co.* 21 Kan. 398; *Flint etc. R. Co.* v. *Dewey*, 14 Mich. 487, 488; *Panama etc. Tel. Co.* v. *India Rubber Tel. Works Co.* L. R. 10 Ch. App. 515, 520, 525; *Harrington* v. *Victoria Graving Dock Co.* L. R. 3 Q. B. Div. 549; *Wardell* v. *Union Pac. R. R. Co.* 103 U. S. 651 (26: 509); *Thomas* v. *Brownville etc. R. R. Co.* 109 U. S. 522 (27: 1018).

Ellicott's clandestine interest in the profits of the contract introduced an element fatal to its existence, whether the interest began with the contract or arose afterwards.

14 Mich. 487, 488; 21 Kan. 398; L. R. 10 Ch. App. 526-528, and *Vice Chancellor* Malin's judgment, 521, 522, in the note.

A court of equity will relieve against a fraudulent contract after it has been executed.

Grymes v. *Sanders*, 93 U. S. 62 (23: 801); *Hammond* v. *Pennock*, 61 N. Y. 153.

The circumstances which rendered the contracts void were concealed from the complainant until after the judgment had obtained. In such a case a court of equity ought to grant relief and enjoin the defendants, even after the judgment at law.

2 Story, Eq. §§ 887, 894; *Marine Ins. Co.* v. *Hodgson*, 11 U. S. 7 Cranch, 332, 333 (3: 362); *Hendrickson* v. *Hinckley*, 58 U. S. 17 How. 445 (15: 124); *Crim* v. *Handley*, 94 U. S. 653 (24: 216); *Smith* v. *Richards*, 38 U. S. 13 Pet. 36 (10: 47).

Messrs. **Nevett Steele** and **Arthur W. Machen**, for appellees:

The answers, being responsive to the allegations of the bill, must be taken to be true, in the absence of countervailing proof to the contrary, by the satisfactory testimony of two witnesses, or of one witness and corroborating circumstances.

Vigel v. *Hopp*, 104 U. S. 441 (26: 765); *Voorhees* v. *Bonesteel*, 83 U. S. 16 Wall. 16 (21: 268); Forty-First Equity Rule; 2 Story, Eq. § 1528.

General allegations of fraud amount to nothing.

Ambler v. *Choteau*, 107 U. S. 591 (27: 324).

This is an executed, not executory, contract. Rescission is impossible.

Pollock, Contracts, 541; *Clarke* v. *Dickson*,

El., Bl. & El. 148; *Grymes* v. *Sanders*, 93 U. S. 55 (23: 798); *Neblett* v. *Macfarland*, 92 U. S. 103 (23: 471); *Lyon* v. *Bertram*, 61 U. S. 20 How. 154 (15: 849); *Houghton* v. *Nash*, 64 Maine, 477; *Macon* v. *Huff*, 60 Ga. 221; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 146; *Re Royal British Bank, Mixer's Case*, 4 De Gex & J. 586.

Contracts impeached for fraud are only voidable, if the other party can be remitted to his former state.

Urquhart v. *Macpherson*, L. R. 3 App. Cas. 831.

There must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff.

1 Story, Eq. § 203.

Canceling an executed contract is an extraordinary power and ought not to be exercised except in a clear case.

Atlantic Delaine Co. v. *James*, 94 U. S. 214 (24: 114).

A fraud which did not exist at the time of the making of the contract could not vitiate it.

Hale v. *Continental L. Ins. Co.* 12 Fed. Rep. 860; *Panama & S. P. Tel. Co.* v. *India Rubber, G. P. & Tel. Works Co.* L. R. 10 Ch. App. 531; *Onions* v. *Cohen*, 2 Hem. & M. 361.

The award and the judgment in this case constitute a conclusive bar to the relief sought.

U. S. v. *Throckmorton*, 98 U. S. 61, 65–68 (25: 93, 95, 96); *Flower* v. *Lloyd*, 10 Ch. Div. 327: *S. C.* 27 Week. Rep. 496.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought by the appellant in the Circuit Court of Baltimore City, and was subsequently removed into the Circuit Court of the United States for the District of Maryland. Its principal object was to obtain a decree setting aside, as void against the appellant, certain construction contracts between the Union Railroad Company of Baltimore, James J. Dull, William M. Wiley, and R. Snowden Andrews; a contract of arbitration between that Company and James J. Dull, surviving partner of William M. Wiley, together with the award of the arbitrators, and the judgment entered pursuant thereto; and, also, a written agreement between the Canton Company of Baltimore and James J. Dull, surviving partner of William M. Wiley, together with certain promissory notes given in execution of the last named agreement. A part of the relief asked was a decree compelling James J. Dull, as surviving partner, Samuel M. Shoemaker (now deceased, and whose administrators with the will annexed are before the court) and John Ellicott, to refund certain sums which they had received on account of the judgment based upon said award and on said promissory notes.

The defendants, Dull, Shoemaker and Ellicott, were required to answer, and did answer, under oath, not only the material allegations of the bill, but various special interrogatories propounded to them. Upon final hearing, the injunction granted at the commencement of the suit was dissolved and the bill dismissed. Of that decree the appellant complains.

Stating only such facts as are clearly established by the answers made under oath (*Vigel* v. *Hopp*, 104 U. S. 441 [26:765]; 2 Story, Eq. § 1528), by the exhibits, and by the depositions, the case before us is, in substance, as follows:

On the first day of May, 1871, the Railroad Company made a written agreement with Dull, Wiley and Andrews, for the construction by those parties, for the prices and upon the terms therein stated, and to the satisfaction and acceptance of its chief engineer, of the graduation and masonry of section 1 of said railroad, including a tunnel under the bed of Hoffman Street, in the City of Baltimore, and such other work as might be necessary to finish that section in accordance with the specifications and agreeably to such directions as might be given by the company's chief engineer, or by his assistant in charge of the work for the time being. The contractors agreed to complete the work on or before January, 1873, the parties expressly stipulating that the time so named should be of the essence of the contract.

On the first of May, 1871, the parties entered into a supplementary agreement, providing for the indemnification of the Company against all claims or damages arising from the tunnel or excavation work under the bed of Hoffman Street.

Shortly thereafter, Andrews, with the consent of the Company, assigned and released to Dull and Wiley all his interest in the original and supplemental agreements.

On the 20th of December, 1875, Wiley having died, and Dull, as surviving partner, having instituted suit against the Railroad Company in the Baltimore City Court, a written agreement was entered into between the Company and Dull, as such surviving partner, which is at the foundation of the present litigation. That agreement recites the completion of the work covered by the original and supplemental agreements of May and July, 1871; the claim by Dull of a large balance due him as surviving partner; a dispute between the parties as to what was due from the Railroad Company under said contracts of construction, as well as for work done and materials furnished by the contractors; the claim of Dull, as surviving partner, to be paid for certain stone used by the contractors, in addition to what was required by said agreements; the claim of the Company that the contractors had not finished the work within the time stipulated, and in a substantial manner, to the satisfaction and acceptance of the chief engineer or his assistant in charge of the work for the time being; its claim that it had been compelled to pay damages against which the contractors could, with due care, have guarded them; and the claim of the Company, that, after deducting its said demands, it was entitled to recover a balance. By this agreement, all matters of difference between the parties, and their respective claims against each other, were referred to the arbitration of indifferent persons to be chosen as follows: one by each party, the two thus chosen to select a third arbitrator, and no one of the arbitrators to be a lawyer. The arbitrators were authorized to determine such matters of difference, and award what sum should be paid by the Railroad Company to Dull, or by the latter to the former, and the award to be "final and conclusive in the premises."

The agreement further provided that the action of Dull, then docketed in the Baltimore

City Court, should by rule of court, "be submitted and referred to the award and arbitrament of the said three arbitrators, whose award, or the award of a majority of them in the premises, shall be returned to said court, to the end that judgment may be given therein in accordance with the provisions of article VII of the Maryland Code of Public General Laws;" further, that the true construction, meaning and extent of certain covenants in the supplemental agreement should be finally and conclusively determined by Alexander Sterling, Jr., Esquire.

Pursuant to this agreement, Henry Tyson and Robert K. Martin were selected by the parties respectively, as arbitrators. They concurred in selecting H. D. Whitcomb as the third arbitrator. By consent, an order was passed in the Baltimore City Court, referring the case pending there to said arbitrators. Upon full examination of all matters and claims in dispute, they unanimously awarded $54,159.50 to be paid by the Company to Dull; and judgment for that amount was, accordingly, entered in the Baltimore City Court, on the 11th of January, 1877, in favor of Dull, surviving partner of Wiley.

On the 25th of February, 1877, a written agreement was entered into between Dull and the Canton Company of Baltimore, whereby the former agreed, among other things, to delay action upon his judgment, and to accept payment of the balance then due upon it—$47,562.15—as follows: $5,000, July 2, 1877; $10,000, February 7, 1878; $14,000, February 7, 1879; $18,562.15, February 7, 1880; for which amounts the Union Railroad Company executed to Dull its promissory notes, as well as interest notes for $1,276.86, $1,298.14, $976.86, $993.14, $556.86, and $556.14. These notes, principal and interest, were guaranteed by the Canton Company. The latter agreed that it would pay each note within one week after default by the Railroad Company. Dull reserved the right, in addition to his recourse on the Canton Company, to sue out execution on his judgment against the Railroad Company for any balance due thereon at the time of default in paying any of said notes at maturity.

The present suit was brought on the 10th of February, 1879, at which time all of said notes, principal and interest, had been paid, except those due the 10th of February, 1879, and after that date. We have already indicated what the general object of the suit is, and the extent to which the appellant asks relief. The principal grounds upon which it proceeds are, that at the time the construction contracts and the specifications and other papers connected therewith were prepared for biddings, and at the time of the execution of those contracts, Charles P. Manning was the chief engineer and John Ellicott the assistant engineer of the Railroad Company; that, by reason of Manning's absence during long periods in Ohio, the preliminary arrangements for the biddings, the interviews with the parties proposing to bid, the construction contracts, and the general superintendence of the work, for some months after its commencement, was left almost entirely to Ellicott, in whom the appellant and Manning had the fullest confidence; that Ellicott remained in that position for about a year, when he left appellant's service because of differences between him and Manning, who had then returned to Baltimore; that there was no just foundation for any of the claims of Dull allowed by the arbitrators; that Ellicott "was presented and sworn by the arbitrators as a disinterested witness on behalf of the said Dull, and upon his testimony, mainly if not entirely, the said arbitrators allowed the pretended claim of the said Dull, based upon an allegation of the change of the model for the construction of the said tunnel, and also other claims made by the said Dull, to which change said Ellicott testified, although in fact no change was made of the execution of said contract;" that Dull himself was sworn and examined before the arbitrators, and testified, among other things, that he was the sole surviving contractor, and that the only contractors had been said Andrews, Wiley and himself; that it had learned only recently before the bringing of this suit that, in an action in the Circuit Court of the United States for the Eastern District of Pennsylvania, Dull admitted, under oath, that he and Wiley had two secret partners in the construction contracts, "who retained their interests until the completion of the work and during said controversy, one of them being Samuel M. Shoemaker, and the other being the said John Ellicott;" that Dull, on the same occasion, admitted that "he had paid large sums to the said Ellicott on account of his interest in the contract, but had not yet fully paid him;" that Ellicott received from Dull and Wiley on that account at least $18,000.

The bill charges that the amount awarded to Dull was "so awarded by virtue of the said contracts, and by means of the covinous and fraudulent conduct of the said Dull and the said Ellicott;" that the said construction contracts and the said arbitration contract were obtained from the Company "by the fraud, covin, and deceit of the said Dull and Ellicott, with the knowledge of the said Samuel M. Shoemaker;" and that the said contracts, and said award and judgment, are in equity void as to the Company.

The precise relations which Ellicott held to the Railroad Company and to the work done by the contractors, and which existed between the contractors, Ellicott, and Shoemaker, are not accurately or fully stated in the bill. It is satisfactorily shown that while Ellicott, as Manning's assistant, conducted preliminary surveys, located the line of the tunnel and the railroad, and aided in the preparation of specifications, his work, in that respect, was done before the letting to the contractors, and was approved and adopted by the chief engineer. There is no ground to suspect, much less believe, that in these preliminary matters any undue advantage was given, or was intended to be given, by Ellicott to the contractors. Before the proposals were received, and before the advertisement for letting, Manning returned to Baltimore, and thereafter personally performed the duties of chief engineer. He was present at the opening of the bids, and personally examined the proposals. In the letting of the work, the Company's officers acted upon their own judgment, and without suggestion or advice by Ellicott. The latter had no business relations with Dull, Wiley or Andrews, either

when they bid for the work or when it was let to them.

Some time after the Company had made its contracts with Dull, Andrews and Wiley, the latter proposed to Shoemaker, a gentleman of large means, that he should have an interest in the profits to be made, in consideration of his furnishing some money in the nature of capital. Shoemaker having the utmost confidence in Wiley's judgment and integrity, verbally accepted this proposition. At an early period in Shoemaker's life he had received valuable assistance from some of the older members of Ellicott's family. This circumstance caused him to feel kindly to Ellicott; and when the latter, at the close of the recent war, returned with his family to Baltimore, laboring under serious financial embarrassment, Shoemaker had a strong desire to sustain him in his efforts for a livelihood, and did assist him in various ways. In his answer, Shoemaker states: "And when the said Wiley, unexpectedly to this respondent, proposed to allow him an interest of one third in the profits from the said contract, this respondent, without attempting to estimate the probable amount of such share of profits, and, in fact, wholly uncertain whether there would be any profits or not, mentioned the fact of said Wiley's promise aforesaid to said Ellicott, and at the same time told him that if anything came of it he would let him, Ellicott, have one half of what this respondent should so receive. There was no contract or agreement of any kind between said Ellicott and this respondent on the said subject. Whatever benefit there might be in the offer or promise to share what might never exist, it was made by this respondent, and as this respondent is well assured, was accepted by the said Ellicott, merely as an act of kindness on this respondent's part, without one thought of any relations existing between the said Ellicott and the Union Railroad Company. Had this respondent been base enough to endeavor to bring about a breach of trust on the part of one in the service of the complainant, as imputed in the bill of complaint, it would have been impossible for him to have thought of presenting unworthy inducements of this sort to a gentleman of the unblemished reputation of Mr. Ellicott, an intimate friend of this respondent himself, and one for whom, on account of his character and personal qualities, he entertained and had manifested a high and sincere regard." These statements are substantially repeated in the deposition of Shoemaker, and we do not doubt their accuracy. Ellicott, referring to Shoemaker's offer, says in his answer: "This respondent thanked the said Shoemaker for his kindness, and accepted it without imagining that there was anything in the relation he temporarily occupied to the said chief engineer to make it improper, or even questionable so to do."

Under the foregoing arrangement between Shoemaker and Ellicott, the latter received different sums from the contractors, aggregating $13,698.14. His employment by Manning was in the fall of 1870. It continued only for about a year, and ended nearly two years before the completion of the work in question. So far from the interviews with parties proposing to make bids, the contracts founded upon the accepted bids, or the general superintendence of the work for some months from its commencement being left almost entirely with Ellicott, as alleged in the bill, he swears in his answer (and the evidence is substantially to the same effect) that Manning returned from Ohio before the letting of the work; approved the specifications; was present to give all requisite information to persons making inquiries with a view to proposals; gave such information and performed the whole duty of chief engineer in connection with the making of the contracts; had the sole and exclusive superintendence of the work from the very commencement, the immediate direction thereof being devolved upon Mr. Kenly, the resident engineer; and that he, Ellicott, had no charge of it whatever. He also states in his answer, and the statement is sustained by the evidence, that he "gave no instructions to the contractors, made no measurements or estimates of any of their work, exercised no authority over them, and had no part at all in the construction of the said railroad and tunnel, his whole work being either preliminary to the advertisement for proposals or office work wholly unconnected with the contractors or their compensation."

Taking the whole evidence together, the utmost which can be said is that Ellicott acquired or accepted an interest in the profits of construction contracts that were made while he was in the employ of the chief engineer. But as he had no such interest when the contracts were made; as he did not represent the Company in the making of the contracts; and as he had no connection, while in the service of the Company or of its chief engineer, with the supervision and control of the work under the contracts, or with the ascertainment of the amount due the contractors, it is not perceived that his mere acceptance of part of the profits awarded to Shoemaker affords any ground in equity for setting aside either the award of 1876 or the judgment entered pursuant thereto.

The complainant attaches great consequence to the fact that Ellicott was presented and sworn before the arbitrators as a disinterested witness on behalf of Dull, and contends that upon his testimony, mainly, if not entirely, the arbitrators allowed the claim of Dull, based upon an allegation in the change of the model for the construction of the tunnel, to which change Ellicott testified. It is sufficient, upon this point, to say that there is an entire failure to discredit the testimony of Ellicott before the arbitrators. There is nothing to show that he did not state what he believed to be true; and according to the weight of evidence all that he stated before the arbitrators was, in fact, true. Besides, it is satisfactorily shown that a very small part of the sum awarded to Dull was on account of the claim based upon the alleged change of the model for the construction of the tunnel. Under these circumstances the fact that the arbitrators were unaware of Ellicott's arrangement with Shoemaker affords no ground to set aside the award.

The relief which the appellant seeks is entirely wanting in equity. The Company has had possession of the work done by the contractors since its completion in 1878. The contracts in question have been fully executed, and restoration of the parties to their original rights has become impracticable, if not impos-

sible. Nevertheless, the Company, holding on to all it has received, asks the court to declare void not only the award of 1876, the judgment of 1877, and the unpaid notes given in payment of that judgment, but the original construction agreements of 1871, and give a decree for a return of all that it paid in cash or on the notes guarantied by the Canton Company; and this, without suggesting fraud upon the part of the arbitrators, or proving that it has been injured, pecuniarily, by anything that either the contractors or Ellicott did or said. The case comes within the rule laid down by this court in *Atlantic Delaine Co.* v. *James*, 94 U. S. 207, 214 [24: 112, 114] where it was said: "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

The decree is affirmed.

UNITED STATES, *Appt.*,
v.
JAMES M. T. GLEESON.

(See S. C. Reporter's ed. 255-260.)

Suits against United States—appeal therein—jurisdiction to review court of claims.

1. The United States can be sued for such causes, and in such court only, as it has by Act of Congress permitted. Neither the court of claims nor this court can hear and determine any claim against the United States, except in the cases and under the conditions defined by Congress.

2. By section 707 of the Revised Statutes an appeal is allowable on behalf of the United States from all judgments in the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000.

3. This court has no jurisdiction to review, upon the merits, a judgment of the court of claims, against the United States, which appears upon its face to have been rendered "*pro forma* for the purpose of an appeal to the supreme court," for less than the above amount, where the opinion shows that the judgment was against the unanimous opinion of the judges, and that they will not consider it a precedent for a like decision in any other case, although the decision would affect a class of cases, and the question involved is novel.

[No. 1064.]

Submitted Jan. 4, 1888. Decided Jan. 16, 1888.

APPEAL from a judgment of the Court of Claims, in favor of the appellee, a clerk in the Postoffice Department, for arrears of salary. *Reversed.*

Statement of the case by *Mr. Justice* **Gray**:

This was an appeal by the United States from a judgment of the court of claims upon the petition of James M. T. Gleeson, a clerk of the Postoffice Department, claiming arrears of salary. Upon the proofs in the cause, the court of claims made a finding of facts, in substance as follows:

On November 15, 1871, the claimant, by an order of the Postoffice Department addressed to him, was "designated a railway postoffice head clerk on cars between Washington, D. C., and Lynchburg, Va. Pay $1,400 per annum." He entered upon his duties under that order, and continued to serve until May 23, 1883.

On August 14, 1876, one of the blank printed forms, used by the department to notify railway postoffice head clerks of a reduction of their pay, and copied below, was filled up by inserting the words and figures in brackets.

"Postoffice Department, Washington, D. C. August [24], 1876. [J. M. T. Gleeson, R. P. O. head clerk, Washington, D. C.] Sir: The Postmaster-General has changed your pay as R. P. O. head clerk between [Washington, D. C., to Lynchburg, Va.,] from $[1,400] to $[1,300] per annum, to take effect on and after August 1, 1876.

Very Respectfully, etc., [James H. Marr, Acting] First Assistant Postmaster-General."

On June 12, 1879, the first assistant postmaster-general made an order to reduce the pay of the claimant and three others, "head clerks on the cars between Washington, D. C., and Lynchburg, Va., from $1,300 to $1,240 per annum, from the first to the 30th day of June, 1879, inclusive."

The claimant received these notices and orders, and received full pay in accordance therewith. From August 1, 1876, to July 31, 1882, his salary was reduced from $1,400 to $1,300 per annum, and for the month of June, 1879, a further reduction was made from $1,300 to $1,240 per annum, the whole amount of the deductions being $597.84.

The further proceedings of the court of claims appeared by the transcript certified by its clerk to this court, to have been as follows:

Its conclusion of law was in these words: "And upon the foregoing findings of fact, it appearing that the decision in this case will affect a class of cases, and that the statutory question involved is novel, the court decides, for the purpose of an appeal to the supreme court, that the claimant should recover the sum of $597.84."

One of the judges, in behalf of the court, delivered the following opinion:

"It has been the rule and usage of this court, when the determination of a new question will affect a class of cases, in none of which a claimant, by reason of the smallness of his demand, will have a right of appeal, to render a judgment *pro forma* against the Government in one case, to the end that the question may be examined and the rights of all parties determined by the supreme court.

"In the present instance, the question is novel, and the claimants are a deserving class of officials, whose skill, diligence and honesty affect the entire community probably more than the personal services of any other officers. If this case were to receive a final decision in this court, my own conclusion would probably be adverse to the claimant. To me it seems clear that the postmaster-general had authority to reduce the claimant's compensation prospectively, whose continuation in the railway mail service must have been upon the terms prescribed; but it does not seem more clear than other class cases, which have been sent to the supreme court in the same way, and in some of which the supreme court has thought otherwise. *Twenty Per Cent Cases*, 4 Ct. Cl. 227; 9 Ct. Cl. 103.

"The other members of the court desire to have it understood that their opinion is adverse to the claimant upon the merits, and that if any other case of this class shall be brought to a hearing before the question involved be determined by the supreme court, the decision *pro forma* now rendered will not furnish a precedent for a recovery.

"The judgment of the court is that the claimant recover of the defendants the sum of $597.84."

Final judgment was entered in this form: "At a court of claims held in the City of Washington, on the 24th day of January, A. D. 1887, it was ordered that judgment *pro forma* for the purpose of an appeal to the supreme court be entered as follows:

"The court, on due consideration of the premises, find for the claimant, and do order, adjudge and decree that the said James M. T. Gleeson do have and recover of and from the United States the sum of five hundred and ninety-seven and $\frac{84}{100}$ dollars ($597.84)."

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** *Asst. Attorney*, for appellant:

The court below erred in ordering that judgment *pro forma* for the purpose of an appeal to the supreme court be entered.

U. S. v. *Stone*, 39 U. S. 14 Pet. 525 (10:572); *U. S.* v. *Chicago*, 48 U. S. 7 How. 192 (12:663); *Webster* v. *Cooper*, 51 U. S. 10 How. 54 (13:325); *Daniels* v. *Chicago & R. I. R. R. Co.* 70 U. S. 3 Wall. 255 (18:225); *U. S.* v *Meigs*, 95 U. S. 749 (24:578).

In the present case the entry of judgment *pro forma* was wholly unnecessary, as the five judges were unanimously of a contrary opinion on the merits. Had the judges been divided, it might have been excusable, if legal.

Ex parte Gordon, 66 U. S. 1 Black, 503 (17: 134); *Bell* v. *U. S.* 9 Ct. Cl. 308; *Baker* v. *U. S.* 4 Ct. Cl. 227; *Marche* v. *U. S.* 5 Ct. Cl. 525; *Twenty Per Cent Cases*, 80 U. S. 13 Wall. 568 (20:707); *Mallory* v. *U. S.* 3 Ct. Cl. 257.

The proposition that under the terms of section 4025, R. S., the compensation for railway postoffice head clerks is fixed at $1,400 per annum is not warranted by the words or the spirit and meaning of the law. The meaning of the Legislature is to be ascertained from the language of the statute.

Wigg v. *U. S.* Dev. Ct. Cl. 157.

The court can only declare what the law is, not what it ought to be.

Beatty v. *U. S.* Dev. Ct. Cl. 157, 158.

Messrs. **Robert C. Schenck,** *Freeman & Money* and *McGrew & Small*, for appellees:

The cases cited do not sustain the objection that the court below erred in entering a judgment *pro forma* for the purpose of an appeal to the supreme court.

U. S. v. *Stone*, 39 U. S. 14 Pet. 525 (10: 572); *Daniels* v. *Chicago & R. I. R. R. Co.* 70 U. S. 3 Wall. 253 (18: 225); *U. S.* v. *Chicago*, 48 U. S. 7 How. 185 (12: 660); *Bell* v. *U. S.* 9 Ct. Cl. 314; *Twenty Per Cent. Cases*, 87 U. S. 20 Wall. 181 (22: 339).

The practical construction given to a statute by the public officers of the State, and acted upon by the people thereof, is to be considered and is perhaps decisive in case of doubt. *Union Ins. Co.* v. *Hoge*, 62 U. S. 21 How. 35 (16:61); *Brown* v. *U. S.* 113 U. S. 568 (28:1079); *Converse* v. *U. S.* 62 U. S. 21 How. 463 (16:192); *U. S.* v. *Kirby*, 74 U. S. 7 Wall. 482 (19:278); Wilberforce, Stat. Laws, 82.

Mr. Justice **Gray** delivered the opinion of the court:

The United States can be sued for such causes and in such courts only as they have by Act of Congress permitted. Neither the court of claims nor this court can hear and determine any claim against the United States, except in the cases, and under the conditions, defined by Congress.

By section 1059 of the Revised Statutes, the court of claims had jurisdiction to hear and determine the claim of Gleeson. The jurisdiction of this court over it depends upon the provision of section 707, by which "An appeal to the supreme court shall be allowed on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000."

Congress has thus clearly manifested its will that in any cause where the amount in controversy does not exceed $3,000, the United States alone shall have a right of appeal; and that if the opinion of the court of claims in such a cause is adverse to the claimant, a final and conclusive judgment shall be rendered against him in that court.

By the existing statutes Congress has neither made nor authorized an executive department or the court of claims to make the appellate jurisdiction of this court, over claims against the United States for $3,000 or less, to depend upon the question whether the decision will affect a class of cases; and the omission is the more significant, because former statutes gave this court, on the certificate of the presiding justice of the court of claims, appellate jurisdiction, and the court of claims, on a submission by an executive department, original jurisdiction of claims of such an amount, where the decision would affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases. Acts of March 3, 1863, chap. 92, § 5, 12 Stat. at L. 766; June 25, 1868, chap. 71, §§ 1, 7, 15 Stat. at L. 75, 76; R. S. § 1063; Act of March 3, 1887, chap. 359, §§ 9, 12, 24 Stat. at L. 507.

In the transcript certified to this court the judgment of the court of claims, that the claimant recover of the United States the sum of $597.84, appears upon its face to have been rendered "*pro forma* for the purpose of an appeal to the supreme court." The court's conclusion of law, which is a necessary part of the record, shows that the decision was made for that purpose, and because it would affect a class of cases, and the question involved was novel. And the opinion (which, though perhaps not strictly a part of the record, has been sent up with the record, as required by Rule 8 [Bk. 20] of this court) shows that the judgment was against the unanimous opinion of the judges, and that they will not consider it a precedent for a like decision in any other case.

The effect of this way of disposing of the case, if sanctioned by this court, would be to-

nullify the restriction put by Congress upon appeals from the court of claims, to subject the United States to be impleaded in this court without their consent, to make this court a court of original instead of appellate jurisdiction, and to compel it to hear and determine a claim which, if the court below had performed the duty, imposed upon it by law, of applying its own judgment to the merits of the case, could not have been brought here at all.

In support of such a course of proceeding in a court of first instance, the appellee relies on a passage in an opinion delivered by *Chief Justice* Taney, in a case which came before this court upon a certificate of division of opinion between two judges in the circuit court, made, as the report states, "*pro forma*, and for the purpose of obtaining the opinion of the supreme court on the points certified." The passage quoted is as follows: "We are aware that in some cases, where the point arising is one of importance and difficulty, and it is desirable for the purposes of justice to obtain the opinion of this court, the judges of the circuit court have sometimes, by consent, certified the point to this court, as upon a division of opinion; when in truth they both rather seriously doubted than differed about it. We do not object to a practice of this description, when applied to proper cases, and on proper occasions." *U. S.* v. *Stone*, 39 U. S. 14 Pet. 524, 525 [10:572]. But that opinion contains nothing to countenance the theory that the judges of a subordinate tribunal can be permitted, without considering a case themselves, to transmit it to this court for determination, and thus to shift a burden upon this court which none of the judges below will have any share in discharging. On the contrary, the Chief Justice went on to say: "But they must be cases sanctioned by the judgment of one of the judges of this court, in his circuit. A loose practice in this respect might render this court substantially a court for the original decision of all causes of importance; when the Constitution and the laws intended to make it altogether appellate in its character; except in the few cases of original jurisdiction enumerated in the Constitution." In that case this court held that it had no jurisdiction, by reason of the irregularity in the proceedings of the circuit court, and remanded the case to that court for further proceedings according to law. And in later cases brought up by certificate of division of opinion, this court has steadfastly declined to answer questions not certified in accordance with the spirit, as well as the letter, of the statutes upon that subject. *Webster* v. *Cooper*, 51 U. S. 10 How. 54 [13:325]; *Colorado Cent. R. R. Co.* v. *White*, 101 U. S. 98 [25:860]; *Jewell* v. *Knight*, 123 U. S. 426 [*ante*, 190].

It is true that there are cases in the books, in which appeals from judgments of the court of claims, appearing to have been rendered *pro forma*, but no objection being taken on that ground, have been considered and decided upon the merits. *Twenty Per Cent Cases*, 87 U. S. 20 Wall. 179, 181 [22:339], and 9 Ct. Cl. 103, 105, 302, 314; *U. S.* v. *Martin*, 94 U. S. 400 [24:128], and *Martin* v. *U. S.* 10 Ct. Cl. 276; *U. S.* v. *Driscoll*, 96 U. S. 421 [24:847], and *Driscoll* v. *U. S.* 13 Ct. Cl. 15, 40; *U. S.* v. *Fisher*, 109 U. S. 143 [27:885], and *Fisher* v. *U. S.* 15 Ct. Cl. 323.

But in the case at Bar, the irregularity of the action of the court of claims has been objected to by the Attorney-General in behalf of the United States, and cannot be passed over.

Judgment reversed, and case remanded to the Court of Claims for further proceedings, according to law.

Ex Parte:

In the Matter of ROGER M. SHERMAN, *Petitioner.*

(See S. C. Reporter's ed. 364–369.)

Mandamus *to circuit court—power to issue.*

This court has no power to require the Circuit Court of the United States, by *mandamus*, to set aside an order granting a motion to remand a suit which had been removed from a state court, and to proceed to a rehearing, on the ground that at the hearing the court did not have before it the complaint in the case. If the complaint had been omitted by mistake, a rehearing might have been granted in the discretion of the court.

[Original.]

Submitted Jan. 9, 1888. Decided Jan. 23, 1888.

MOTION for leave to file a petition for *mandamus*. *Denied.*

Points of Petitioner:

The circuit court could not judicially determine for or against the jurisdiction in this case in the absence of the complaint.

Windsor v. *McVeigh*, 93 U. S. 282, 283 (23: 917); *Garland* v. *Davis*, 45 U. S. 4 How. 148 (11: 911); *The Divina Pastora*, 17 U. S. 4 Wheat. 64 (4: 515); *Mandeville* v. *Burt*, 38 U. S. 8 Pet. 257 (8: 937); *U. S.* v. *Kirkpatrick*, 22 U. S. 9 Wheat. 729 (6: 201); *Bradstreet* v. *Thomas*, 37 U. S. 12 Pet. 177 (9: 1046) *Gold W. & W. Co.* v. *Keyes*, 96 U. S. 204 (24: 659); Act of Mar. 3, 1875, §§ 5–7; 18 Stat. at L. 472; *McBratney* v. *Usher*, 1 Dill. 367; *Clark* v. *Hancock*, 94 U. S. 493 (24: 146).

The order of remand being without jurisdiction, this court, in the absence of a remedy by writ of error, can by the writ of *mandamus* command the circuit judge to expunge the void order and proceed to decide the motion to remand or entertain the cause according to law.

Ex parte Bradley, 74 U. S. 7 Wall. 375–379 (19: 218, 219); *Chicago & A. R. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 (23: 103); *Ex parte Va.* 100 U. S. 343 (25: 678).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The object of the petitioner is to compel the Circuit Court of the United States for the Southern District of New York to set aside an order granting a motion to remand a suit against him, which he had caused to be removed from a state court, and to proceed to a rehearing, on the ground that at the former hearing the court did not have before it and did not see the complaint in the case on which he relied to show his right to a removal.

The petition makes it apparent that the mo tion was submitted by both parties, and decided on the papers then furnished. If, in point of fact, the complaint was not included among those papers, and it had been omitted by mistake, a rehearing might have been granted in the discretion of the court upon a showing to that effect; but this court has no power to require that court to do so by *mandamus*.

THE FLORENCE MINING COMPANY,
Appt.,
v.
FAYETTE BROWN, Receiver of BROWN, BONNELL & COMPANY.

(See S. C. Reporter's ed. 385–391.)

Contract for sale of goods, rescission of—check on bank, effect of—when not an equitable assignment.

1. In proceedings to recover damages for non-performance of a contract for the sale of iron ore on credit, *held*, that the nonaction of the vendee for the enforcement of the contract, and its silence on the subject, was evidence that it desired to rescind the contract; and the action of the vendor, its suspension of further shipments to the vendee, and subsequent failure to deliver the balance of the ore, or to call upon the vendee to comply with the contract, was evidence that it also desired to rescind the contract; and that the conduct of vendor and vendee justified the conclusion of the court below that the contract was in fact rescinded by the consent of both parties.

2. *Held, further*, that a check upon a bank, given to the vendor, on account of a cash payment then due, did not operate as an equitable assignment of moneys then in the bank to the credit of the drawer, where the check was not drawn against any particular fund, and there was no fund out of which it could have been paid, there being only about one fifth of its amount on deposit at the time to the credit of the drawer.

3. A check upon a bank in the usual form not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder, nor create any lien on the money which the holder can enforce against the bank. It is simply an order which may be countermanded before paid, and does not of itself operate as an equitable assignment.

[No. 92.]

Argued Dec. 1, 2, 1887. Decided Jan. 23, 1888.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio, from a decree confirming the report of a master upon a claim of the appellant. *Affirmed.*

The facts of the case are fully stated in the opinion.

Messrs. George D. Van Dyke and **Harvey D. Goulder**, for appellant:

The Mining Company had the right to retain the ore still in its possession as a security for the price.

Morgan v. *Bain*, L. R. 10 C. P. 15; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Re Phœnix Bessemer Steel Co.* L. R. 4 Ch. Div. 108; *Grice* v. *Richardson*, L. R. 3 App. Cas. 319; *Ex parte Stapleton*, L. R. 10 Ch. Div. 586; 2 Benj. Sales, 4th Am. ed. §§ 1016, 1119–1121; Blackburn, Sales, 2d Eng. ed. part III, chap. 3; *Newhall* v. *Vargas*, 15 Maine, 314; *Parker* v. *Byrnes*, 1 Lowell, 539; *Ex parte Luce*, 2 Lowell, 245; *Milliken* v. *Warren*, 57 Maine, 46–50; *Patten's Appeal*, 45 Pa. 151; *White* v. *Welsh*, 38 Pa. 396; *Wanamaker* v. *Yerkes*, 70 Pa. 443; *Arnold* v. *Delano*, 4 Cush. 33.

If, before payment, the vendee becomes bankrupt or insolvent and the vendor still retains possession of the goods, or any part of them, or if the goods are in the hands of a carrier, and the vendor can regain his actual possession by a stoppage *in transitu*, then his lien is restored, and he may hold the goods as security for the price.

Mohr v. *Boston & A. R. R. Co.* 106 Mass. 67–71; *Collins* v. *Delaporte*, 115 Mass. 159–162; *Daniels* v. *Newton*, 114 Mass. 539; *Rowley* v. *Bigelow*, 12 Pick. 307; *Stanton* v. *Eager*, 16 Pick. 467–475; *Jordan* v. *James*, 5 Ohio, 88–98; *Rhodes* v. *Mooney*, 2 West. Rep. 866, 43 Ohio St. 421; *Rogers* v. *Thomas*, 20 Conn. 53; *Harris* v. *Pratt*, 17 N. Y. 263; *Hunter* v. *Talbot*, 3 Smedes & M. 754; 2 Kent, Com. 492, 493, 541; 1 Pars. Cont. 598; *White* v. *Welsh*, 38 Pa. 396; Hilliard, Sales, 286; Story, Sales, 286.

It was impossible to rescind this contract and place the parties in anything like their original condition.

Patten's Appeal, 45 Pa. 151.

Whenever notice is given by one party to the contract that he will not carry it out, the other party is excused from tender of performance.

Cort v. *Ambergate etc. R. Co.* 17 Q. B. 127–148; *Smith* v. *Lewis*, 26 Conn. 110; *Haines* v. *Tucker*, 50 N. H. 307; *James* v. *Adams*, 16 W. Va. 245–266; *Derby* v. *Johnson*, 21 Vt. 21.

The measure of damages is stated in *Dustan* v. *McAndrew*, 44 N. Y. 72–78; *Mason* v. *Decker*, 72 N. Y. 595–599; 2 Benj. Sales, 4th Am. ed. § 1165; *Cahen* v. *Platt*, 69 N. Y. 348; 2 Kent, Com. 504; *Johnson* v. *Elwood*, 58 N. Y. 431; *Brownlee* v. *Bolton*, 44 Mich. 218; *Holland* v. *Rea*, 48 Mich. 218; *Bagley* v. *Findlay*, 82 Ill. 524; 1 Sedgwick, Damages, 591, marg. p. 281, note b.

The taking of notes did not affect the question, since the contract called for cash payments.

2 Daniels, Neg. Inst. §§ 1260, 1261, and cases cited; *Merrick* v. *Boury*, 4 Ohio St. 60; *Sutliff* v. *Atwood*, 15 Ohio St. 186; *Arnold* v. *Delano*, 4 Cush. 33; *Mohr* v. *Boston & A. R. R. Co.* 106 Mass. 67.

The notes are ready to be delivered up and canceled as the court may order.

Daniels, Neg. Inst. § 1275.

The check gave us no right of action at law against the bank.

Bank of Republic v. *Millard*, 77 U. S. 10 Wall. 152 (19:897); *First Nat. Bank* v. *Whitman*, 94 U. S. 343 (24:229); *Laclede Bank* v. *Schuler*, 120 U. S. 511 (30:704).

The Receiver, in this case, stands in no better position than Brown, Bonnell & Co., who drew the check.

High, Receivers, §§ 138–444; 3 Pomeroy, Eq. Jur. § 1336; Burrill, Assignments, 2d ed. 488; 2 Daniels, Neg. Inst. § 1643; *Dix* v. *Cobb*, 4 Mass. 508–511; *Coates* v. *Emporia First Nat. Bank*, 91 N. Y. 20–26; *Burn* v. *Carvalho*, 4 Myl. & C. 690.

The drawer impliedly engages that at the time when the check is due and payable he has and will then have, and at all times thereafter, sufficient funds in the bank to pay the same on presentment; and by the draft he appropriates those funds absolutely for the use of the holder.

Re Brown, 2 Story, 502–519.

If the drawer, after doing this, withdraws or otherwise appropriates the indebtedness against which he checked, the authorities characterize it as a fraud.

Story, Prom. Notes, 7th ed. § 498 and note 4, p. 694; *Bell* v. *Alexander*, 21 Gratt. 1, 6; *Pease* v. *Landauer*, 63 Wis. 20; *Voorhes* v. *Herket*, 1 Ohio Cir. Ct. 1; *Christmas* v. *Russell*, 81 U. S. 14 Wall. 69, 84 (20:762, 764); *First Nat. Bank* v. *Coates*, 8 Fed. Rep. 540.

A check operates as an equitable assignment *pro tanto*.

Walker v. *Seigel*, 12 Nat. Bankr. Reg. 394; *S. C.* 2 Cent. L. J. 508; *German Sav. Inst.* v. *Adae*, 8 Fed. Rep. 106; *S. C.* 1 McCrary, 501.

The case at Bar presents strong equities in favor of the right contended for.

2 Daniels, Neg. Inst. §§ 1638–1643; Morse, Banking, 234, 459, 471 and 474; Byles, Bills, 7th ed. 14 and note; 1 Story, Eq. Jur. 1044; *Morrison* v. *Bailey*, 5 Ohio St. 18; *Andrew* v. *Blachly*, 11 Ohio St. 89; *Bell* v. *Alexander*, 21 Gratt. 1, 6; *National Exch. Bank* v. *McLoon*, 73 Me. 498; *Wheatley* v. *Strobe*, 12 Cal. 92–97; *Pope* v. *Huth*, 14 Cal. 407; *Risley* v. *Phenix Bank*, 83 N. Y. 318–328; *Coates* v. *Emporia First Nat. Bank*, 91 N. Y. 20; *Harker* v. *Anderson*, 21 Wend. 372–381; *Yeates* v. *Groves*, 1 Ves. Jr. 281; *Lett* v. *Morris*, 4 Sim. 607; *Row* v. *Dawson*, 1 Ves. Jr. 331; *Harwood* v. *Tucker*, 18 Ill. 544; *Watts* v. *Shipman*, 21 Hun, 598; *Ex parte Waring*, 2 Rose, Bankr. Cas. 182; *Ex parte Smart*, L. R. 8 Ch. 220.

As to the length equity will follow securities or their proceeds which equitably should be applied to a particular debt, see *Bradley* v. *Root*, 5 Paige, 632–640.

Mr. **Francis J. Wing**, for appellee:

The fact of making a bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee.

Benj. Sales, 3d ed. 6, § 78; *Ogg* v. *Shuter*, L. R. 1 C. P. Div. 47; *Morgan* v. *Bain*, L. R. 10 C. P. 15; *Ex parte Chalmers*, L. R. 8 Ch. 289.

The exercise of the right of stoppage *in transitu*, or the analogous right of detaining the goods when the seller has not parted with them, is not a rescission of the contract.

Newhall v. *Vargas*, 15 Me. 314.

In *Hendrick* v. *Lindsay*, 93 U. S. 143–150 (23: 855–858), it is decided that negotiable promissory notes are equivalent to the payment of money, if received by the creditor as payment. The mandate of this court should issue, directing the court below to enter a judgment disallowing the claim of the appellant, entirely.

Sec. 701 U. S. R. S.; *Sheehy* v. *Mandeville*, 10 U. S. 6 Cranch, 253 (3: 215); *N. O. Ins. Asso.* v. *Piaggio*, 83 U. S. 16 Wall. 378 (21: 358).

Reply brief for appellant:

No exceptions were filed by appellee, and he has not appealed.

The Stephen Morgan, 94 U. S. 599 (24:266).

Where a party asserts that notes were taken in payment, the burden of proof is upon the party so asserting, and he must establish that fact by clear and satisfactory proof.

Merrick v. *Bourg*, 4 Ohio St. 60; *Leach* v. *Church*, 15 Ohio St. 169; 2 Daniels, Neg. Inst. § 1260; *Wheeler* v. *Faurot*, 37 Ohio St. 26–29. See also *Bank of U. S.* v. *Daniel*, 37 U. S. 12 Pet. 32 (9:989); *Peter* v. *Beverly*, 35 U. S. 10 Pet. 533 (9:522); *Duncan* v. *Kimball*, 70 U. S. 3 Wall. 37 (18:50).

Mr. Justice **Field** delivered the opinion of the court:

In February, 1883, three corporations, namely, the Lake Superior Iron Company, and the Jackson Iron Company, created under the Laws of Michigan, and the Negaunee Concentrating Company, created under the Laws of New York, filed a bill in chancery in the Circuit Court of the United States for the Northern District of Ohio against the defendant, Brown, Bonnell & Company, a corporation created under the Laws of Ohio, alleging that they were creditors of the latter corporation, and designating the amounts of such indebtedness; that owing to the first two named corporations consisting of certain promissory notes of the defendant, and that owing to the last named corporation being a judgment against the defendant in the circuit court rendered on that day. The bill purported to be filed, not only on behalf of all the complainants, but also on behalf of all other creditors, whom it represented to be so numerous that it was impossible to make them parties. It alleged that the defendant was insolvent; that it had long been engaged in the business of manufacturing iron, and had erected blast furnaces, rolling mills and coke works, and had opened and operated coal mines; that its plant was of great value, as was also the good will of its business; and that it employed at least 4,000 persons in its mills and works. It also alleged that vexatious litigation had been commenced against the defendant, and more was threatened; that such litigation was accompanied by attachments and seizures of property, and the threatened litigation would also be accompanied by like attachments and seizures, and they would give to the creditors who were pursuing them undue advantage over those complainants whose claims were not yet due, and work them irreparable injury; and that if such litigation should be further instituted, and the property of the defendant be attached, there was danger that it would be to a great extent destroyed, and its long established business broken up. It therefore prayed the appointment of a receiver to take charge of the assets and property of the defendant, and for further relief.

The defendant appeared at once to the bill, and thereupon, pursuant to the complainant's motion, Fayette Brown was appointed receiver of its assets and property.

In March, 1883, a supplemental bill was filed, setting forth that the property of the defendant was of such a peculiar nature that great and irreparable loss would be caused to the complainants and other of its creditors, unless its property should be preserved by the Receiver in its entirety as a business during the time required to liquidate and adjust its affairs; that the Negaunee Concentrating Company, one of the complainants, had recovered judgment against the defendant prior to the filing of the bill; that its recovery gave to the company a lien upon all the real estate of the defendant within the jurisdiction of the court; that execution had been issued upon said judgment and been returned unsatisfied; that other claims for liens and priorities of payment had been made by creditors of the defendant, both secured and unsecured; and that many claims were made, the justice of which was doubtful, and many which were unliquidated. It therefore prayed the appointment of a special master to ascertain the priorities of liens and the rights and claims of creditors generally, and report to the court his findings.

The court thereupon made an order requiring all the creditors of the defendant to file their claims in the office of the clerk by petition stating their amount and nature; and in July following it appointed the special master prayed to determine the rights of the several creditors

of the defendant who had, in accordance with its previous order, filed their claims with the clerk, and to marshal the liens and priorities of such claims.

Among the claims filed with the clerk pursuant to this order was one presented by the Florence Mining Company, a corporation of Michigan, for an amount alleged to be due to it upon a contract with Brown, Bonnell & Company for the sale of certain iron ores. Among the transactions had under the contract a check was given to the Florence Mining Company by Brown, Bonnell & Company, shortly before its failure, upon the Importers and Traders National Bank of New York, on account of a cash payment then due, which check, it was contended, operated as an equitable assignment of certain moneys then in the bank to its credit.

These matters were considered by the special master, who took testimony respecting them, and heard counsel thereon. He reported the amount due the Florence Mining Company, deducting from the price for the whole ore which was to be delivered the value of the quantity undelivered, estimated according to the contract price, and he reported against the alleged equitable assignment. Exceptions to his report were overruled, and the report was confirmed. To review this ruling the case is brought here on appeal.

The contract between the Florence Mining Company and Brown, Bonnell & Company was made on the 13th of February, 1882. By it the Florence Mining Company agreed to sell to Brown, Bonnell & Company 30,000 gross tons of Florence iron ore, of its standard quality, deliverable at Cleveland and Ashtabula, during the season of navigation of 1882, at the docks of the New York, Pennsylvania and Ohio Railway Company, or of the Lake Shore and Michigan Southern Railway Company, and as near one sixth of the total quantity per month as practicable; "Said ore to be paid for by the said Brown, Bonnell & Co. at the rate of $5.75 per ton, in eight equal payments of $21,562.50 each, payable on the 15th days of May, June, July, August, September, October, November and December next, respectively, in cash, all in funds par in Cleveland or New York, making a total of $172,500. The said ore is to be consigned to Florence Mining Company, and to be subject to their order until forwarded from docks. It is further agreed that promissory notes of Brown, Bonnell & Company, drawn at four months from date, on which a cash payment is due, with interest at the rate of 6 per cent per annum added into the face of note (making $21,993.75), may be substituted for either of the above cash payments except the last two due in November and December next, which are to be paid only in cash. Said Brown, Bonnell & Company for the above named consideration hereby agrees to buy, receive and pay for said ore as above mentioned."

The Florence Mining Company had the ore on the docks designated, by November 1, 1882. It was all consigned to the Company, as provided in the contract, and no part of it was delivered to the vendee except upon the order of the Company, which continued the owner of the ore not delivered. Shipments to the vendee were, during this period, that is, from the date of the contract until November 1, 1882, suspended at the vendee's request for about two months, but at other times shipments were made as the ore was wanted. Prior to February 19, 1883, the vendor had delivered to the vendee 20,762 tons of the ore, and had the remaining 9,238 tons on hand, when the vendee became insolvent, and the receiver of its assets and property was appointed by the court. On the day previous to this appointment, the vendor, having reason to fear the insolvency of the vendee, ordered the suspension of any further shipments of ores. No shipments to the vendee were subsequently made, nor did the vendor offer to make any, or give notice that it was ready to deliver the ore. The statement of its agent, that he asked the Receiver to buy ore of the Company, does not show any offer to deliver the ore under the contract, nor was it intended as such proof. In its petition setting forth its claim, filed with the clerk of the court, the Company alleged that it was at all times ready, willing, and able to perform the contract on its part, but that the vendee, by reason of its insolvency and the appointment of a receiver, was unable to take and pay for the ore remaining undelivered. These allegations were not admitted before the special master; but, if true, the fact would not constitute any performance of the contract on its part without an offer to deliver the balance, or, at least, without notice to the vendee, or its Receiver, of a readiness to do so. The insolvency of one party to a contract does not release the other from its obligations, provided, always, the consideration promised, if money, be paid, or if the consideration be the note or other obligation of the insolvent, money be tendered in its place. The Mining Company contended that it should be allowed the difference between the contract price of the undelivered ore, $5.75 per ton, and the market price for it at the time of the appointment of the Receiver, which was only $4.50 per ton, making a difference of $11,577. This contention rested, as we have seen, solely upon the fact of the insolvency of the vendee before the whole of the ore was delivered; but that fact, if excusing the delivery of the balance without payment, did not release the Company from offering to deliver the property in performance of the contract, if it intended to hold the purchasing party to the contract. It could not insist upon damages for nonperformance of the contract by the other party without showing performance, or an offer to perform it on its part with an ability to make good the offer if accepted.

Nor did the vendee or its Receiver call upon the vendor for the balance of the ore and offer cash in payment. Its nonaction for the enforcement of the contract and its silence on the subject was evidence that it desired to rescind the contract; and the action of the vendor, its suspension of further shipments to the vendee, and subsequent failure to deliver the balance of the ore, or to call upon the vendee to comply with the contract, was evidence that it also desired to rescind the contract. The master was therefore justified in holding that the contract was in fact rescinded by the consent of both parties.

Numerous cases have been cited to us upon

the conduct which a vendor should pursue to preserve his rights under a contract for the sale of goods on credit, when he has refused to proceed with its performance upon learning of the insolvency of the vendee, but they exhibit so much difference of judicial opinion on the subject that it is difficult, if not impossible, to reconcile them. Some of the divergences of opinion may perhaps be traced to the different position of the vendor, where he has sold the goods on credit, the title passing immediately, but has stopped some of them *in transitu*, and where he has merely contracted to sell the goods, the delivery to be made by installments, and payment made with each delivery, the title only then vesting in the vendee. However this may be we do not deem it necessary to go over the cases in an attempt either to reconcile or explain them. We rest our present decision on the fact that the conduct of vendor and vendee in this case justified the conclusion that they both assented to the rescission of the contract.

Upon the second point, as to the alleged equitable assignment of the funds in the bank against which the check was drawn by Brown, Bonnell & Company, and given to the Florence Mining Company, we do not think there can be any serious question of the correctness of the master's decision. The check was not drawn against any particular fund. There was indeed, no fund out of which it could have been paid. There was only a little more than one fifth of its amount on deposit at the time to the credit of the drawer. The notes sent to the bank for discount at the time the check was given were never discounted, and were returned to the sender. They were not to be used for the payment of the check unless discounted.

An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto* unless accompanied with such a relinquishment of control over the sum designated that the fundholder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit, it is a debt to him by the bank payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded, and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money, which the holder can enforce against the bank. It does not of itself operate as an equitable assignment.

Judgment affirmed.

Mr. Justice **Matthews** did not sit in this case or take any part in the decision.

ALBERT C. WIDDICOMBE, *Plff. in Err.*, v. OLIVER P. CHILDERS ET AL.

(See S. C. Reporter's ed. 400–405.)

Legal title, when not good as against prior equity—purchaser in bad faith, when decreed to hold as trustee.

1. The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued.

2. Where the error was one which arose from the mistake of the register, one of the officers of the local land office, in describing the southwest quarter, instead of the southeast quarter, which was purchased, and which error occurred in the application and certificate, but the entries upon the record of the office were correct, and the purchaser had been in the undisputed possession for thirty-five years and more, of what he supposed he purchased as his own property under a completed purchase with the price fully paid, a third person, who, with full knowledge of the purchaser's rights, secured a patent vesting the title in himself, was in law a purchaser in bad faith; and under such circumstances a court of chancery can charge him as trustee, and compel a conveyance which shall convert the superior equity of the original purchaser into a paramount legal title.

[No. 89.]

Argued and submitted Dec. 1, 1887. Decided Jan. 23, 1888.

IN ERROR to the Supreme Court of the State of Missouri, to review a judgment in favor of defendants requiring plaintiff to convey lands to the equitable owner. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **S. S. Burdett,** for plaintiff in error:

Although under the system of pleading in civil cases in the Courts of Missouri there is but one form of action, an equitable defense is, nevertheless, permitted to be set up by way of cross action in the answer.

Maguire v. *Vice*, 20 Mo. 431; *Meyers* v. *Field*, 37 Mo. 434; *Bohall* v. *Dilla*, 114 U. S. 47 (29: 61.)

The right asserted by both parties to the land in controversy is based upon a purchase from the United States. The title of the plaintiff in error, under a patent from the United States, is put in issue, thus presenting a question of which this court will take cognizance.

Moore v. *Robbins*, 96 U. S. 531 (24:849); *Minn.* v. *Bachelder*, 68 U. S. 1 Wall. 109 (17: 551).

A patent raises the presumption that all previous steps have been taken to justify its issue.

Polk v. *Wendal*, 13 U. S. 9 Cranch, 87 (3: 665); *Minter* v. *Crommelin*, 59 U. S. 18 How. 87 (15: 279).

There is no proceeding in this case such as is requisite to the impeachment or setting aside of a patent of the United States.

Field v. *Seabury*, 60 U. S. 19 How. 323 (15: 650); *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636 (26: 875); *U. S.* v. *Throckmorton*, 98 U. S. 61 (25: 93).

The forms and conditions of the sale of the public lands are prescribed by law; and the Acts of Congress, with the regulations of the land department, become a part of the contract in every sale.

Bagnell v. *Broderick*, 38 U. S. 13 Pet. 436 (10: 235); *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *Jourdan* v. *Barrett*, 45 U. S. 4 How. 169 (11: 924); *Irvine* v. *Marshall*, 61 U. S. 20 How. 558 (15: 994); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); 1 Lester, Land Laws, 675.

The inquiry that a proper court may institute, after the title has passed from the govern-

ment, is whether the party having that title should hold it absolutely or as trustee for another.

Johnson v. *Towsley*, *supra*; *Warren* v. *Van Brunt*, 86 U. S. 19 Wall. 646 (22: 219).

One invoking the aid of a court of equity to reverse the act of the land department, must show that he had done all that the law required of him, and that the decision ought to have been for him.

Lytle v. *Ark.* 50 U. S. 9 How. 314 (13: 153); *Stark* v. *Starrs*, 73 U. S. 6 Wall. 402 (18: 925); *Bohall* v. *Dilla*, 114 U. S. 47 (29: 61); *Matthews* v. *Zane*, 20 U. S. 7 Wheat. 164 (5: 425).

Where a written instrument is sought to be reformed, the burden of overcoming the strong presumption arising from its terms rests upon the moving party.

Howland v. *Blake*, 97 U. S. 624 (24: 1027); *Kent* v. *Lasley*, 24 Wis. 654; Story, Eq. Jur. § 1201 a, 11th ed.

The Act of May 24, 1824, conferred a right with a statutory remedy; in such case the party is confined to the remedy given.

Pritchard v. *Norton*, 106 U. S. 131 (27: 106); *Pittsburg, C. & St. L. R. Co.* v. *Hine*, 25 Ohio St. 629; *Smith* v. *Lockwood*, 13 Barb. 209; *Franklin Glass Co.* v. *White*, 14 Mass. 286.

Mistakes resulting from gross negligence will not be relieved against by equity.

Lewis v. *Lewis*, 5 Oregon, 169; *August* v. *Seeskind*, 6 Cold. 166; *Moran* v. *McLarty*, 11 Hun, 66.

That the number of the application was written upon another tract on the plat in the land office is not evidence of a mistake entitling the plaintiff to relief in equity.

Iowa R. R. Land Co. v. *Adkins*, 38 Iowa, 351.

The legal title cannot be made to yield to an equity founded in the mistake of a ministerial officer.

Miller v. *Kerr*, 20 U. S. 7 Wheat. 1 (5: 381).

The burden of proof is on him who asserts notice.

Bartlett v. *Varner*, 56 Ala. 580.

Neither suspicion, rumor nor vague speculation is sufficient to put one upon inquiry.

Lamont v. *Stimson*, 5 Wis. 443; *Wilson* v. *McCullough*, 23 Pa. 440; *Wilson* v. *Wall*, 73 U. S. 6 Wall. 91 (18: 780); Story, Eq. note 4, 402; *Jones* v. *Smith*, 1 Hare, 43.

Lapse of time is held to bar relief.

Clarke v. *Johnston*, 85 U. S. 18 Wall. 493 (21: 904); *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 806 (24: 324); *Brown* v. *Buena Vista Co.* 95 U. S. 161 (24: 423); *U. S.* v. *Tichenor*, 12 Fed. Rep. 415; *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); U. S. McGraw, 12 Fed. Rep. 449; *Harkness* v. *Underhill*, 66 U. S. 1 Black, 316 (17: 208); *Leavenworth Co.* v. *Chicago, R. I. & P. R. Co.* 18 Fed. Rep. 209.

All persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit.

Caldwell v. *Taggart*, 29 U. S. 4 Pet. 190 (7: 828); *Shields* v. *Barrow*, 58 U. S. 17 How. 130 (15: 158); *Coiron* v. *Millaudon*, 60 U. S. 19 How. 113 (15: 575); *Wyche* v. *Green*, 32 Ga. 341; *U. S.* v. *Central Pac. R. Co.* 11 Fed. Rep. 449.

That defendants Jungher and Johnston were notified by their grantees to make defense to plaintiff's action in ejectment merely relieves the grantee from the burden of being afterwards obliged, in the action on the covenant, to prove the validity of the title of the adverse claimant.

Cooper v. *Watson*, 10 Wend. 202; *Turner* v. *Goodrich*, 26 Vt. 708; *St. Louis* v. *Bissell*, 46 Mo. 157.

The equitable defense failing, the plaintiff in error was entitled to judgment upon his legal title.

Bohall v. *Dilla*, 114 U. S. 51 (29: 63).

Mr. **James Hagerman**, for defendants in error:

There is no federal question presented by this record, but only one of general equitable jurisprudence; and therefore the appeal should be dismissed.

Chicago & A. R. R. Co. v. *Wiggins Ferry Co.* 119 U. S. 624 (30: 523); *Williams* v. *Weaver*, 100 U. S. 547 (25: 708).

Although the legal title is in the plaintiff, yet he holds the same in trust for the equitable owners.

Story's Eq. § 395; Bispham, Eq. § 262.

After the title has passed from the government to individuals and the question has become one of private rights, the jurisdiction of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

Johnson v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Minn.* v. *Bachelder*, 68 U. S. 1 Wall. 109 (17: 551); *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219 (19: 138); *Stark* v. *Starr*, 73 U. S. 6 Wall. 402 (18: 925) *Carman* v. *Johnson*, 29 Mo. 84; *S. C.* 20 Mo. 108.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit brought by Albert C. Widdicombe to recover the possession of the S. E. ¼ sec. 36, T. 64, R. 6, Clarke County, Missouri. He claimed title under a patent of the United States bearing date December 15, 1871, issued upon a location of agricultural scrip on the 10th of May, 1871, under the Act of July 2, 1862. 12 Stat. at L. 503, chap. 130. As an equitable defense to the action, such a defense being permissible by the laws of Missouri, the defendants alleged in substance that they claimed title under Edward Jenner Smith, who, on the 6th of July, 1836, went to the proper land office and made application for the purchase of the land in dispute; that his application was duly accepted, and he completed the purchase by the payment of the purchase money as required by law; that the entries made at the time by the proper officers in the plat and tract books kept in the office showed that he had bought and paid for the S. E. ¼, but that the register, in writing his application, described the S. W. ¼ by mistake; that he signed the application without discovering the error; that he immediately went into the possession of the S. E. ¼, as and for the lands he had purchased, and he and those claiming under him have asserted title thereto, and paid taxes thereon ever since; that afterwards the entries on the plat and tract books were changed, without authority of law, so as to show that his purchase had been of the S. W. ¼ instead of the S. E. ¼; that Widdicombe located his scrip on the S. E. ¼ with full knowledge of all the facts, and that he now holds the legal title under his patent in trust for those claiming under Smith, whom the defendants

represent in the suit. The prayer of the answer was that such trust might be established, and Widdicombe decreed to convey the legal title to those who had acquired Smith's rights.

The trial court found the facts to be substantially as stated in the answer. The supreme court, on appeal, affirmed this finding, and rendered judgment in favor of the defendants, requiring Widdicombe to convey in accordance with the prayer of the answer. From that judgment this writ of error was brought.

We entertain no doubt whatever as to the correctness of the findings of fact in the courts below. The evidence establishes beyond all question that Smith intended to buy, and the officers at the land office intended to sell the S. E. ¼. That tract was then unsold, while the S. W. ¼ had been purchased by Robert Wooden at private entry on the 8th of November, 1884, and this was shown by the records of the office. The written application, by mistake, described the wrong land, and the certificates of the register and receiver followed the application; but the entries upon the records of the office were correct. The officers supposed they had sold, and Smith supposed he had paid for, the S. E. ¼. This was in 1836. For twenty-two years afterwards, certainly, and, as we are satisfied, for a much longer time, the plat and tract books showed that this quarter section was not subject to entry or sale. At some time, but exactly when or by whom does not distinctly appear, the entry of Smith was changed from the S. E. ¼ to the S. W. ¼, thus showing two entries of the S. W. ¼—one by Wooden in 1884, and the other by Smith in 1886. The fact of the change, as well as what it was, appeared on the face of the records; and no one could have been misled by it unless he willfully shut his eyes to what was before him.

Widdicombe was sworn as a witness in his own behalf, and the following is the whole of his testimony:

"I am plaintiff in this cause. I applied for and entered the land in controversy at the Boonville land office, as shown by my application in evidence, in the early part of 1871. Never was in Clarke County, Mo., or the northeastern part of the State prior to June, 1874. Never saw the Hampton map of Clarke County, referred to in evidence, prior to that time. Never saw any records, other than the government or United States records, having reference to the land in controversy, prior to that time. I had heard of no person claiming the land in controversy prior to the time I went to Clarke County, in 1874. The defendant, Childers, was cutting timber upon the land when I went there, in June, 1874, and was cutting about the middle of the tract; so he informed me."

Cross examined by defendants:

"I discovered the southeast quarter 36, 64, 6 W., was vacant while employed in making an examination of the records to purchase for a party in Scotland County an eighty acre tract, where there were three applicants at the same time for the same piece of land, one of whom was the Sheriff of Scotland County. There had been a correction, alteration, or erasure, call it as you please, on the plat and tract books in the register's office, in section 36, township 64, range 6 west, and I saw it before I made the entry. The plat book, whereon the numbers of entries are posted, in section 36, and on the southeast quarter of said section, there is a perceptible erasure. On the tract book the letter 'W' in the Smith entry, appears to have been made with a heavy stroke of the pen, and has a much heavier and darker appearance than the letter 'S' preceding it, and has the appearance of having been changed from some other letter; and the letter 'E' is the only letter over which the letter 'W' could have been written so as to have formed a correct description of any other entry, either in that or any other section, or in the description of lands similarly situated."

The evidence shows clearly and distinctly that Widdicombe had been for many years familiar with the books of the office and their contents, as well as with the way in which the business was done there. He must have known that the original entry by Smith was of the S. E. ¼, and that it could not be changed to the S. W. ¼ without putting the entry on a quarter section that had already been bought and paid for. Under these circumstances the conclusion is irresistible that he is legally chargeable with notice of Smith's prior entry and of the rights which had been acquired under it.

Such being the case the judgment below was clearly right. There cannot be a doubt but that if the mistake in the written application and in the certificates of the register and receiver had been discovered before the patent was issued to Widdicombe, it would have been corrected in the land office upon proper application in that behalf. The error was one which arose from the mistake of the register, one of the officers of the local land office, and comes directly within the provisions of section 2369 of the Revised Statutes, which is a re-enactment of the Act of March 3, 1819, 3 Stat. at L. 526, chap 98, and in force from the time of the entry by Smith until now. The Act of 1819 was extended by the Act of May 24, 1828, 4 Stat. at L. 301, chap. 96, to cases where patents had been or should be issued. This extension is now embraced in section 2370 of the Revised Statutes. Another statute, passed May 24, 1824, 4 Stat. at L. 31, chap. 188, now section 2372 of the Revised Statutes, authorizes similar relief.

The mistake in this case does not appear to have been discovered by Smith, or those claiming under him, until after Widdicombe had got his patent, and after they had been in the undisputed enjoyment for thirty-five years and more of what they supposed was their own property under a completed purchase, with the price fully paid. Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith; and, as their equities were superior to his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a court of chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. The cases to this effect are many and uniform. The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior

right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons. *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326, 335 [18: 547, 549]; *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219, 228 [19: 138, 141]; *Meader* v. *Norton*, 78 U. S. 11 Wall. 442, 458 [20: 184, 187]; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72, 87 [20: 485, 488]; *Carpentier* v. *Montgomery*, 80 U. S. 13 Wall. 480, 496 [20: 698, 701]; *Shepley* v. *Cowan*, 91 U. S. 330, 340 [23: 424, 427]; *Moore* v. *Robbins*, 96 U S. 530, 535 [24: 848, 850]; *Wirth* v. *Branson*, 98 U. S. 118, 121 [25: 86, 87]; *Marquez* v. *Frisbie*, 101 U. S. 473, 475 [25: 800, 801].

The judgment is affirmed.

PILAR GARCIA DE SABARIEGO ET AL.,
Plffs in Err.,
v.
MARY A. MAVERICK ET AL.

(See S. C. Reporter's ed. 261–301.)

Acts of officer or tribunal, when valid—government documents, as evidence of title—effect of, as against pre-existing, adverse title—recitals in deed — presumption — confiscation, how proved—prior possession—abandonment.

1. Where power or jurisdiction is delegated to any public officer or tribunal over a subject matter and its exercise is confided to his or its discretion, the acts so done are binding and valid as to the subject matter; and the only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying their validity, are as to power in the officer, and fraud in the party.

2. But in no case have documents, with the recitals therein, and the presumptions of law and fact arising thereon, shown to have been executed by officers of the government, within the apparent scope of their authority, been held sufficient, where the fact in issue was whether the government at that time had any title to convey, to establish the fact in dispute, as against parties claiming a pre-existing, adverse and paramount title in themselves.

3. All that can be reasonably or lawfully claimed as the effect of such documents of title is that they pass such estate, and such estate only, as the government itself, in whose name and on whose behalf the official acts appear to have been done, had at the time, but not to conclude the fact as to whether the estate conveyed was lawfully vested in the grantor at the time of the grant.

4. Recitals in a deed bind the parties and those who claim under them, but do not bind mere strangers claiming by an adverse title or those who claim by title anterior to or paramount to the deed.

5. The presumption that public officers have done their duty is a legal one; but it does not supply proof of a substantive and independent fact.

6. Where the documents relied upon as the foundation of plaintiff's title declare that the property is in the hands of public officers charged with its custody, as having been confiscated with that of others described as rebels, and show a sale and conveyance of the premises according to the recitals upon a confiscation of the property by the Spanish Government, but do not show any decree or adjudication of confiscation sufficient to warrant the sale or that the person whose property is thus sold was within the jurisdiction of any tribunal which could pronounce such a decree, *held*, that such documents were not sufficient to show a legal confiscation, nor to pass title to the purchaser at the sale.

7. Notwithstanding such recitals and the inferences to be drawn from them, the alleged confiscation of the property, if it ever took place, could have been lawfully effected only by means of a formal judicial proceeding, which must be primarily proved by the official record of the transaction or a duly certified copy thereof, and, secondarily, in case of its loss, by proof of its previous existence and of its contents. The certificates of other officers referring to it only incidentally and collaterally, although as the basis of their own official action, are not legal proof of the fact itself.

8. Prior possession is sufficient to entitle a party to recover in an action of ejectment, only as against a mere intruder or wrong doer or a person subsequently entering without right; and in order to recover it must appear that such possession has been continuous and has not been abandoned.

9. The action to regain the prior possession must be brought within a reasonable time after it had been lost. If there has been delay in bringing the action, the *animus revertendi* must be shown and the delay satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim to the possession.

[No. 67.]

Argued Nov. 11, 14, 1887. Decided Jan. 23, 1888.

IN ERROR to the Circuit Court of the United States for the Western District of Texas, to review a judgment for the defendants in an action to recover land. *Affirmed.*

Statement of the case by *Mr. Justice* **Matthews:**

This is an action of trespass to try title, brought in the Circuit Court of the United States for the Western District of Texas by Pilar Garcia de Sabariego and her husband Manuel, citizens of Mexico, against Maverick and others, citizens of Texas, to recover a certain tract of land lying in the City of San Antonio, Texas. She claimed the property as the sole heir of her deceased father, Francisco Garcia, and of her deceased mother, Gertrudes Barrera de Garcia, both of whom it was alleged died seised and possessed of the said land. The different defendants filed pleas of not guilty, the Statute of Limitations, alienage of the plaintiffs, etc. On the trial, as shown by the bill of exceptions, the plaintiffs read in evidence certain partition proceedings showing title in one Miguel Losoya to the *suerte* or tract claimed in the suit by a grant from the King of Spain. The plaintiffs next offered in evidence certain documents, the originals being in Spanish, and translations of which into English are set out, and a deed from a board of commissioners to Garcia showing a sale and conveyance of the premises in controversy to him, based, according to the recitals, upon a confiscation of the property of Losoya by the Spanish Government in the year 1814. These documents, relating to the confiscation, sale, and conveyance of the property in controversy, were admitted in evidence, the court stating at the time that, in its opinion, they did not show any decree or adjudication of confiscation sufficient to warrant the sale, and that, unless the plaintiffs could show some further proceedings upon which to base the action of the officers in the premises, the said proceedings constituted no legal confiscation and passed no title to the purchaser at said sale. Counsel for the plaintiffs then stated to the court that they were unable to offer in evidence any further or other confiscation decree or proceedings than those already offered and read in evidence. Counsel for the plaintiffs then offered other testimony in depositions, "but the court, upon the objection of defendants, refused to allow the depositions aforesaid, or any part

of them, to be read, and refused to permit plaintiffs to make any of the proofs aforesaid, upon the ground that the said confiscation proceedings were insufficient to pass title of any character, and that no title of any character was thereby passed to or vested in said Garcia, and that this was fatal to plaintiffs' right of recovery, and that all the said evidence read as well as that proposed to be offered showed no title in plaintiffs which would warrant a verdict and judgment in their favor."

The court thereupon directed a verdict for the defendants, which was rendered, and judgment thereon accordingly, to reverse which this writ of error is prosecuted.

The documents relating to the sale and conveyance of the premises in dispute are as follows:

The first is entitled: "The Governor of the Province of Texas returns statements of property confiscated from the rebels in Bexar, and of the condition thereof, and asks whether some of it may be sold." Then follows a list of the names of the parties and a general description of the property of each, extended into a column of valuations. In this list appears the name of Miguel Losoya; the property described, one half dula of water; extended 100. This list is preceded by the following heading: "Statement of property confiscated from the rebels of this city by the order of the commanding general, Don Joaquin de Arredondo, as shown by the statement and inventory made by Captain Don Fran'co del Prado y Arce on the 27th of October, 1814, which I copy, and to which I refer myself, viz." It is dated Bexar, the 27th of October, 1814, and signed F'co del Prado y Arce, Juan Fran'co de Collantes. Then follows: "General inventory and copy of property belonging to the King, and confiscated from the insurgents of this Province, which I received from my predecessor, Lieutenant Don Juan Antonio Padilla, and is now in existence, viz." In this list also appears Miguel Losoya's one half dula of water. Then follows, under the head of remarks, the following:

"All the other confiscated property appearing in the statement made by Don Francisco del Prado as above, in the copy of the statement of existing property which I have received from my predecessor, Lieutenant Don Antonio Padilla, now wanting, shall be accounted for by my predecessor in office, since I have had no knowledge of it; but I will be accountable for the property which I received from said Padilla, as appears in this last statement.

Bexar, 19th of September, 1817.

Juan Fran'co de Collantes."

On the same document is the following endorsement:

"[On margin:] On the 20th inst. receipt was acknowledged, stating that he shall be advised of the result.

"There are in this city several houses sequestered from the insurgents who took part in the revolution of this Province, which took place in the past year, 1811; but all of them are so deteriorated that they are becoming wholly unserviceable, having never been repaired, owing to want of funds for that purpose, a few of them having been inhabited by persons connected with the army, who, considering their well known straitened circumstances, had means to pay rent only. The result is that, although at that time they were appraised by commissioners appointed for that purpose, according to their inventory existing in these archives, in amounts which were then adequate, they cannot now be worth one half of what they were then, and some of them may not be worth one third; and, considering that their ruinous condition increases from day to day, I hope that Your Lordship will please tell me whether some of them may be sold in case that purchasers be found, and whether, owing to the cause above specified, some rebate may be made on the appraised value, considering that at this moment a buyer comes before me of a house appraised at three hundred and eighty dollars, but, inasmuch as the price does not suit him, he asks for some rebate on it, said house being wholly unserviceable. In these terms, and considering that this business is under the authority of the intendancy, I shall act according to the instructions which Your Lordship may give on the subject. God keep you many years.

Bexar, September 14, 1817.

Antonio Martinez.

To the Intendant of San Luis Potosi."

"One 'cuartillo.'

Fourth stamp: 'One cuartillo.' For the years eighteen hundred and fourteen and fifteen."

"San Luis Potosi, the 20th of October, 1817.

"Let the official communication of the Governor of the Province of Texas, and inventory and statements thereto attached, upon houses sequestered from the rebels at Bexar, and asking whether some of them may [Seal.] be sold, be filed, and let the whole be referred to the 'asesor' for his opinion upon such instructions as may be proper. The intendant 'corregidor' of this Province, Don Manuel Jacinto de Acevedo, has thus decreed and ordered and did sign hereto with assisting witnesses, in default of a notary, which I certify.

[Seal. 1817.] Manuel de Acevedo.

Assisting, José Maria Bural.

Man. José Domingo.

One cuartillo.

[On margin:] Erasures are not valid."

"To the Intendant.

Art. 82 of the royal Ordinance of December 4, 1786, gives powers, in case of confiscation by sentence of any property within the territory of this Province, and makes it the special duty of Your Lordship to proceed to the alienation and collection of the proceeds and to take cognizance of all litigation and claims subsequently arising; and on the same subject a superior order was afterwards issued referring to property confiscated from the rebels. In these terms and in the case to which the Governor of the Province of Texas makes reference at the beginning of his report of the 19th of September of this year, that the confiscation of the property mentioned in it was effected by the order of the commanding general of the eastern Provinces, the provisions of said articles are applicable, and, consequently, Your Lordship should be pleased to order that the confiscated property, owing to the deterioration it has suffered, as stated, be reappraised by two sworn experts, thus altering the value hereto-

fore assessed on it, in order to facilitate its more speedy sale, and that its total loss may not result to the prejudice of the royal treasury; and said property being thus appraised let it at once be offered in public sale for the term of nine days, three outcries being afterwards made, and, at the last outcry, adjudication being awarded to the best bidders for parcels, who may appear with the respective bond certificates by persons able to give security for their bids; and these bids shall be good and may be accepted for adjudication thereon, provided that others be not made a little more in excess of the two third parts of the amount of appraisement, this being the practice generally observed in all the tribunals. And Your Lordship will please give notice of this decision to the commanding general; whereupon, these proceedings should be referred for the specific objects to the Governor of Bexar, who should in due time report the results to this intendancy.

San Luis Potosi, October 29, 1817.

(Lic'do) Josef Ruiz de Aguirre.

"San Luis Potosi, October 31, 1817.

"As the 'asesor' advises, let this be communicated to the commanding general of the eastern Provinces for his information. This His Lordship has decreed and signed hereto, which he certifies. Acevedo.

Assisting, Juan José Domingo, 8.
José Maria Bural."

"On the same day an official communication was addressed to the general commanding the eastern Provinces, with insertion of the foregoing opinion, which I certify.

"——, Paraph."

Then follows a "statement showing the property sequestered from the rebels of the capital of Texas, according to the inventory, existing in the archives of this government, specifying that which has subsequently been returned, donated, and finally ruined by the swollen river in the overflow of the 5th of July of this year, viz.:" This includes Miguel Losoya, one half dula of water, rented for one fanega of corn; dated at Bexar, September 10, 1819.

The next document referred to is called a "translation of confiscation proceedings of 1819," dated at the Intendancy of San Luis Potosi, in the year 1819: "The Governor of Texas reports the injury caused by the overflow undergone by the City of Bexar on the fifth of July to the landed estate confiscated from the insurgents. Statement of the houses and 'jocales' (thatched cabins) belonging to the royal domain, as confiscated from the rebels, which have been ruined in the overflow of the City of Bexar, which took place in the morning of the 5th of July." Then follows a list of houses and "jocales," dated Bexar, the 8th of July, 1819, signed José Flores; Examined, Martinez; with the following statement at its conclusion:

"On the morning of the 5th instant, in consequence of a terrific waterspout which bursted north of this city, the river became so swollen as to run over its banks, causing a general overflow such as has never been beheld in the Province before, leaving the city in such a condition that it may be said to exist no longer, and its inhabitants (those who were not victims of the fury of the waters) being reduced to the most lamentable destitution. The landed estate belonging to the royal domain by sequestration has been ruined by that overflow, a statement of which property I enclose herewith for the knowledge of your lordship. The unfortunate condition of this people did not allow me to offer that property for sale, as Your Lordship had instructed; now and for better cause it will be more difficult, and all the houses left standing will by degrees fall in ruins, as they have been considerably shattered by the overflow; even the parcels of cultivable land are no longer fit for cultivation. Therefore your lordship will please determine as you may deem most advisable, in order that the royal domain may not suffer a total loss. May God preserve you many years.

Bexar, July 9, 1819. Antonio Martinez.

To the intendant, Don Manuel Acevedo.

One quartillo fourth [L. S.] stamp, one quartillo, years eighteen hundred and sixteen and eighteen hundred and seventeen. One quartillo.

September 18th, 1819.

[L. S.] Luis Potosi."

"Let the Governor of the Province of Texas be notified that this intendancy is informed of the occurrence referred to in the foregoing letter, and that, inasmuch as the property mentioned in the accompanying list has suffered so great injury, while other property is completely falling into ruin, he will cause the same to be appraised again by experts sworn in due form, and that it be sold at auction, to be awarded to the best bidder, conforming himself, so far as the said occurrence allows, to the order given on the subject, and contained in the proceedings addressed to him on the thirty-first of October, eighteen hundred and seventeen. Thus it has been determined and signed by the "Señor Intendente Corregidor" of this province, by the advice of his "Intendente Letrodo," before me, which I certify.

Manuel de Acevedo,
Licenciado Josef Rusi de Aguirre.
Before me— Antonio Maria Juares,
Notary Royal and Military Intendente of State.

On the seventeenth of the same month the letter was dispatched as by orders.

Juares."

This list of houses and "jocales" does not contain any reference to Miguel Losoya, but in the same document follows a "statement of property this day in existence confiscated from the rebels of the capital of Texas, viz." In that list is found the name of "Miguel Losoya, one half stock watering privilege (*media dula de agua*), with its land;" dated Bexar, September 10, 1819; signed José Flores and Martinez.

Then follows an "exhibit of the property sequestered from the rebels of the capital of Texas, according to the inventory existing in the archives of this government, stating what was subsequently restored, donated and received, and finally swept off by the waters of the river in the overflow of the 5th of July of this year, viz." In this again appears "Miguel Losoya, one half stock watering privilege, with land, rented for one fanega of corn;" dated Bexar, September 10, 1819; signed José Flores; Examined, Martinez. And there is added the following statement:

"Considering that the overflow of the 5th of July last past resulted in the ruin of several houses and all the 'jocales' which were sequestered and belong to the royal domain, I instructed the agent of said property to make statements, which I inclose herewith to Your Lordship for your information. One of these statements exhibits all the sequestered property, as I did formerly report to Your Lordship, stating the disposition made of that property. The other statement shows what is this day remaining of said property, with the remark that in relation to the arable lands most of it has been destroyed by the overflow, being situated in close proximity to the banks of the river, and they are no longer fit for cultivation. I also inclose to Your Lordship a statement as required, of the same commissioner, who has not one 'real' on hand, but holds some bills, part of which may be collected, being against the troops, to which they may be charged on their accounts; others, however will be of difficult collection, being due by several parties whom the late misfortune has left in the greatest destitution, and now exclusively depending on the charity of His Excellency, the Viceroy, who has sent $29.00 for the purpose, and of the most illustrious prelate, Don José Ignacio de Aransivia, who contributed $19.00. However, Your Lordship will determine as you deem just. May God preserve Your Lordship many years.

Bexar, September, 1819.

Antonio Martinez.

To the Intendant, Don Manuel de Acevedo.

"Luis Potosi, October 20th, 1819.

Let this letter and accompanying documents be filed with the former proceedings existing in this intendancy, and be referred to the 'promoter fiscal,' and according to his request to the assessor.

[L. S.] Acevedo.

Antonio Maria Guares, one 'quartillo;' fourth stamp, one quartillo; years eighteen hundred and sixteen and eighteen hundred and seventeen, one quartillo.

[L. S.] [L. S.] One quartillo."

Also the following:

"Proceedings of Sale of the Property Sequestered from the Rebels for the Account of the Royal Revenues. Year 1819.

The real estate sequestered in this capital from the rebels, having to be sold for the benefit of the royal treasury, in order that said royal treasury may not lose all its interests owing to the great depreciation suffered by said property, and by virtue of the orders received by me on the subject, I commission you jointly with the inhabitants, Don Vicenti Gortori, first regidor, and Don José Flores, agent of said property, to proceed to said sale, in accordance with the opinion of the assessor of the intendancy of San Luis Potosi, a copy of which I inclose to you in order that you may conform with it in all its points, and to form the heading of the proceedings to be instituted on the subject. I do likewise inclose a statement of the houses and lands which must be sold according to the last appraisement made by the experts, José Donaciano Ruiz and Francisco Zapata, master masons, for the houses, and for the lands by the farmers Francisco Flores, Don Santiago Seguin, Diago Perez, and José Gomez, to whom I did administer the oath to proceed to the appraisement; and you will inform me of the result, and forward said proceedings to me. May God preserve you many years.

Bexar, 6th of November, 1819.

Antonio Martinez.

To Captain Don Manuel Cedron."

"Potosi, the 20th of October, 1817.

Let the letter of the Governor of the Province of Texas and the accompanying inventory and statement of houses sequestered from the rebels of Bexar be filed, advising whether any of them may be sold; and let the whole be referred for advice to the assessor for such determination as he deems proper. The 'intendante corregidor' of this Province, Don Manuel Jacinto de Acevedo, has thus determined and ordered and signed hereto, with assisting witnesses, in default of a notary, which I certify.

Manuel de Acevedo.

"Assisting, Juan José Dominguez.

José Maria Loma.

"To the Intendant.

Article 82 of the royal Ordinance of December 4, 1786, gives power in case that in the territory of this Province the case should arise to confiscate any property, it should be the special duty of Your Lordship to proceed to the alienation and to the collection of the proceeds, notwithstanding all pleadings and applications subsequently made. On this same subject orders were subsequently issued referring to property confiscated from the rebels. Consequently, and whereas, the Governor of the Province of Texas states at the beginning of the statement made on the 19th of September of this year that the confiscation from the inhabitants referred to in it was made by the order of the commanding general of the eastern Provinces, the case referred to in said article exists, and therefore Your Lordship should order that the confiscated property, owing to the depreciation suffered by it, shall be appraised again by two sworn experts, thus modifying the prices formerly assessed, in order to facilitate a prompt sale, and to avoid a total loss to the injury of the royal treasury; and that said property, upon being thus appraised, be placed at auction for nine days, and afterwards cried three times, and at the last cry be adjudicated to the best bidder or bidders for parts, who may appear with proper security papers by individuals able to be good for their bids, and said securities shall be good and may be accepted in proceeding to the adjudication, provided that other parties do not offer a little more than two thirds of the appraisement, this being the practice habitually observed by all courts; and Your Lordship should inform the commanding general of this determination, and subsequently refer these proceedings for the contemplated purpose to the said Governor of Bexar, who will in due time report the results to the intendancy.

San Luis Potosi, October 29, 1817.

Licenciado José Ruiz de Aguirre.

"San Luis Potosi, October 31, 1817.

Agreeably to the advice of the assessor, this will be communicated to the commanding general of the eastern Provinces for his information.

Thus his lordship has decreed and did sign hereto, which I certify.

Acevedo.

Assisting, Juan José Dominguez.
José María Loma."

"I, Don Antonio Martinez, Knight of the Royal Order San Hermenegildo, colonel in the royal armies, and Civil and Military Governor for His Majesty of this Province of the Texas, New Philippines, etc., do certify that the foregoing opinion is a literal copy of that appearing in the proceedings referred from the intendancy of San Luis Potosi and existing in the archives of government in my charge; and for due authenticity I have signed hereunto at Bexar, the 6th of November, 1819.

Antonio Martinez.

To this is attached: "Exhibit of property sequestered from the rebels to be offered at public auction, with statement of the value of the same according to the last appraisement." In this list is contained Miguel Losoya's *suerte*, and extended in a column of figures at 50. This list is dated Bexar, the 6th of November, 1819, and signed Antonio Martinez.

Then follows a return by the commissioners of the sale, as follows:

"Pursuant to Your Lordship's order to proceed to the sale and adjudication of the property sequestered from the rebels of this Province, the same was placed at auction for the term of nine days, after which it was cried three times, as prescribed by the order of the Intendant of San Luis Potosi, said property and grounds being adjudicated at the last cry, as appears from the documents which we return to Your Lordship, with others referred by you to this board, for your information, with the understanding that the buyers have been notified to keep the amounts in which the adjudication was made subject to your lordship's pleasure. The other property has not been adjudicated, because no bidders presented themselves.

May God preserve Your Lordship many years.

Bexar, November 22, 1819.

Manuel Cedran.
Vicente Gortori.
José Flores."

"To Governor Don Antonio Martinez.

In the City of San Fernando de Bexar, on the twenty-second day of the month of November, in the year eighteen hundred and nineteen, we, the board of commissioners organized for the sale of the property sequestered from the rebels of this Province by the order of the Governor of the same, Colonel Don Antonio Martinez, viz., Captain Don Manuel Cedran, Don Vicente Gortori, first regidor of the ayuntamiente of this capital, and the inhabitant Don Josef Flores de Abrego, by virtue of the order of the said Governor heading these proceedings, in consequence of the order received by that chief from the Intendancy of San Luis Potosi, also herein inserted, to proceed to the sale of said property sequestered, as appears in the exhibit accompanying the order of said Governor, the whole for the benefit of the royal treasury, do certify and, so far as we are able, do pledge our faith that, after having placed said sequestered property mentioned in the above recited order and exhibit at auction for the term of nine days, and caused the same to be cried three times, according to the order of the Intendant of San Luis Potosi, they were adjudicated at the last cry, which took place on the twenty-first instant."

Then follows a list of the property sold, including "that of Miguel Losoya, also in favor of Captain Don Francisco Garcia, in $55." The return proceeds:

"To which parties adjudication was made, being the only ones whose respective bids reached the limits specified, no other party having bidden over them, nor did buyers present themselves for the other property contained in the Governor's statement; and for due authenticity, wherever it may be proper, we give the presents, signed by us on the aforesaid day, month, and year.

Manuel Cedran,
Vicente Gortori,
José Flores,
Presidial Company of Bexar."

"Received from the board commissioned by the Governor of the Province, Colonel Don Antonio Martinez, the sum of three thousand one hundred and fifty-five dollars, proceeds of the sale of rebel property in favor of the royal treasury, which shall be charged to this company, of which I am the fiscal agent, and used for the support of the troops in said Province.

Bexar, November 27th, 1819.

$3,155.00. Alexandro Travino.

Examined: Martinez."

"The property sequestered from the rebels in this capital having been offered for sale by virtue of Your Lordship's order to me on the subject, I inclose to you the proceedings formed concerning said sale, together with the receipt of the sum of three thousand one hundred and fifty-five dollars, proceeds of the sale of said property, which amount was received by the financial agent of this presidial company for the support of the troops of this Province, which had no means whatever. Therefore I hope that, should Your Lordship deem it proper, the royal treasury department at Saltillo will be instructed to charge the same against the said Bexar Company.

As to the property still remaining unsold, no bidder having presented himself, owing both to the depreciated condition of the same, and to the poverty of the population, which does not permit them to buy it; some purchasers might present themselves if it were sold on credit, which point I did not wish to determine, because, although some honorable persons may be found able to assume that indebtedness, the uncertainty of the crops and their reduced proportion might prevent them from meeting it. However, Your Lordship will determine as you deem advisable.

Respecting the house sequestered from the rebel, Vicente Travieso (which has been provisionally transferred to the ayuntamiento of this city by Your Lordship's order), no bidder will ever appear, because it has been materially injured by the overflow; and it would be impossible for the whole population to raise the four thousand five hundred dollars, amount of

its reduced appraisement. May God preserve Your Lordship many years.

Bexar, December 10th, 1819.

Antonio Martinez.

To the Intendant, Don Manuel de Acevedo.

Potosi, January 20, 1820."

"To the 'promotor fiscal,' in whose office the former proceedings exist, Licenciado Ruiz de Aguerro: I return these proceedings, after having taken proper action thereon and on the former proceedings, without the respective requests, in order that the 'juez de letros' of the respective district may act as he deems just.

Potosi, April 16, 1821.

Licenciado Marquez."

The next document is the deed of the commissioners, as follows:

"*Translation of Deed. Nov.* 23, 1819.

Valid during the reign of our Lord Ferdinand 7th.

4th stamp, 1819.

The party interested paid, in this revenue office, in my charge, the half 'real,' cost of this stamp.

"Bexar, Nov. 23, 1819.

Luis Galau (Paraph.)"

"In the city of San Fernando de Bexar, on the twenty-third day of the month of November in the year eighteen hundred and nineteen, we, the commissioners of the board organized for the sale of property confiscated from the rebels of this Province, by the order of the Governor of the same, Colonel Don Antonio Martinez, viz., Captain Don Manuel Cedron, Don Vicente Gortori, first regidor of the ayuntamiento of this capital, and the resident José Flores de Abrego, by virtue of the order of the said Governor, in consequence of the order received by said chief from the Intendancy of San Luis Potosi, to proceed to the sale and adjudication of said confiscated property for the benefit of the royal treasury, do certify and do, so far as we can, bear evidence that after said property was offered in public auction, according to accustomed processes, the 'suerte' of Miguel Losoya was adjudicated in favor of Don Francisco Garcia in the sum of fifty-five dollars, being bounded on the north by the land of the widow of Vicente Amador, on the south by that of Cipriano Losoya, on the east by the wall of the mission of Balero, and on the west by the land of Don Francisco Collantes and Manuel Hirnines, which tract of land was delivered by said board to Captain Don Franciso Garcia in the specified sum of fifty-five dollars, which he paid in current money for the benefit of the royal treasury, in consideration whereof he shall possess it now and hereafter as its lawful lord and owner, remaining at liberty to sell it again, to donate or transfer it by inheritance to whomsoever it may be his will, so that no contradiction may be opposed as to the freedom in which he remains to make use of it; and for due authenticity, and in order that this evidence of sale may avail him as a title and muniment in the archives of the government, and that as many copies of the same may be delivered to the party interested as he may desire, we sign these presents in the City of Bexar on the day, month, and year above stated.

Manuel Cedron (Paraph).

Vicente Gortori (Paraph).

José Flores (Paraph).

I approve this sale.

Martinez (Paraph.)"

Among the depositions offered in evidence on the part of the plaintiffs were those of Juan N. Seguin and José Flores. The former of these, Juan N. Seguin, testified that he had resided in San Antonio from the year of his birth, 1807, until the year 1842; that in 1833 he was Mayor of the City of San Antonio and political chief *pro tempore* of the department of Texas; that in 1835 he was captain of a company of Mexican volunteers, and took part in the battle of San Jacinto, in defense of the independence of Texas, April 21, 1836; that in 1838 he was elected Senator in the Congress of Texas, and in May, 1840, Mayor of the City Council of the City of San Antonio; and that in 1869 he was appointed County Judge of Wilson County, Texas, but subsequently removed to Mexico. He also testified that he was personally acquainted with the lands in controversy, known as the Miguel Losoya suerte, and had been since the year 1818, when Francisco Garcia consulted his father as to its purchase, and was acquainted with it as the property of Garcia, who went into and maintained peaceable possession of it until the year 1834, when he died of cholera in the Bahia del Esperita Santo, near Goliad. He says the possession of the land by Garcia was public and notorious, and that from 1824 to 1835 it was cultivated by Felipe Musquize, whose brother, Don Raymond Musquize, was the attorney in fact of Don Francisco Garcia. This testimony as to possession is corroborated by the witness Flores, who says he leased it himself in 1835 from Raymond Musquizes, which fact is also testified to by another witness, Louis Gomez.

It further appears from the record that the plaintiffs' demurrer to the answers of the defendants, pleading the alienage of the plaintiffs and the statutes of limitation as defenses, being overruled, the plaintiffs took issue by a general denial of the allegations by a supplemental petition, which also alleged "That in the year 1838, and from said year and up to the institution of this suit by the plaintiffs, Pilar Garcia de Sabariego had been a *feme covert* and married woman, and during the whole of said period labored, and still labors, under the disability of being a *feme covert* and married woman; that her father, Francisco Garcia, died intestate at Goliad, Texas, in the year 1834, and her mother, Gertrudes Barrerra de Garcia, died intestate at Matamoras, in Mexico, in the year 1843; that at the times of the death of her said father and mother, and from said times until the bringing of this suit, she labored, and still labors, under the disability of being a *feme covert* and married woman; and plaintiffs plead the said disability as excepting and saving the said Pilar from the operation of all limitation laws and from all presumptions of grant, and any and all other presumptions and pleas in defendants' answers contained, which are not good as against a *feme covert* and married woman."

Messrs. **W. Hallett Phillips,** *John Hancock* and *S. R. Fisher*, for plaintiffs in error:

The determination of the question whether the deed to Garcia and the other confiscation proceedings constituted valid evidences of title depends upon the force and effect of the documents, tested by the law of Spain, from which sovereignty the title emanated.

If valid under that law, it remained valid through the successive changes of the government of the country in which the property is situated.

U. S. v. *Percheman*, 32 U. S. 7 Pet. 87 (8: 617).

As regards titles made in the name and assumed authority of the sovereign power of the country, the public acts of public officers, purporting to be exercised in an official capacity and by public authority, are not presumed to be usurped, but a legitimate authority previously given or subsequently ratified.

An official title is evidence both of the facts it recites and declares, leading to and the foundation of the grant, and all other facts legally inferable from what is apparent on its face.

U. S. v. *Arredondo*, 31 U. S. 6 Pet. 724–728 (8: 559–561); *Delassus* v. *U. S.* 34 U. S. 9 Pet. 134 (9: 78); *Strother* v. *Lucas*, 37 U. S. 12 Pet. 437 (9: 1147); *U. S.* v. *Peralta*, 60 U. S. 19 How. 347 (15: 680); *Jenkins* v. *Chambers*, 9 Tex. 235; *Johns* v. *Schutz*, 47 Tex. 578; *Hanrick* v. *Jackson*, 55 Tex. 17; *State* v. *DeLeon*, 64 Tex. 558.

Even in Texas, under the very liberal system of practice there prevailing, the defense of stale demand is not available as against a strictly legal title.

Satterwhite v. *Rosser*, 61 Tex. 172; *Williams* v. *Conger*, 49 Tex. 602; *Murphy* v. *Welder*, 58 Tex. 235; *Carlisle* v. *Hart*, 27 Tex. 350.

The presumption of the regularity and validity of a grant, indulged in favor of innocent purchasers, is a very different thing from presuming the existence of a grant.

Sulphen v. *Norris*, 44 Tex. 204; *Sheppard* v. *Harrison*, 54 Tex. 91–96; *Enders* v. *Sternbergh*, 2 Abb. App. Dec. 31.

The presumption of a grant cannot be indulged as against a *feme covert*.

Gilman v. *Tilton*, 5 N. H. 233–4; Washburn, Easements, 2d ed. 156; *Watkins* v. *Peck*, 13 N. H. 360; *Melvin* v. *Whiting*, 13 Pick. 184; *Reimer* v. *Stuber*, 20 Pa. 458–463; *Edson* v. *Munsell*, 10 Allen, 557; *McGregor* v. *Wait*, 10 Gray, 74; *Biencourt* v. *Parker*, 27 Tex. 558.

To sustain the presumption of grant it must be by definite boundaries, and coextensive with them.

Sulphen v. *Norris*, 44 Tex. 204; *Dangerfield* v. *Paschal*, 11 Tex. 579.

No facts amounting to an estoppel were alleged against plaintiffs. That they, for a long period, have failed to assert title to, or exercise dominion over, or pay taxes or other charges against, the land is not sufficient to defeat their action.

Moss v. *Berry*, 53 Tex. 633; *Williams* v. *Conger*, 49 Tex. 602; *Murphy* v. *Welder*, 58 Tex. 241.

In *Ortiz* v. *De Benavaides*, 61 Tex. 62, the Supreme Court of Texas expressly recognize upon the authority of *Jones* v. *McMasters*, 61 U. S. 20 How. 8 (15: 805); *Sabariego* v. *White*, 30 Tex. 576, and *Andrews* v. *Spear*, 48 Tex. 567, the right of an alien plaintiff claiming title by inheritance to maintain an action for the recovery of lands in Texas.

Wiederanders v. *State*, 64 Tex. 133; *Hanrick* v. *Patrick*, 119 U. S. 156 (30: 396); *State* v. *Sais*, 47 Tex. 307; *State* v. *Cuellar*, 47 Tex. 304; *U. S.* v. *Moreno*, 68 U. S. 1 Wall. 404 (17: 635); *Brownsville* v. *Cavazos*, 100 U. S. 138 (25: 574).

The Treaty of Gaudalupe Hidalgo must be construed to protect a title which accrued before the independence of Texas; Sup. Protocol to the Treaty of May 26, 1848.

But, whether covered by treaty or not, such a title, when valid, has always been respected and sustained in Texas.

Jones v. *McMasters*, 61 U. S. 20 How. 8 (15: 805); *Sabariego* v. *White*, 30 Tex. 576; *Airhart* v. *Massieu*, 98 U. S. 491 (25: 213); *Hanrick* v. *Hanrick*, 54 Tex. 101; *Hanrick* v. *Patrick*, 119 U. S. 156 (30: 396); *Kilpatrick* v. *Sisneros*, 26 Tex. 125; *Barrett* v. *Kelly*, 31 Tex. 483; *Osterman* v. *Baldwin*, 73 U. S. 6 Wall. 116 (18: 730); *Phillips* v. *Moore*, 100 U. S. 208 (25: 603); *Solomon* v. *Menard*, Dallam, 548.

The title to the half derived in 1834 having arisen before the independence of Texas, declaration whereof was made March 2, 1836, its validity is to be determined by the laws of Mexico then in force.

Brownsville v. *Cavazos*, 100 U. S. 138 (25: 574); *State* v. *Sais*, 47 Tex. 307; *Sabariego* v. *White*, 30 Tex. 576; Peeler, Law & Eq. § 55, p. 195.

Of these laws the courts take judicial notice, and no proof thereof is necessary.

U. S. v. *Perot*, 98 U. S. 428 (25: 251); *State* v. *Cuellar*, 47 Tex. 304.

The interpretation thereof by the state courts will be followed by the federal courts.

Christy v. *Pridgeon*, 71 U. S. 4 Wall. 196 (18: 322).

Mr. **John Ireland,** for defendants in error:

At common law a married woman could not sue or hold property in her own right.

In Texas she can do both; and there is nothing in our situation to induce or call on the courts to extend this exemption in her favor.

O'Brien v. *Hilburn*, 9 Tex. 297; *Cannon* v. *Hemphill*, 7 Tex. 184; *Wright* v. *Wright*, 3 Tex. 168; *Mitchell* v. *Wright*, 4 Tex. 283; *Chapman* v. *Allen*, 15 Tex. 278.

At the expiration of twenty years, an absolute deed will be presumed.

Barclay v. *Howell*, 31 U. S. 6 Pet. 498, (8: 477); *Elmendorf* v. *Taylor*, 22 U. S. 10 Wheat. 153 (6: 289); *Jackson* v. *Huntington*, 30 U. S. 5 Pet. 402 (8: 170); *Lewis* v. *Marshall*, 30 U. S. 5 Pet. 470 (8: 195); *Hawkins* v. *Barney*, 30 U. S. 5 Pet. 457 (8: 190); *Airhart* v. *Massieu*, 98 U. S. 491 (25: 213).

No presumption can or will be indulged in, by court or jury; because the confiscation, if it ever took place, was an extraordinary proceeding and not in the regular or ordinary course of justice.

Whart. Evidence, § 1308; *State* v. *Sullivan*, 9 Tex. 156; *Gaines* v. *Hennen*, 65 U. S. 24 How. 553 (16: 770); *Jones* v. *Muisbach*, 26 Tex. 235; 2 Domat, Civil Law, 2457, 2669; 1 White, Recopilacione, 255, 288, 289, 280.

This routed and defeated dynasty could not confiscate the real property of the victorious and successful Mexican people.

Wheat. Law of Nations, 56; *Houston & G. N. R. R. Co.* v. *Kuechler*, 36 Tex. 425; Lawrence's Wheaton, Internat. Law, 86, 529, 580, 609, 688; *McIlvaine* v. *Coxe*, 8 U. S. 4 Cranch, 212 (2: 599).

There was no authority to confiscate property.

Constitution of Spain, of 1812; Cadiz, Constitution, arts. 24, 242-244, 246, 304, 305; Alaman, History of Mexico, Vol. 3277.

All the property attempted to be confiscated by the vanquished Spanish troops was restored by royal orders under Iturbide.

Decree of December 15, 1821; Orders and decrees Mexican Congress, Vol. 1, p. 21, 1822.

The claim is a stale demand.

Willard v. *Dorr*, 3 Mason, 161; Story, Eq. 1520; *Carlisle* v. *Hart*, 27 Tex. 350; *De Cordova* v. *Smith*, 9 Tex. 129; *McMasters* v. *Mills*, 30 Tex. 595; *Flemming* v. *Reed*, 37 Tex. 152; *Barrett* v. *Kelly*, 31 Tex. 480; *Williams* v. *Conger*, 49 Tex. 602; *Harpending* v. *Reformed Dutch Church*, 41 U. S. 16 Pet. 455 (10: 1029); *Barclay* v. *Howell*, 31 U. S. 6 Pet. 498 (8: 477); *Elmendorf* v. *Taylor*, 22 U. S. 10 Wheat. 153 (6: 289); *Jackson* v. *Huntington*, 30 U. S. 5 Pet. 402 (8: 170); *Lewis* v. *Marshall*, 30 U. S. 5 Pet. 470 (8: 195); *Airhart* v. *Massieu*, 98 U. S. 491 (25: 213).

As a matter of law the court must presume from the allegation in the petition of the eviction, forty years before suit was brought, that defendants had an absolute fee simple title, and will not allow them evicted.

1 Greenl. Ev. §§ 15, 17.

If on inspection of the case it is clear that plaintiff cannot recover, this court will not reverse, although the trial court may have committed errors.

Brobst v. *Brock*, 77 U. S. 10 Wall. 519 (19: 1002).

Ten years is the longest limitation known to the laws of Texas.

Texas R. S.

Prescription is founded on the highest considerations of public policy.

Gautier v. *Franklin*, 1 Tex. 732.

Public policy demands that the law of estoppel shall have full force.

Herman, Estop. p. 501.

At the time the transactions took place in Texas, 1810-1822, the Spanish Constitution and laws and decrees of the Emperor and Congress of Mexico, being then the supreme law in Mexico and Texas, are now the laws of the case at bar, and this court will take judicial knowledge of them.

Whart. Ev. §§ 283, 285, 291; *Romero* v. *U. S.* 68 U. S. 1 Wall. 721 (17: 627); *Chandler* v. *Von Roeder*, 65 U. S. 24 How. 227 (16: 634).

An alien cannot sue to recover lands, either at common law or under the laws of Texas.

White v. *Sabariego*, 23 Tex. 243; *Barrett* v. *Kelly*, 31 Tex. 476; *McKinney* v. *Saviego*, 59 U. S. 18 How. 235 (15: 365).

Plaintiffs allege that they are citizens and residents of Mexico, and the presumption of law is that they have always been citizens of Mexico, and aliens.

Whart. Ev. § 1284; *Walrod* v. *Ball*, 9 Barb. 271; *Cooper* v. *Dedrick*, 22 Barb. 516; *Smith* v. *Smith*, 4 Paige, 432; *Wilkins* v. *Earle*, 44 N. Y. 172; Morse, Citizenship, pp. 18, 87; 1 Greenl. Ev. § 41.

If there had been formal confiscation it would have conferred no rights beyond the cessation of hostilities.

Cooper v. *Telfair*, 4 U. S. 4 Dall. 14 (1: 721); *Fairfax* v. *Hunter*, 11 U. S. 7 Cranch, 603 (3: 453); *Georgia* v. *Brailsford*, 3 U. S. 3 Dall. 1 (1: 433); *The Emulous*, 1 Gall. 563; *Ware* v. *Hylton*, 3 U. S. 3 Dall. 225 (1: 579); *Brown* v. *U. S.* 12 U. S. 8 Cranch, 110 (3: 504); *Planters Bank* v. *Union Bank*, 83 U. S. 16 Wall. 483 (21: 473).

No title could pass unless confirmed by treaty, after the war.

Lawrence's Wheaton, 2d ed. 683; Wheaton, § 398, p. 465.

Mr. Justice **Matthews** delivered the opinion of the court:

The precise point ruled by the circuit court in rejecting the evidence offered by the plaintiffs was that the documents, including the deed to Garcia, notwithstanding their recitals, failed to establish even *prima facie* any transfer of Losoya's title, to effect which it was necessary to prove by other evidence a lawful confiscation of his estate. This ruling is assigned for error on the ground, contended for by counsel for the plaintiffs in error, that the documents referred to, according to the laws prevailing in the locality at the time of their execution, were sufficient, with the aid of presumptions supplied by that law, to establish in the first instance the truth of the facts recited and on the basis of which alone the proceedings could be lawful, including the principal fact of a lawful confiscation of the estate of Miguel Losoya.

The contention on the part of the plaintiffs in error is stated by counsel, furnishing an opinion to that effect from Señor Emilio Velasco, an eminent lawyer of the City of Mexico, as follows:

"The documents upon the confiscation and sale are, therefore, authentic documents, and in their whole contents are entitled to full faith and credit. Thus, when the Governor of Texas affirms in them that, by order of the commanding general, the property was confiscated, the affirmation is entitled to full faith and credit. A direct proof by the introduction of a certified copy of the order of confiscation issued by the commanding general would undoubtedly have been proper; but if it is not in existence, the facts are sufficient proof that it did in fact exist:

"I. The inventory made by Captain Don Francisco del Prado y Arce, October 27, 1814, states that the said property was confiscated by order of the commanding general, Brigadier Don Joaquin de Arredondo. From the tenor of that document it is to be deduced that the said Prado y Arce held the character of depository (custodian) and administrator of the confiscated property, and, consequently, when stating in the inventory that the confiscation had been done by the order of the commanding general, he affirmed a fact connected with the exercise of public functions and on account of which he exercised these same functions.

"II. The Governor of Texas forwarded to the Intendant of San Luis Potosi the inventory established by Captain Prado y Arce; and in his communication he stated that the prop-

erty had been sequestered from the insurgents who, in 1811, took part in the revolution in Texas. The Governor of Texas proceeded in the confiscation business in the exercise of the functions intrusted to him by law. When forwarding the inventory to the Intendant of San Luis Potosi he accepted its contents and assumed the responsibility thereof; consequently it results from the documents authenticated by the Governor of Texas that, in consequence of having taken part in the insurrection which occurred in Texas in 1811, the property of Miguel Losoya was confiscated by the order of the commanding general Brigadier Don Joaquin de Arredondo.

"III. The opinion of Don José Ruiz de Aguirre, the assessor intendancy of San Luis Potosi, and the decree of the intendant, Don Manuel de Acevedo, in which he concurs in the opinion, are, as stated by the Governor of Texas, in the beginning of his statement of September 19, 1817, founded on the fact that the confiscation of the property was effected by the order of the commanding general of the eastern Provinces. As will subsequently appear, both the intendant and his assessor were judges, and in these cases acted as judges; there is reason, therefore, for affirming that, by a judicial resolution (judgment), it was declared that the property had been confiscated by the order of the commanding general, and that the report of the Governor of Texas was considered a sufficient foundation for this declaration.

"IV. Finally, in the assessor's opinion and in the decree of the Intendant of San Luis Potosi, it was directed that a report of the decision of these functionaries should be made to the commanding general. It further appears that this decree was complied with, and there is no evidence whatever that the commanding general denied the correctness of the report made by the Governor of Texas.

"These several reasons admit of no doubt that the confiscation was effected by order of the commanding general; and authorizes the affirmation that it was done by a judicial resolution by a competent authority. It was so declared; therefore this point cannot be questioned."

In support of this conclusion counsel cite also the declarations of this court in cases supposed to be similar, and reference is made to that of the *U. S.* v. *Arredondo*, 31 U. S. 6 Pet. 691 [8:547]. That case related to the validity of a Spanish grant of title to lands in Florida as affected by the Treaty between Spain and the United States of 1819; and the question was as to the effect of the documents in evidence to show a grant of its own public lands by the Spanish Government, entitled to be recognized as valid under the treaty with this country. Speaking to that point, this court said p. 727 [560]: "It is thus clearly evidenced by the acts, the words, and intentions of the Legislature that, in considering these claims by the special tribunals, the authority of the officer making the grant or other evidence of claim to lands formed no item in the title it conferred; that the United States never made that a point in issue between them and the claimants to be even considered, much less adjudicated. They have submitted to the principle which prevails as to all public grants of land, or acts of public officers in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles, which is, that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be an usurped but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country; especially in the States whose tenures to land depend on every description of inceptive, vague and inchoate equities rising in the grade of evidence by various intermediate acts to a full and legal confirmation by patent under the great seal. * * * Without the recognition of this principle there would be no safety in title papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments (*Polk* v *Wendal*, 13 U. S. 9 Cranch, 99 [3:669]; S.C. 18 U. S. 5 Wheat. 808 [5:94]); but in all the question is on whom the law throws the burden of proof of its existence or nonexistence. A grant is void unless the grantor has the power to make it; but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption arising from the full, legal and complete execution of the official grant, under all the solemnities known or proved to exist, or to be required by the law of the country where it is made and the land is situated. * * * This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider that it exists in the officers or tribunal who exercise it by making grants, and that it is fully evidenced by occupation, enjoyment and transfer of property had and made under them, without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the State, Colony or Province where it lies. A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implication; an objection to its admission in evidence on a trial at law or a hearing in equity is in the nature of a demurrer to evidence, on the ground of its not conducing to prove the matter in issue. If admitted, the court, jury or chancellor must receive it as evidence, both of the facts it recites and declares leading to and the foundation of the grant, and all other facts legally inferable by either from what is so apparent on its face. * * * The validity and legality of an act done by a governor of a conquered Province depends on the jurisdiction over the subject matter delegated to him by his instruction from the king and the local laws and usages of the Colony, when they have been adopted as the rules for its government. If any jurisdiction is given, and not limited, all acts done in its exercise are legal and

valid; if there is a discretion conferred, its abuse is a matter between the governor and his government, etc. *The King* v. *Picton*, 30 Howell, St. Tr. 869–871. It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (1 Cranch, 170, 171), legislative (4 Wheat. 428; 2 Pet. 412; 4 Pet. 563), judicial (11 Mass. 227; 11 Serg. & R. 429, adopted in 2 Pet. 167–8), or special (20 Johns. 739–40; 2 Dow, P. C. 521), unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law."

The same principles were applied in the case of *Strother* v. *Lucas*, 37 U. S. 12 Pet. 410 [9: 1137], and have been uniformly recognized by the Supreme Court of Texas in dealing with claims of title based on the official acts of the public authorities of the preceding Governments of Mexico and Spain. *Jones* v. *Muisbach*, 26 Tex. 235.

But in all these cases the question was whether the documents, with the recitals therein, and the presumptions of law and fact arising thereon, shown to have been executed by officers of the government, within the apparent scope of their authority, were sufficient in the first instance to show that the title of the government assumed by them to exist passed by the conveyance which undertook to transfer it. In no case, however, have they been held sufficient, where the fact in issue was whether the government at that time had any title to convey, to establish the fact in dispute, as against parties claiming a pre-existing, adverse and paramount title in themselves. All that can be reasonably or lawfully claimed as the effect of such documents of title, is that they passed such estate, and such estate only, as the government itself, in whose name and on whose behalf the official acts appear to have been done, had at the time, but not to conclude the fact that the estate conveyed was lawfully vested in the grantor at the time of the grant. This is the doctrine declared by this court in the case of *Herron* v. *Dater*, 120 U. S. 464 [30: 748]. In that case it was sought to give effect to a recital in a patent from the State of Pennsylvania as against the party who at the date of the patent was shown to have a title good as against the State. It was said by the court, p. 478 [754]: "Clearly that recital was not evidence against the plaintiffs, for if the patent could not take effect against them without it, it could not give any effect to that recital. Their right had already vested prior to the existence of the patent, and the grant to them could not be affected by a subsequent grant to a stranger." So in the present case, the question is not whether the title which the King of Spain had to the lands in controversy passed by the documents in question to Garcia, but whether at that date the King of Spain had the title which they purport to convey.

The law on this subject was stated by this court, in its opinion delivered by *Mr. Justice* Story in *Carver* v. *Astor*, 29 U. S. 4 Pet. 1, 88 [7: 761, 790], as follows: "It is laid down generally that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies—privies in blood, privies in estate, and privies in law. But it does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed. Such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers. If, for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger the title under the release comes in question, there the recital of the lease in such release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself, under such circumstances, materially fortify the presumption from lapse of time and length of possession of the original existence of the lease."

So in *United States* v. *Ross*, 92 U. S. 281 [23: 707], this court, speaking by *Mr. Justice* Strong on this point, said, p. 284 [709]: "Because property was captured by a military officer and sent forward by him, and because there is an unclaimed fund in the treasury derived from the sales of property of the same kind as that captured, because *omnia præsumuntur rite esse acta*, and officers are presumed to have done their duty, it is not the law that a court can conclude that the property was delivered by the military officer to a treasury agent, that it was sold by him, and that the proceeds were covered into the treasury. The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, but it does not supply proof of a substantive fact. Best, in his Treatise on Evidence, § 300, says: 'The true principle intended to be asserted by the rule seems to be that there is a general disposition in courts of justice to uphold judicial and other acts, rather than to render them inoperative; and with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy.' Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

It is contended, however, by counsel for the plaintiffs in error, that the validity and effect of the documents under consideration must be

tried by the system of law in force in the locality at the time of the transactions, and that, by reference to the Spanish Law in force at the time in Mexico, the documentary evidence offered was sufficient to establish *prima facie* the title of Garcia as legitimately derived through a confiscation and sale of the property of Miguel Losoya.

By that law, as it appears, among the cases of treason the following is enumerated: "The third is, if anyone induce, by deed or advice, a country or people, owing obedience to their King, to rise against him, or not to obey him as well as they formerly did." Ley 1, tit. 2, partida 7; Law 5, tit. 32 of the Ordonamiento de Alcula; Recopilacion, Ley 1, tit. 8, 18 lib. 8. "The punishment of death and confiscation of property is inflicted upon persons guilty of this crime." L. 2, tit. 18, lib. 8, Rec. 1 White's New Recopilacion, 255.

It is admitted that, by the provisions of the Spanish Law in force at the time, confiscation of property as a punishment for the crime of treason could only be effected by regular judicial proceedings. The text cited on that point is Ley 4, tit. 7, lib. 12, of the Novissima Recopilacion, as follows: "It is not our will that such persons should forfeit their property and offices without having first been heard and found guilty; and let the laws of our kingdom be observed in such case, unless their treason or evil deed be notorious." The authority of the King to take cognizance of cases of confiscation as a punishment for treason was entrusted in the Spanish Colonies to other functionaries designated for the Territory of New Spain, which subsequently became the Mexican Republic, in the Real Ordenanza, or Royal Ordinance, for the establishment and instruction of the army and provincial intendants of the Kingdom of New Spain, December 4, 1786. It is to article 82 of this Ordenanza that the asesor, Josef Ruiz de Aguirre, refers as the ground for recommending the sale of the property in question in one of the documents offered in evidence.

The following summary of the provisions of the Ordenanza bearing on that point is taken from the opinion of Señor Emilio Velasco furnished by counsel for the plaintiffs in error, and to which reference has already been made:

"In article 1 of the Ordenanza twelve intendancies were established, one of which was that of San Luis Potosi. In article 7 it was provided that the alcalde, mayor, or corregidor (chief alcalde or corregidor) of San Luis Potosi should be united with the intendancy established in its capital and Province. For this reason, in the procedure of confiscation, the title of the intendant corregidor of San Luis Potosi is assumed. This government by intendants continued until the independence of Mexico. Hall, Mex. Law, § 16.

"The intendants were very high functionaries in the Colony. The King reserved to himself their appointment. See end of article 1. Their functions were various and of very different nature from each other. In article 7 it was ordered that they should take charge of the departments of justice, of police, of finance, and war. Each of these departments embraced highly important business of various kinds, minutely mentioned in the Ordenanza.

"Article 10 provides that the civil and military governors, among them the Governor of Texas, should subsist. These governors still retained cognizance of judicial and police matters, together with the military command of their respective territories and matters pertaining to the departments of finance and war. The same article, at its close, provided that the intendants should appoint as their subdelegates the said governors within the territories of their respective commands.

"Article 77 also says, in order that the mandates of the intendants be complied with in relation to this matter (the department of finance) and to that of war * * * they shall appoint * * * subdelegates only for matters of controversy connected with these two branches, it being understood that in the capitals and the districts of the * * * government the said subdelegate shall be attributed to the governors themselves as is provided in article 10.

"In the same Ordenanza, the matter of the department of finance is included in articles 75 to 249, and among them article 82 is included. This article refers to confiscation which, therefore, belonged to the department of finance, in which the Governor of Texas acted as subdelegate of the intendant; and on this account it is to be observed, in the procedure of the confiscation of Losoya's property, that the Governor applied to the Intendant of San Luis Potosi for instructions, and acted according to the orders of the latter. As said before, the functions of the intendants were various. The whole administration of the department of war was entrusted to them; that which referred to taxation and fiscal property also pertained to them; they were the superior authority in the department of police; and, finally, they were judicial authorities.

"In this latter capacity their functions were exceedingly comprehensive. The intendants were Chief Justices in their Provinces, and were entrusted with the jurisdiction which formerly belonged to the corregidores and chief alcaldes. Art. 11. Article 21 specifies the laws to which, in the administration of justice, they ought to subject themselves. Articles 22 and 23 confer upon them the power of supervision and vigilance over the other justices of the Province."

"Each intendant should have a '*Teniente Letrado*'—a deputy versed in law. The powers of this '*Teniente Letrado*,' as a judicial functionary, had a dual character (art. 15.) By himself, in civil and criminal cases, he exercised contentious jurisdiction; in this point of view he was independent of the intendant's court, and his sentences were appealed from before the audiencia (art. 19). But, besides this, he was asesor (adviser) of the intendant; in this capacity all the intendancy's business, whether administrative or judicial, wherein a legal question was involved, was referred to him for his opinion to enable the intendant to act. In this point of view the asesor was an integrant part and parcel of the intendancy's court. For this reason in the procedure relating to the confiscation of Miguel Losoya's property the intendant, Don Manuel de Acevedo, called for the opinion of the asesor, Don José Ruiz de Aguirre."

Article 82 of the Ordenanza provides as follows:

"In cases of confiscation of property situated in their Provinces (those under an intendant) and of which a viceroy, the commanding general of the frontiers, the audiencias, or other tribunals have cognizance, they (the intendants) ought not to intervene without a spécial permission or trust from them (the viceroy, the commanding general, the audiencia or other tribunal) while the said property is kept sequestered; but, if the same come to be confiscated by a sentence ordered to be executed, it shall be the special duty of the intendant to proceed to the alienation thereof, and the collection of the proceeds, and also to take cognizance of all claims and controversies subsequently arising upon the confiscated property."

It is argued from this and the other provisions of the Ordenanza that the commanding general of the frontiers had the right in the matter of confiscation to take cognizance and pronounce sentence, not only as acting in the exercise of his military command, but as in charge of civil administration as a tribunal of justice; it being his duty in this matter to follow the procedure established by law, and to exercise the powers which the King himself exercises in the metropolis. It therefore pertained to him to inquire whether or not the crime was notorious, in order that he might pronounce sentence of confiscation without an actual hearing of the accused. In the proceedings relating to the confiscation of Miguel Losoya's property it is stated that "the commanding general of the eastern Provinces" confiscated this property. The intendant corregidor of San Luis Potosi, and his assessor, recognized him as such. It is therefore inferred that the commanding general of the eastern Provinces was a commanding general of the frontiers, in the sense of article 82 of the Ordenanza, and consequently had power to take cognizance of matters of confiscation.

Article 78 of the Ordenanza is also referred to. It reads as follows:

"As to what pertains to the exercise of contentious jurisdiction in the proceedings and business of my revenue, the intendants shall take special and exclusive cognizance, with inhibition of all magistrates, tribunals, and audiences of that kingdom. * * * They shall also act in all causes in which any interest may accrue. * * * to my royal exchequer, or which may pertain to any of the branches or rights thereof under administration or in lease, both in respect to collection and to all matters incident thereto."

From this it appears that, confiscation once declared, the property belonged to the fiscal, and, therefore, as property in which the royal exchequer held an interest, it remained subject to the exclusive jurisdiction of the intendants, both in ordering the sale and for taking cognizance of controversies raised concerning it. According to article 77, the military governors were subdelegates to the intendant, and subordinate to him in authority; and their powers, in reference to the two branches of administration included under the head of finance and war, extended only to the institution of proceedings by them until they were placed in a position for final adjudication, when their proceedings were required to be forwarded to the intendant of the Province for his decision, in concurrence with his assessor.

In the present case it is shown by the documents that the Governor of Texas instituted the proceedings in the condition in which the confiscated property was in 1817. The purpose of this procedure was to effect the sale of the property as confiscated. Under article 77 it pertained to him to institute it; but the sentence that had to be pronounced, as to whether or not it must be sold, whether or not there was a legal cause for sale, and whether or not the condition of the property was such as to require a sale, was a judgment which could only be pronounced by the intendant after having heard his assessor. The intendant and his assessor, therefore, in the determination of this point, were called upon to inquire whether the confiscation was legal, or, in other words, whether a competent authority had ordered it. In the present case, as appears by the documents, the intendant and his assessor assumed that the commanding general of the eastern Provinces had made the confiscation; they considered as sufficient proof of that fact the statement contained in the proceedings instituted by the Governor of Texas. It is thence inferred and argued that their decision in this case, directing the sale of the property, was the exercise of jurisdiction in a judicial capacity wherein they were required to examine and settle the proofs of the existence of the fact of confiscation, and that, therefore, the order directing the sale adjudged the fact and the legality of the confiscation, without which that sale could not have been authorized. It is thus sought to give to the recitals contained in the documents the force of a judicial determination operating as conclusive evidence of the fact supposed to be contained in it.

It will be observed, however, that this reasoning in regard to the probative force of the documents in question does not rest upon any positive provision of the Spanish Law then and there in force giving that effect to such recitals. The only positive provision on that subject to which we are referred is that contained in Ley 1, tit. 18, partida 3, which says: "Every writing executed by the hand of a notary public of the council, or sealed with the King's seal, or with that of any other person having authority to affix his seal, is an authentic act (*escriptura*) which is of itself full proof. From the faith given to these writings the greatest good arises; for they are the evidence of what has taken place, and full proof of the contract they contain." 1 Moreau and Carleton's Partidas, 222, tit. 18, law 1.

We do not, however, understand this provision as giving to such instrument any greater effect as evidence than similar documents have in our own law. They are proof, in solemn form, as ordained by the law, which defines the mode of their execution and preservation, of the transaction which they record and consummate. They certainly cannot be regarded as conclusive proof as to all persons, whether parties or not, of every fact to which they refer, or the existence of which seems to be implied.

In the present case, the documents in question declare that the property of Miguel Losoya

is in the hands of public officers charged with its custody, as having been confiscated with that of others described as rebels, and regular and appropriate steps are officially taken to procure its sale as such. To justify the lawfulness of these proceedings unquestionably requires us to assume a prior and legal procedure against Miguel Losoya, resulting in the confiscation of his property for the alleged offense in accordance with existing law; but the legality of the procedure resulting in the sale of his property on the basis of that assumption is the very thing in question to be proved, and we are at last still confronted with the inquiry whether the absence of proof of the principal fact, on which the legality of everything succeeding it depends, can be supplied by a mere presumption.

In considering this question further, it is to be remarked that the documents under consideration do not even expressly recite that any judicial proceeding whatever was had against Miguel Losoya charging him with treason, that he ever had notice of such an accusation, or an opportunity to appear and defend against it; or, in the alternative, that his offense was found to be notorious, so as to dispense with any other notice than that given by the actual seizure of his property as the proper subject of confiscation. Nor in fact is it expressly stated that there had been any official seizure of the property for purposes of confiscation in any judicial proceeding. All these are the matters the existence of which we are asked to infer from the simple fact, which these documents do attest, that the property of Miguel Losoya was sold to Garcia by order of the intendant of San Luis Potosi, as though it had been regularly proceeded against and adjudged to be confiscated. In the absence of any positive provision of the local law to the contrary, we are bound to determine this question upon those principles of right reason and abstract justice which are recognized in our own system of jurisprudence. The presumption to which we are asked to resort for an answer to the question is, however, not peculiar to any system of law. It is found in the law of all civilized States, and the phrases in which the maxim is expressed are taken from the civil law, the basis of the jurisprudence of Spain as of all other European States, and imported into the common law of England as adopted by us. *Omnia præsumuntur rite esse acta* is its familiar form, but as said by Mr. Best, Principles of Evidence, §§ 353, 361: "The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed." It does not apply to give jurisdiction to magistrates or other inferior tribunals; nor to give jurisdiction in proceedings not according to the common course of justice.

We are asked to assume that Miguel Losoya was guilty of the offense of treason against the King of Spain, and that he was so adjudged in regular judicial proceedings, on the basis of which conviction his property was officially seized and confiscated; and this we are asked to do as a judicial tribunal, sitting in a case wherein we are called to apply and administer the Laws of Mexico, our government being the successor of that Republic, as the Republic was the successor of the Spanish Government, in order to justify the taking of Miguel Losoya's property and transferring it to another for the sole offense on his part of assisting to achieve the independence of his own country, whose justice is now invoked against him. If we had before us an actual and formal decree of a competent tribunal adjudging him guilty of the offense, and confiscating his property in punishment therefor, that of itself would not be sufficient to establish its own validity. We should still require record evidence of the existence of those facts which brought him and his property within the jurisdiction of the tribunal pronouncing such a decree. "Wherever one is assailed in his person or his property," said this court in *Windsor* v. *McVeigh*, 93 U. S. 274, 277 [23: 914, 915] "there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all Nations. A sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. * * * The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer." To the same effect is the case of *Alexandria* v. *Fairfax*, 95 U. S. 774 [24:583]. The subject was very thoroughly examined by *Mr. Justice* Story in *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 600. In that case, the question discussed had relation to the effect to be given to the decree and sentence of a foreign court of admiralty and prize *in rem*. The learned justice said, p. 608: "I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem* that some specific offense is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally, or by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that the parties in interest may appear and make defense, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign Nations as importing verity in its statements or proofs." In another place he said: "It amounts to little more in common sense and common honesty than the sentence of the tribunal which first punishes and then hears the party—*castigatque auditque*."

This was said, it is true, of the effect to be given in our courts to the decree of a court in a foreign jurisdiction. But the rule is the same in regard to domestic judgments, the records of which, to be effective as evidence, must show upon their face a case within the apparent jurisdiction of the court. If the mere de-

cree and sentence of a court standing by itself, without the record of those prior proceedings necessary in law to support the judgment, is not receivable in evidence as proof of its own legality, *a fortiori* no effect can be given to the proceedings in this case, unless sustained by proof of the actual proceedings against Miguel Losoya and his property conducted according to law to a sentence of judicial confiscation. The mere recital of the fact in the documents of sale is not evidence of the fact.

The statement made by Captain Don Francisco del Prado y Arce in the inventory dated October 27, 1814, that the property described in the list was confiscated by order of the commanding general, Brigadier Joaquin de Arredondo, while, as contended, it may be regarded as an affirmation on his part of the fact connected with the exercise of his public functions, is nevertheless not a certificate of the fact which he was by law authorized to make as proof of its existence. So when the Governor of Texas forwards that inventory to the Intendant of San Luis Potosi, and in his communication states that the property had been sequestered from the insurgents, who, in 1811, took part in the revolution in Texas, it is a mere narration of a fact supposed to exist by him on the authority of others, and not by virtue of any lawful authority on his part to certify to its truth. Neither can the opinion of Don José Ruiz de Aguirre, the assessor of the intendancy of San Luis Potosi, and the order of the intendant, Don Manuel de Acevedo, concurring in the opinion, be regarded as a judicial finding of the fact that the property had been confiscated by the order of the commanding general of the eastern Provinces. It is not shown, and is not pretended, that these officers had any authority under the law to pass judicially upon the question of the fact or the regularity of proceedings for confiscating the property of offenders, which must have taken place within the jurisdiction of another and a superior authority; nor is anything to be inferred from the fact recited that a report of the decision of these functionaries should be forwarded to the commanding general. It does not appear as a fact that they were laid before him, or were approved by him; and if they had been, his approval could not be construed to extend beyond the formal regularity of their proceedings in the sale. Notwithstanding all these recitals, and the inferences and implications that are sought to be drawn from them, it still remains that the alleged confiscation of the property of Miguel Losoya, if it ever took place, could have been lawfully effected only by means of a formal judicial proceeding, which must be primarily proved by the official record of the transaction or a duly certified copy thereof, and, secondarily, in case of its loss, by proof of its previous existence and of its contents. The certificates of other officers referring to it only incidentally and collaterally, although as the basis of their own official action, are not legal proof of the fact itself.

This principle is illustrated by the case of *Atwood* v. *Winterport*, 60 Maine, 250, where it was decided that a certificate, officially signed by the provost-marshal of the district, that the plaintiff "has this day been credited as a recruit in the navy to the" defendant town "by order of the A. A. Pro. Mar. Gen. of Maine," was not legal evidence of his enlistment. Appleton, *C. J.*, said: "The fact of enlistment is a matter of record. It must be proved by a duly authenticated copy from the army records. A sworn copy is admissible, or a copy certified by the proper certifying officer. But the certificate offered is not and does not purport to be a copy of any recorded fact or of any record. It is the assertion of the person certifying that the fact therein stated is true. A mere certificate that a certain fact appears of record, without the production of an authenticated copy of the record, is not evidence of the existence of the fact."

There are certain departments of scientific knowledge where an entire series of facts or forms may always be inferred from the existence of anyone, according to the maxim *Ex pede Herculem*. The conclusion in such cases is deduced from the observed uniformity of physical nature, which by a necessity of our own minds we believe to be invariable. But this mode of reasoning has but a very limited application in the law of evidence as judicially applied to ascertain the facts and motives of human conduct. It is the foundation of the doctrine of presumptions to the extent to which they are admitted, the limits of which in its application to the circumstances of this case we have already considered. The principal fact in controversy in this case is one of that nature, which the policy of the law requires to be proved by direct evidence of a formal character. The absence of that proof cannot be supplied by argument and inference from casual and collateral cirumstances.

It is further argued, however, that, admitting this to be the case so far as Miguel Losoya is concerned, and those claiming title under him, nevertheless the documents are sufficient evidence, in the first instance, against everyone else, and that consequently the defendants in this action are not entitled to make the objection. In support of this contention it is said:

"Among the laws quoted by Escriche is Ley 50, tit. 5, partida 5, in the final part, whereof it is said that if a thing belonging to another person is sold to two persons at different times, he who took possession first has the better right to it, always reserving the right of the true owner; consequently, color of title, coupled with possession, gave to the vendee a real right against everyone except the owner; and, therefore, it is not lawful for third parties to impugn the title, thus exercising the right reserved alone to the owner or his successors.

"If subsequently to taking possession the vendee loses possession before prescribing the thing, his right is superior to that of all persons except the owner. He may pursue his action against third parties in the capacity of owner, resting on the purchase and on subsequent possession, because third parties have no right to question the validity of the title. In such case judgment should be pronounced declaring ownership in favor of the vendee; but such judgment bears no prejudice to the true owner who had not litigated, and who, during the term of prescription, may either exercise his right *de dominio*, or in case the thing has returned to his power, oppose the exception *de dominio* against the person who would sue him for it."

This is also the rule of the common law as declared by this court in the case of *Christy* v. *Scott*, 55 U. S. 14 How. 282 [14: 422], where it was applied to a case from Texas arising under a Mexican title. The court, speaking by *Mr. Justice* Curtis, p. 292 [426] said: "According to the settled principles of the common law, this is not a defense to the action. The plaintiff says he was seised in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder cannot enter on a person actually seised and eject him, and then question his title or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title. He may do so by a writ of entry, where that remedy is still practiced (*Jackson* v. *Boston & W. R. R. Corp.* 1 Cush. 575); or by an ejectment (*Allen* v. *Rivington*, 2 Saund. 111; *Doe* v. *Reade*, 8 East, 356; *Doe* v. *Dyson*, 1 Mood. & M. 77; *Jackson* v. *Hazen*, 2 Johns. 488; *Whitney* v. *Wright*, 15 Wend. 171); or he may maintain trespass (*Catteris* v. *Cowper*, 4 Taunt. 548; *Graham* v. *Peat*, 1 East, 246). Nor is there anything in the form of the remedy in Texas which renders these principles inapplicable to this case."

This rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder. But, as it is intended to prevent and redress trespasses and wrongs, it is limited to cases where the defendants are trespassers and wrongdoers. It is, therefore, qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim on which it is defended. It does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title. *Fowler* v. *Whiteman*, 2 Ohio St. 270; *Drew* v. *Swift*, 46 N. Y. 204. And in the language of the Supreme Court of Texas in *Wilson* v. *Palmer*, 18 Tex. 592, 595, "The evidence must show a continuous possession, or at least that it was not abandoned, to entitle a plaintiff to recover merely by virtue of such possession." That is to say, the defendant's possession is in the first instance presumed to be rightful. To overcome that presumption the plaintiff, showing no better right by a title regularly deduced, is bound to prove that, being himself in prior possession, he was deprived of it by a wrongful intrusion by the defendant, whose possession, therefore, originated in a trespass. This implies that the prior possession relied on by the plaintiff must have continued until it was lost through the wrongful act of the defendant in dispossessing him. If the plaintiff cannot show an actual possession, and a wrongful dispossession by the defendant, but claims a constructive possession, he must still show the facts amounting to such constructive possession. If the lands, when entered upon by the defendant, were apparently vacant and actually unoccupied, and the plaintiff merely proves an antecedent possession, at some prior time, he must go further and show that his actual possession was not abandoned; otherwise, he cannot be said to have had even a constructive possession.

To the same effect are the cases of *Jackson* v. *Walker*, 7 Cow. 637; *Jackson* v. *Denn*, 5 Cow. 200. In *Smith* v. *Lorillard*, 10 Johns. 356, Kent, *Chief Justice*, said: "A prior possession short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of less than twenty years when no other evidence of title appears on either side. There are many decisions of this court which look to this point. *Jackson* v. *Hazen*, 2 Johns. 22; *Jackson* v. *Meyers*, 3 Johns. 388; *Jackson* v. *Harder*, 4 Johns. 202. It is, however, to be understood, in the cases to which the rule of evidence applies, that the prior possession of the plaintiff had not been voluntarily relinquished without the *animus revertendi* (as is frequently the case with possessions taken by *squatters*), and that the subsequent possession of the defendants was acquired by mere entry, without any legal right. That the first possession should in such cases be the better evidence of right seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has in the first instance; and after a continued possession for twenty years under pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry; but until the possession of the tenant has become so matured, it would seem to follow that if the plaintiff shows a prior possession, and upon which the defendant entered without its having been formally abandoned as *derelict*, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant, to recall that presumption, must show a still prior possession; and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be overreached, or puts an end to the doctrine of presumptions founded on mere possession by showing a regular legal title or a right of possession."

In *Jackson* v. *Rightmyre*, 16 Johns. 314, *Chancellor* Kent, delivering the opinion of the court of errors, speaks of the rule expressed by himself in the case of *Smith* v. *Lorillard*, and says that its qualifications are "that no other evidence of title appeared on either side, and that the subsequent possession of the defendant was acquired by mere entry without any legal right."

It therefore appears that prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrongdoer, or a person subsequently entering without right. Another qualification of the rule is that the action to regain the prior possession must be brought within a reasonable time after it has been lost. If there has been delay in bringing the suit, the *animus revertendi* must be shown and the delay satisfactorily ac-

counted for, or the prior possessor will be deemed to have abandoned his claim to the possession. Thus in *Whitney* v. *Wright*, 15 Wend. 171, it was held that where there was a prior possession of eleven years, and then an entry by the defendants claiming under a title adverse to such possessory title, the omission to bring a suit for thirteen years, with knowledge of the adverse entry and continuance of possession under it, would authorize a jury to find an abandonment of claim by the prior possessor.

In *Jackson* v. *Denn*, 5 Cow. 200, the defendant had entered on a vacant possession, without any claim or color of title; and it was held that the plaintiff was entitled to recover on the strength of his prior possession, but the reason why the premises had been left vacant was explained by proving that the plaintiff did not know his tenant had left the property until he found the defendant in possession.

It follows that in cases where the proof on the part of the plaintiff does not show a possession continuous until actual dispossession by the defendant, or those under whom he claims, the burden of proof is upon the plaintiff to show that his prior possession had not been abandoned.

There is nothing in the record to show that the evidence offered and rejected was tendered as proof of a possessory title relied upon as the basis of recovery by the plaintiffs. There was certainly no distinct statement to that effect made to the court by counsel when the offer was made; and, for aught that appears, the sole ground of the offer may have been the supposition that in some way the facts testified to in the depositions might be used to supply that defect in the evidence of the existence of a confiscation decree, on which the court ruled that the documentary title was not complete. It is, nevertheless, true that the court did rule upon the offer made "that all the said evidence read, as well as that proposed to be offered, showed no title in the plaintiffs which would warrant a verdict and judgment in their favor." It may, therefore, with reason now be contended by the plaintiffs in error that this was, in effect, a direction to the jury to return a verdict for the defendants upon the whole case as contained in the documentary evidence admitted, coupled with the testimony offered and rejected, and that they are entitled to the benefit of their exception in any aspect of the case as thus made; and from this it is argued that, having shown color of title by the defective documents relating to the confiscation, and an entry into possession under them, they were entitled to prove a continuance of that possession so as to authorize a recovery upon the strength of that title alone.

Assuming this to be so, the question is presented upon the whole testimony as offered, taken in connection with the documents read, whether the plaintiffs had thereby presented such a case as, in the absence of all other testimony, would have justified a verdict in their favor. The evidence on the subject contained in the depositions did not tend to establish any possession of the premises in dispute later than the year 1835. At that time Garcia himself had died, his daughter had married in the year 1833, and from the year 1835 the mother and daughter with the husband of the latter, had left Texas and gone into Mexico, where they have ever after remained. There is no evidence whatever that after the year 1835 they exercised any dominion or control over this property in San Antonio, or were in possession of it through tenants or agents. The proof, therefore, does not satisfy the rule as stated by the authorities cited; for, although it shows that the possession on the part of the plaintiffs had been originally acquired under color of title, it does not show that that possession had been continuous and had not been abandoned. On the contrary, so far as the proof extends, it leaves a period of time, from 1835 to 1843, when, it is alleged in the petition, that the defendants, or those under whom they claim title, entered into possession, entirely unacounted for, and during which, so far as the plaintiffs are concerned, the possession appears to have been vacant and abandoned. It follows, therefore, that the court committed no error in rejecting the offered proof of a prior peaceable possession under color of title.

The judgment is accordingly affirmed.

CATHERINE SHIELDS ET AL., *Pffs. in Err.*,
v.
ARTHUR SHIFF.

(See S. C. Reporter's ed. 351–359.)

Confiscation Act, effect of—sale of the property under mortgage—mortgagee's right—prescription, when lost—inscription or reinscription, when necessary.

1. In a sale of property confiscated under the Act of Congress of July 17, 1862, generally known as the Confiscation Act, all that could be sold was the right to the property seized, terminating with the life of the person for whose offense it had been seized.

2. Such proceedings and sale do not affect a mortgage in favor of third persons on the property, and a subsequent sale under such mortgage is valid; and it makes no difference that the purchaser of the life estate under the confiscation proceeding became also the purchaser under the mortgage.

3. A mortgagee under an Act containing the *pact de non alienando*, can proceed against the mortgagor, after the latter's expropriation through confiscation proceedings, as though the latter had never been devested of his title.

4. Prescription is forever lost to the mortgagor and his heirs, where he has failed to plead it, in an action for the foreclosure of his mortgage.

5. Neither inscription nor reinscription is necessary to preserve a mortgage, as against the mortgagor and his heirs.

6. The Confiscation Act makes no disposition of the property confiscated, after the death of the owner, but leaves it to devolve to his heirs according to the *lex rei sitæ*; and those heirs take as heirs by inheritance and not by donation from the government.

[No. 61.]

Argued Nov. 9, 1887. Decided Jan. 23, 1888.

IN ERROR to the Supreme Court of the State of Louisiana, to review a judgment affirming a judgment of the Civil District Court for the Parish of Orleans, in favor of defendant, in an action to recover certain lands in New Orleans. *Affirmed.*

The case and facts are stated in the opinion.

Mr. **Gus. A. Breaux,** for plaintiffs in error:

The plaintiffs have a standing in court to claim the property in controversy, notwithstanding the will in favor of Mrs. Surget.

The Confiscation Act of Congress seized, and disposed of all the interest of the offender in the property. His estate was separated entirely from that of his heirs after his death.

French v. *Wade*, 102 U. S. 132 (26:44); *Wallach* v. *VanRiswick*, 92 U. S. 209 (23:476); *Pike* v. *Wassell*, 94 U. S. 714 (24:310); *Chaffraix* v. *Shiff*, 92 U. S. 214 (23:478).

The intent of Congress was to sever all connection between the confiscated property and the offender; to place it absolutely beyond his reach at any time; and to establish a reservation as to the property in favor of the heir alone.

The term *heir* is not necessarily used to denote a person whose ancestor is dead.

Dwarr. Stat. Gould & Son's ed. 199; *Lockwood* v. *Jesup*, 9 Conn. 274; *Cox* v. *Beltzhoover*, 11 Mo. 142.

In the statute the intent was that the fee to the confiscated and forfeited estate, which vested in the government, was to be transferred to the heir apparent, the heir presumptive, at the death of the offender; in no event could the latter be permitted to designate to whom it should go, by will or otherwise. The right of the heir is not derived from the offender, but from the government.

Civil Code, 3369; R. S. 3141; *Lemelle* v. *Thompson*, 34 La. Ann. 1043; *Watson* v. *Bondurant*, 30 La. Ann. 11; *Shepherd* v. *Orleans Cotton Press Co.* 2 La. Ann. 100.

The foreclosure proceeding, under which Shiff acquired the title was not valid as against these plaintiffs. There was no existing claim or mortgage when the action was instituted; the claim was prescribed, and the mortgage had fallen with it.

Splane v. *Daniel*, 11 Rob. (La.) 449; *McMasters* v. *Mather*, 4 La. Ann. 418; *Union Bank* v. *Dosson*, 7 La. Ann. 548; *Fowler* v. *Beatty*, 10 La. Ann. 275; *Taylor* v. *Hill*, 21 La. Ann. 627; *Union Bank* v. *Marin*, 3 La. Ann. 84; *Michie* v. *Armat*, 15 La. Ann. 225; *McDaniel* v. *Lalanne*, 28 La. Ann. 663; *Succession of Kugler*, 23 La. Ann. 456; *Larthet* v. *Hogan*, 1 La. Ann. 331; *Grayson* v. *Mayo*, 2 La. Ann. 927; *Day* v. *Micou*, 85 U. S. 18 Wall. 161 (21:862).

The fee of confiscated property was absolutely devested from the offender.

French v. *Wade*, 102 U. S. 132 (26:44); *Chaffraix* v. *Shiff*, 92 U. S. 214 (23:478).

The possession of Shiff was simply that of a person enjoying a life estate.

N. O. Ins. Asso. v. *Labranche*, 31 La. Ann. 845.

Mr. **John A. Campbell,** for defendant in error:

The will of Surget in favor of his wife was the institution of an heir.

Rev. Civ. Code, 884, 1606, 1609; 3 Touillier, Tit. Don. and T. no. 492, p. 282; *Succession of Langley*, 5 La. Ann. 199; *Fowler* v. *Boyd*, 15 La. 562; *Burnside's Succession*, 35 La. Ann. 708.

Whatever succession Eustace Surget had to transmit was legally and validly devolved upon Madame Surget, the universal legatee, and not upon the heirs by blood.

2 Bl. Com. 267.

Mr. Justice **Bradley** delivered the opinion of the court:

Catherine Shields, a sister of Eustace Surget, deceased, and the children of two other sisters of his, claiming to be his nearest relatives and only heirs at law (he having left neither ascendants nor descendants) filed a petition in the Civil District Court for the Parish of Orleans against Arthur Shiff, in March, 1883, alleging that said Eustace, in 1860 and thereafter, owned certain property in New Orleans, consisting of certain lots of ground and buildings, particularly described, acquired by purchase from R. P. Hunt by Act passed April 18, 1860; that, by proceedings in the United States District Court said property was condemned and confiscated as property of said Surget, under the Act of Congress of July 17, 1862, and sold at marshal's sale on the 30th of May, 1865, to Arthur Shiff; that Surget died on the first of February, 1882; and that Shiff had continued in possession since that time, receiving the rents and revenues. The petitioners prayed to be declared owners of the property and entitled to the possession thereof since the death of Surget, and for a judgment against Shiff for the rent and damages.

Shiff, by his answer claimed to be the owner and possessor of the property by lawful title acquired at public sale made by the civil Sheriff of Orleans on the third day of August, 1880, under and by virtue of a writ of seizure and sale for the foreclosure of a mortgage given upon said property on the 28th of January, 1860, by the former owner, R. P. Hunt, to one Edward Shiff, to secure $24,000, payable in notes which matured in January, 1862; which mortgage the said Eustace Surget, in his act of purchase from Hunt, assumed to pay as part of the price; and that the defendant, Arthur Shiff, was holder of the notes secured by said mortgage.

Under these pleadings the parties went to proof, and the statements of both petition and answer were verified. The act of mortgage given by Hunt to Shiff, January 28, 1860; the act of sale by Hunt to Surget, April 18, 1860; the confiscation proceedings and sale; the foreclosure proceedings and sale; and testimony of witnesses as to the family of Surget, were given in evidence. The mortgage from Hunt to Shiff contained the clause agreeing not to alienate, called the *pact de non alienando*. The act of sale by Hunt to Surget contained a statement that the amount of the notes secured by the mortgage was part of the purchase price, and an assumption by Surget to pay the same, and a promise to fulfill and comply with all the conditions and clauses therein contained.

It appears that Arthur Shiff intervened in the confiscation proceedings for the protection of his mortgage upon the property, and at the sale became the purchaser for the sum of $22,000, the residue of which, after payment of costs and expenses, was duly credited on his notes. From the time of said sale, May 17, 1865, Shiff had possession of the property.

There remained a large sum due to Shiff on the notes, amounting, on the 22d of June, 1880, to over $30,000. On that day, he instituted proceedings to foreclose his mortgage, by seizure and sale, making Eustace Surget, the debtor, party to the proceedings. Surget,

being then in France, could not be personally served with the notice of demand of payment, and it was served upon a *curator ad hoc* appointed by the court; and a writ of seizure and sale was issued, and, on the third of July, 1880, the property was sold, and Shiff became the purchaser for the sum of $19,000. Monition proceedings were afterwards had, homologating the sale.

It appears by a certificate of the authorities of the City of Bordeaux, France, that Surget died in that place on the first of February, 1882. He left a will, dated July 11, 1872, with a codicil thereto, dated November 12, 1879. By the will he gave all his property to his wife, Mary Atwell Surget, (who survived him), and made her his sole executrix; and the codicil was in these words, to wit:

"I hereby forcibly enjoin upon my dear wife, or, should she not be living at the time of my own demise, upon my natural heirs, to make immediately unto Arthur Shiff, of the City of New Orleans, Louisiana, a clear and valid title to certain property situated on Rampart Street, in that city, and conveyed to him by me by notarial act executed by me before T. O. Starke, notary public, in the City of New Orleans, on the 18th of July, 1866, the confiscation laws of the United States Government having deprived Mr. Shiff up to the present time of the full enjoyment and possession of said property, which is justly his, it having been my fixed and honest intention to make him a good and valid title to the said property."

It is understood that the property referred to is the same property now in question in this suit.

The Civil District Court of New Orleans, in accordance with the decisions of this court in *Bigelow* v. *Forrest*, 76 U. S. 9 Wall. 339 [19:696]; *Day* v. *Micou*, 85 U. S. 18 Wall. 156 [21:860]; *The Confiscation Cases*, 87 U. S. 20 Wall. 92 [22:320]; and *Waples* v. *Hays*, 108 U. S. 6 [27:632]; and also in accordance with the decision of the Supreme Court of Louisiana in *Avegno* v. *Schmidt*, 35 La. Ann. 585 (which has since been affirmed by this court), held that the confiscation of Surget's estate did not affect the mortgage which his grantor, Hunt, had given to Shiff, and that a sale of the property under that mortgage in 1880 was perfectly valid; and that it made no difference that Shiff, the purchaser of Surget's life estate under the confiscation proceedings, became also the purchaser under the mortgage.

It was objected by the plaintiffs against Shiff's title under the foreclosure proceedings, that the notes, to secure which the mortgage had been given, had been long prescribed, and that the mortgage had lapsed for want of reinscription. But the civil district court overruled this objection and said: "Like the mortgage in the case of *Avegno* v. *Schmidt*, Shiff's mortgage contained the *pact de non alienando*. As we have seen above, the confiscation proceedings did not disturb the contractual relations existing between Surget and Shiff. And as long as the debt was not prescribed, or, if prescribed, and the debtor did not plead it, the foreclosure was in time." The court also held (though this was not necessary to the decision) that Surget's instituted heir, and not his natural heirs, was entitled to succeed to the estate upon his death. Judgment was given in favor of the defendant. This judgment was appealed to the Supreme Court of Louisiana, and was affirmed. *Shields* v. *Shiff*, 36 La. Ann. 645. The judgment of the supreme court is now before us for revision; and substantially the same questions are raised here which were made in the Courts of Louisiana.

The opinions of the Justices of the Supreme Court of Louisiana are presented to us in the record, and seem to us satisfactorily to dispose of every question which is necessarily involved. The leading opinion states the point to be decided, and the propositions on which the decision should rest, as follows:

"Under our views of the controversy, in the light of the established jurisprudence on the true and correct meaning of the Confiscation Act, the pivotal issue in the case hinges upon the validity of the sale effected under the executory process instituted against Surget by the defendant Shiff in June, 1880. A proper solution of that issue involves a consideration of the question of the effect of the confiscation on the perpetual ownership or fee of the confiscated property. In the recent case of *Avegno* v. *Schmidt*, 35 La. Ann. 585, we had occasion to consider some of the effects of proceedings instituted under that legislation. Under the guidance of numerous decisions of the Supreme Court of the United States we established in that case the following propositions, which are to some extent involved in the present controversy, and which we shall therefore abstain from discussing in this opinion:

"1. The Act of Congress of July 17, 1862, generally known as the 'Confiscation Act', and the Joint Resolution of the same day explanatory thereto, must be construed together.

"2. In a sale of property confiscated thereunder, all that could be sold was a right to the property seized, terminating with the life of the person for whose offense it had been seized.

"3. Such proceedings and sale do not affect the rights of mortgage in favor of third persons on the property, which goes to the government or to the purchaser *cum onere*.

"4. A mortgagee under an act containing the *pact de non alienando*, can proceed against the mortgagor, after the latter's expropriation through confiscation proceedings, as though the latter had never been devested of his title. *Bigelow* v. *Forrest*, 76 U. S. 9 Wall. 339 [19:696]; *Day* v. *Micou*, 85 U. S. 18 Wall. 160 [21:862]; *Waples* v. *Hays*, 108 U. S. 6 [27:632].

"Under the principles thus laid down, resting on the high authority of the first tribunal of the land, and which we do not understand to be contested by either party in the case at bar, we conclude that the following propositions can be considered as fully established in the present controversy:

"1. That the title which Shiff acquired at the confiscation sale in May, 1865, expired with Surget at his death, in 1882.

"2. That the mortgage rights of Shiff on the fee of the confiscated property for the security of the unpaid balance of his notes were not affected by that sale, but remained in full force notwithstanding his acquisition of a life estate in the property, and his possession and enjoyment of the same under his title, and that in this case there was no extinction of either the debt

or the security by reason of confusion, as provided in our Code."

There seems to have been some difference of opinion between the judges, on the question whether, after the confiscation proceedings and sale, the fee was in abeyance, or in the United States, or in Surget devested of the power of disposition; but all agreed that, however it was, the heirs succeeded by inheritance from Surget, and not by donation from the generosity of the government; and hence, being in privity with their ancestor, they were bound, equally with him, by the proceedings on the mortgage, which contained the *pact de non alienando*.

Chief Justice Bermudez says:

"It is true that the proceeding is *in rem*, but the law of the *situs* requires it to be conducted contradictorily with the owner, in order that the judicial sale may operate a valid devestiture of the title or fee, if the defendant were not the owner of the fee at the date of the proceeding and sale following. But even assuming and conceding that the offender, Surget, was actually devested of his entire ownership, perfect and imperfect, and that the fee vested in the United States, the devestiture would not be entitled to more effect than it would have if Surget had himself, in the absence of any condemnation and sale, voluntarily parted with his ownership of the property. In such a case, under the terms of the contract of sale on which Shiff bases his claim, the alienation of the property by Surget could not have prejudiced him, as it contains the clause *de non alienando*, which, under the laws of this State, authorizes him to proceed in the enforcement of his debt against the original debtor and mortgagor, regardless of the transfer and ignoring it, the property passing to the transferee or purchaser *cum onere*, or subject to that clause. From that standpoint it is therefore immaterial whether the fee remained in Surget or passed to the government. It was devested by the proceedings of 1880 and vested in Shiff.

"Prescription is a means of defense created by the law for the necessity of things to which the individuals, in whose favor it exists, may have recourse or not as they may deem better. They are under no obligation to set it up. When, therefore, they are sued in a case in which they could urge it, and do not do so, they are deemed to have waived the benefit of it. Under such circumstances, those who take from them, their heirs or assigns, are as equally estopped from pressing it as effectually as the debtor himself. As Surget did not set up prescription or preemption prior to the sale of the property, but, on the contrary, waived it, and recognized title in Shiff, as is shown by his silence and his will, the claim of Shiff, continued in existence, was legal and valid, and the expropriation became complete in his favor, as creditor, purchasing as if there never was any prescription law.

"Those and any other defenses which could have been and were not set up by Surget before the sale, the plaintiffs, who are Surget's heirs and successors, and who have acquired no rights which he did not possess, and could not have exercised, cannot be permitted to assert and urge after his death."

Mr. Justice Fenner says:

"For the purposes of this controversy, it matters not where the fee resided. Wherever it was, the supreme court has unequivocally settled the doctrine that it remained subject to prior mortgages and privileges in favor of third persons, which were entirely unaffected by the confiscation proceedings. Neither did those proceedings affect the debt due by Surget to Shiff, which was secured by the mortgage. The object and effect of the *pact de non alienando* under our laws are to secure to the mortgage creditor the rights to foreclose his mortgage by executory process directed solely against the original debtor, and to seize and sell the mortgaged property, regardless of any subsequent alienation.

"We make a long step towards eliminating irrelevant questions and exposing the real and pivotal question in this case when we announce as an indisputable proposition that if the executory proceedings against Surget were regular; if, at the date thereof, the debt subsisted; if the mortgage securing the same were valid, and had been preserved by proper inscription and reinscription, the purchaser at the sale under these proceedings would have acquired a valid title against all the world, regardless of who owned the fee at the date thereof. Indeed, I do not understand that the learned counsel of plaintiffs would dispute this proposition. They claim that the title is invalid, as against plaintiffs, on two grounds, viz.: 1, that at the date of the foreclosure proceeding, the debt of Shiff had been extinguished by prescription; 2, that his mortgage had lapsed as to them by the failure to reinscribe it within the term prescribed by law.

"At this point we encounter other elementary propositions, too plain for dispute, establishing that, whatever force the above objections might have if urged by third persons, they have none in favor of the mortgagor or his heirs. As to prescription, the mortgagor having failed to plead it, its effect is forever lost as to him and his heirs. As to the want of reinscription, neither inscription or reinscription is necessary to preserve the mortgage as against the mortgagor and his heirs.

"By this process of elimination we reduce this controversy to a single question, viz.: Are the plaintiffs, heirs of Surget, claiming title by virtue of inheritance through him, or are they third persons as to him, deriving title from the bounty of the United States, conferred upon them under the merely descriptive quality of heirs of Surget? They have their right upon the latter hypothesis. If we confine ourselves to the plain language of the Acts of Congress, it is difficult to discern any foundation for such a theory."

The learned Justice then proceeds to demonstrate from the words of the Act of Congress of July 17, 1862, and the explanatory resolution, that they make no disposition of the property confiscated, after the death of the owner, but leave it to devolve to his heirs according to the *lex rei sitæ*, and that those heirs take *qua* heirs and not by donation from the government.

These opinions express precisely our own views with regard to the effect of the Confiscation Act upon the devolution of title at the death of the owner in whose hands the property was confiscated. Indeed, we expressed our concurrence in the judgment of

the Supreme Court of Louisiana in this case in the opinion delivered by *Mr. Justice* Woods in *Avegno* v. *Schmidt*, 113 U. S. 293, 300 [28: 976, 978]. As this is the only federal question in the case, and as we concur in the opinion of the Supreme Court of Louisiana thereon, we accept the views of the state court as to the validity of the proceedings for foreclosure under the local laws of that State. In fact, nearly every point raised in the present case was decided in the case of *Avegno* v. *Schmidt*, above cited.

Judgment affirmed.

Ex Parte:

In the Matter of HENRY C. CRAFT, *Petitioner.*

(See S. C. Reporter's ed. 370–374.)

Appeals from Supreme Court of District of Columbia.

1. Where the amount in dispute is less than $5,000, and the decree of the Supreme Court of the District of Columbia does not involve the decision of any federal question, an appeal to this court from such decree is not authorized under section 2 of Act of March 3, 1885, 23 Stat. at L. 443, chap. 355.

2. An injunction, restraining a person from prosecuting an ordinary suit in replevin in a court established under the authority of the United States, does not necessarily involve a question of "the validity of a treaty or statute of or an authority exercised under the United States."

Submitted Jan. 16, 1888. Decided Jan. 23, 1888.

MOTION for the allowance of an appeal from a decree of the Supreme Court of the District of Columbia. *Denied.*

Mr. **R. H. Steele**, for Petitioner:

The denial of the right of appeal in the premises is, in effect, the denial of the right, through due process of law, to fully and properly show, in the supreme court, where and how is drawn in question the validity of an authority exercised under the United States.

R. S. D. C., § 846, R. S. U. S. §§ 690–692, 699, 705, 706, 923, 999, 983, 1007, 1012; *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7: 412); *Davis* v. *Packard*, 31 U. S. 6 Pet. 41 (8: 312); *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 (9: 458.)

The "restraining order" was issued by said justice while holding a district court, not only without notice to the adverse party, but directly in contravention of the prohibitory statutes.

R. S. U. S. §§ 718, 719, 723, Equity Rules, Sup. Ct. 11, 16, 55 (Bk. 20, L. ed); *Hollingsworth* v. *Barbour*, 29 U. S. 4 Pet. 466 (7: 922); *McVeigh* v. *U. S.*, 78 U. S. 11 Wall. 259 (20: 80); *Windsor* v. *McVeigh*, 93 U. S. 274 (23: 914).

Said decree of affirmation was in contravention of the statutes, in relation to the rules of equity in force upon Courts of the United States.

R. S. D. C. §§ 92, 93, 753, and par. 11, § 2, chap. 69, Act Feb. 27, 1877, 19 Stat. at L. 240; *Smith* v. *M'Iver*, 22 U. S. 9 Wheat. 532 (6: 152); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 739 (6: 204); *Harding* v. *Handy*, 24 U. S. 11 Wheat. 103 (6: 429); *Vattier* v. *Hinde*, 32 U. S. 7 Pet. 252 (8: 675); *Dunn* v. *Clarke*, 33 U. S. 8 Pet. 1 (8: 845); *Hipp* v. *Babin*, 60 U. S. 19 How. 271 (15: 633).

The decree prohibited and prevented the proper and only solution of the very question originally at issue, and as yet remaining unanswered.

Gettings v. *Burch*, 18 U. S. 9 Cranch, 372 (3: 763); *Thompson* v. *Central Ohio R. R. Co.* 78 U. S. 6 Wall. 134 (18: 765); *Rees* v. *Watertown*, 86 U. S. 19 Wall. 107 (22: 72); *Seitz* v. *Mitchell*, 94 U. S. 580 (24: 179); *Crim* v. *Handley*, 94 U. S. 652 (24: 216); 1 Story, Eq. Jur. § 61; Sedgwick, Stat. & Const. Law, 90.

(There was no brief in opposition.)

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. The amount in dispute is less than $5,000, and we cannot discover that the decree involves the decision of any such federal question as will authorize an appeal to this court under section 2 of the Act of March 3, 1885, 23 Stat. at L. 443, chap. 355. An injunction restraining a person from prosecuting an ordinary suit in replevin in a court established under the authority of the United States, does not necessarily involve a question of "the validity of a treaty or statute of, or an authority exercised under the United States."

DISTRICT OF COLUMBIA, *Appt.*,

v.

AUGUSTA MCBLAIR ET AL.

(See S. C. Reporter's ed. 390–393.)

Final decree, what is—resale of real estate, order for—payment of consideration—conveyance, when ordered.

1. A decree of the General Term of the Supreme Court of the District of Columbia, reversing a decree of the special term and remanding the cause to the special term, to be further proceeded with as the parties might be advised, is not a final adjudication upon the petitioner's right to some relief in accordance with the prayer of the petition.

2. Where a bill has been filed, for the sale of a part of the real estate left by a will, by which the real estate was limited to certain lives with a contingent limitation over to the issue of the tenants for life, and to apply the proceeds of the sale to the improvement of the remainder of said real estate, and the purchaser at the sale has paid a portion of the consideration of the conveyance to be made to him, and has made default in paying a part of the consideration, any resale of the property, ordered by the court, should be made only in case of a default on the part of the purchaser in making payment of the unpaid portion of the consideration within some reasonable time to be fixed by the court.

3. Because the purchaser has not fully paid all the consideration for the conveyance, he has not lost all right to obtain, by order of the court, a conveyance of the title; *held*, therefore, that a decree, ordering a resale, without regard to the previous payments and the right to make such additional payments as should be ascertained to be due and required to be paid, was erroneous.

4. *Held, further*, that the purchaser is entitled, on payment of the amount due from him of the purchase money, to a decree of the court below for a conveyance to him of the title to the real estate, and in default of such payment within a reasonable time to be fixed therefor, directing a resale of the premises for the satisfaction thereof.

[No. 1329.]

Submitted Jan. 5, 1888. Decided Jan. 23, 1888.

APPEAL from a decree of the Supreme Court of the District of Columbia, direct-

ing a resale of real estate on default of payment of part of the purchase money, due on a prior sale ordered by the court. *Reversed.*

Statement of the case by *Mr. Justice* **Matthews:**

An Act of Congress to authorize the Circuit Court of the District of Columbia to decree the sale of real estate in certain cases, approved August 18, 1856, 11 U. S. Stat. at L. 118, provides "That in all cases in which real estate within the District of Columbia shall have been limited heretofore, or shall be limited hereafter, by the provisions of any deed or will, to one or more, for life or lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of their parent or parents, and the said deed or will containing the limitation shall not prohibit a sale, the Circuit Court for the District of Columbia, upon the application of the tenants for life, shall have power to decree a sale of such real estate, if, upon the proofs, it shall be of opinion that it is expedient to do so, and to decree to the purchaser an absolute and complete title in fee simple."

Section 2 enacts "That application for the sale of such real estate shall be by bill in equity, verified by the oath or oaths of the party or parties, in which all the facts shall be distinctly set forth, upon the existence of which it is claimed to be expedient that such sale should be decreed; which facts shall be proved by competent testimony. Such of the issue contemplated by the limitation as shall be in existence at the time of the application for the sale of such real estate shall be made parties defendant to the bill, and, if minors, by guardian *ad litem*, together with all who would take the estate in case the limitation over should never vest. Such of the parties defendant as shall be of the age of fourteen years or more shall answer in proper person, on oath, and all evidence shall be taken upon notice to the parties and to the guardian *ad litem*."

Section 3 requires "That the proceeds of the sale of such real estate shall be held under the control and subject to the order of the court, and shall be vested under its order and supervision, upon real and personal security, or in government securities, and the same shall, to all intents and purposes be deemed real estate, and stand in the place of the real estate from the sale of which such proceeds have arisen, and, as such real estate, be subject to the limitations of the deed or will."

To obtain the benefit of this Act, on July 30, 1868, Augusta McBlair, wife of J. H. McBlair, and Julia Ten Eyck, wife of John C. Ten Eyck, filed a bill in equity in the Supreme Court of the District of Columbia, in which it was alleged that John Gadsby, the father of the complainants, died in the District of Columbia in the year 1844, leaving a last will and testament, whereby he devised to trustees, and the survivors of them, certain real estate in the City of Washington, known as lots Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19, in square No. 78, in trust, after the expiration of twelve months from his death, to permit his daughters to receive the rents, issues and profits thereof, for their sole and separate use and enjoyment, in equal moieties for life, respectively, so that neither said property nor the income thereof should be subject to the control or disposition of the respective husbands of his said daughters, or responsible for their debts; and in case either of his said daughters should die leaving no issue living at her death, that the interest or estate of her so dying without issue should become forthwith vested in the survivor, in the same manner as her own moiety was before held and enjoyed; and in case both or either of said daughters should die leaving issue living at the time of her death, then the said trustees should hold the property to the use of said issue, one moiety to the issue of each of his said daughters; and in case one only of them should die leaving such issue, then, after the death of the other daughter, the whole of said estate should vest in said issue in fee simple. The contingency of the death of both of his said daughters without issue was not provided for in the will, thereby leaving a contingent reversion in his right heirs. It was also alleged in the bill that the complainant Augusta McBlair had children, viz.: John G. McBlair, Virginia Smith, wife of——Smith, J. H. McBlair, Jr., Julia I. McBlair, C. Ridgley McBlair, and S. Jackson McBlair, of whom said last two were minors under twenty-one years of age; and that said complainant Julia Ten Eyck also had children, viz.: Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, May Ten Eyck, and John C. Ten Eyck, of whom the last three were minors under twenty-one years of age; that besides the complainants John Gadsby left as his heirs at law his son William Gadsby, and his other daughters, Ann Sophia Newton and Margaret S. Chapman, and of these Ann Sophia Newton had died before the filing of the bill, leaving as her heirs at law Albert Newton, Maria McCommick, and Margaret Wallach, wife of W. Douglas Wallach; and that William Gadsby had died leaving as his heirs at law William Gadsby, Sallie Gadsby, Eakin Gadsby, and Mary Gadsby, the last of whom was a minor under twenty-one years of age. It was also alleged that of the trustees named in the will the survivor, Alexander McIntyre, had also died before the filing of the bill, leaving heirs at law, who are therein named as defendants.

It was also alleged in the bill, that of the lots of ground enumerated those numbered 8, 9 and 10 front upon north I Street, in the City of Washington, and are improved by a substantial row of dwellings, six in number, and all the others are vacant and unimproved, except where partially occupied by outbuildings; that said dwelling houses are of considerable value, and, if properly improved and modernized, would yield a good income and revenue, which would inure to the benefit of all parties interested, but that at present they are much out of repair, old fashioned, and unprovided with modern conveniences; that the vacant lots in the rear, front upon K Street north, and at present yield no income, but would sell, and it would be greatly to the advantage of all parties to make sale of said lots and apply the proceeds to the improvement of said dwelling houses; that the complainants have not the means to make such improvements, the income now accruing to them from their father's estate being wholly inadequate to their support; that as an additional

reason for such sale it is alleged that said vacant lots are burdensome to the complainants by reason of the heavy municipal taxes to which they are subject, so that their retention defeats the primary object of said testator, which was not to burden the complainants as devisees, but to provide them an ample revenue for their comfortable support.

The prayer of the bill is that the parties named therein be made defendants, and that, pursuant to the Act of Congress of August 16, 1856, a decree be granted for a sale of said vacant lots for the object aforesaid, and for general relief.

On this bill such proceedings were thereafter had that a decree *pro confesso* was entered against the nonresident defendants, served by publication, and the resident defendants, served with process, who had made default, and the cause was set for hearing as against such defendants as had answered; and thereupon it was ordered that the cause be referred to a special auditor "to inquire and report whether it will be expedient, and for the benefit of all parties interested, that the property described in the proceedings be sold, and that the prayer of the bill as to the application of the proceeds should be granted."

On May 8, 1869, the auditor filed his report in writing that the disposition of the property in the manner sought by the bill would be for the interest and advantage of all parties concerned, and recommending that the prayer of the bill be granted. On May 10, 1869, a decree was entered directing a sale of the property by Walter S. Cox, as trustee appointed for that purpose, who was directed thereby "To make sale of said property at public auction or at private sale, as he may find most expedient, and if at public auction, after giving at least three weeks' previous notice by advertisement in some convenient newspaper of the time, place and terms of sale, which terms shall be, one third of the purchase money to be paid in cash, and the residue in two equal installments at six and twelve months after date, with interest, to be secured by approved notes and a lien reserved, and on the ratification of such sale and full payment of the purchase money he shall convey the property sold to the purchaser, with all the title of the parties to this cause, and, as soon as convenient after any such sale, he shall make report of the same and of the fairness thereof to this court, under oath, and shall bring into court the proceeds of sale to abide the court's future order in the premises."

On June 13, 1872, Walter S. Cox, the trustee, reported that he had made sale "of the lots of ground described in the bill, being lots 14, 15, 16, 17, 18, 19, 20 and 21, and the north twenty-three feet five inches of lot 13, in square No. 78, to J. H. McBlair, for the sum of $24,521.50, for which sum the said McBlair has passed to the undersigned his two promissory notes, each for $12,260.75, payable, respectively, in three and six months after date, with interest." A rule to show cause why this sale should not be confirmed having been entered on June 13, 1872, and no cause having been shown, the court, on July 16, 1872, entered a decree ratifying and confirming the sale.

On June 15, 1874, the District of Columbia, then being a corporate body for municipal purposes by virtue of the Act of Congress of February 21, 1871, filed its petition in the cause, wherein, after reciting the proceedings therein, including the sale of the said premises to McBlair, it alleged that by virtue of an Act of the Legislative Assembly of the District of Columbia, approved August 23, 1871, entitled "An Act to Provide for the Purchase of Certain Market Sites and the Erection Thereon of Certain Markets," Henry D. Cooke, then Governor of the District of Columbia, on July 26, 1872, had purchased the said lots numbered 14, 15, 16, 17, 18, 19, 20 and 21, and part of lot 13, in square No. 78, from said McBlair, who, together with his wife, Augusta McBlair, one of the complainants, had executed and delivered a deed in fee simple conveying the said premises to the District of Columbia, with covenants of general warranty, for the consideration, as expressed in said deed of $26,521.50, which consideration, the petition alleged, was paid in certain market stock bonds of the District of Columbia computed at ninety-seven cents on the dollar, and said bonds to the amount of $27,350 were delivered to said McBlair in satisfaction thereof.

It was further alleged in the petition that "The said McBlair made a sale of said premises to the petitioner, and forthwith and long before receiving payment therefor entered into a contract for the repair of certain buildings in which the parties to said cause are interested, to be paid for out of the proceeds of said sale, and, upon receiving payment for said property from the petitioners, as hereinbefore stated, proceeded to expend the money upon said buildings. Said contract and payment having been made and said deed executed by McBlair to the petitioner without the knowledge or concurrence of said trustee regularly, said McBlair ought to have paid the amount of his notes to said trustee in order that the money should be disbursed under directions of the court, without which payment his title to said property did not become technically complete, and said trustee could not convey to him. But the petitioner shows that the object of the bill in this cause was to have the proceeds of said property applied precisely as they were applied, to wit: to the improvement of the buildings aforesaid so as to increase the rental value thereof; and if the proceeds of said ground, to the amount of said McBlair's notes to said Cox, trustee, were in fact applied to said object, as petitioner avers was the case, then, however irregular such proceeding, the said notes are virtually paid, and said trustee ought to execute a deed for said premises to the petitioner as assignee of said McBlair."

The petition therefore prayed that an account might be taken of the expenditures from the proceeds of the bonds upon said buildings; that said notes of McBlair to the trustee be canceled as paid, and said trustee be directed to convey the premises to the District of Columbia—and for general relief.

On the filing of this petition, the matter thereof was referred to the auditor to state an account in respect to the expenditures from the proceeds of the bonds in the petition mentioned; and by consent of counsel, on April 22, 1875, this order of reference was enlarged so as to require the auditor also to report his conclu-

sions in respect to the subject matter of the petition on the evidence heretofore taken under the pending reference of the cause. On July 26, 1875, the auditor filed his report, in which he finds that the purchase price agreed upon for the lots mentioned to be paid by the District of Columbia was $26,521.50 cash, payable in the market stock bonds of the District of Columbia, of the nominal value of $27,350. guaranteed to produce ninety-seven cents on the dollar; that in point of fact those bonds had realized not more than $22,700, and that the purchase money of the property, therefore, had not been paid by the amount of the difference between that sum and the agreed price, equal to $3,821.50. The report, therefore, recommended that the prayer of the petition for a decree directing the trustee to convey the premises to the petitioner should be denied. Exceptions were filed on behalf of the District of Columbia to this report, and on August 7, 1875, they were sustained by the court, and the prayer of the petition of the District of Columbia was granted, and the trustee, Walter S. Cox, was directed to execute and deliver a conveyance of the premises in said petition mentioned to the District of Columbia, and to surrender the notes of J. H. McBlair in said petition mentioned to said McBlair as though they had been paid. From this decree of the court at special term an appeal was taken by J. H. McBlair to the general term; and on March 4, 1876, the decree of the special term of August 7, 1875, was reversed, and the cause remanded to the special term, to be further proceeded with as the parties might be advised.

The record further shows that on July 14, 1876, Williams and Gallant filed a petition in the cause, setting up a lien as builders under a contract made with McBlair for work done in erecting back buildings and remodeling main buildings on lots Nos. 8, 9 and 10 in square No. 78, mentioned in the original petition, whereby they were to receive therefor the sum of $18,000, with additional compensation for extra work. The petitioners admit they had received from McBlair on account thereof the sum of $17,205, and claimed a balance due of $2,299.20, with interest from April 30, 1873. It is alleged in the petition that the parties in the cause had knowledge that the petitioners were doing work on the dwelling houses under the contract with McBlair, and that the amount due on account thereof was to be paid for out of the proceeds of the sale of the vacant lots. It was also alleged that John C. Harkness had been appointed trustee under the will of Gadsby; and the prayer of the petition was that he should be directed to pay to the petitioners the amount of the balance due them out of the trust estate in his hands. Harkness, as trustee under the will, answered this petition, denying its equity. The matter was referred to the auditor of the court, who reported a balance due the petitioners of $2,050.70, with interest from April 30, 1873. On this report, on December 18, 1877, a decree of the court at special term was made confirming the auditor's conclusion finding the balance due to the petitioners, which was declared to be a lien on the proceeds of the sale of the vacant lots mentioned and described in the cause and sold by Walter S. Cox, as trustee; and thereupon the said Walter S. Cox, as trustee, was directed and ordered to proceed to collect from the purchaser of said vacant lots the purchase money and interest due thereon, and pay the amount found due to the petitioners; "and, further, if said purchase money and interest be not paid to him, said Walter S. Cox, as trustee, be, and he is hereby, instructed to proceed to advertise and sell said vacant lots, under the same terms and conditions in the original decree of sale prescribed, at the cost and risk of said purchaser or purchasers." On February 20, 1880, Walter S. Cox resigned his office as said trustee, and the court appointed William J. Miller as trustee in his stead, who was required to proceed to perform the duties required of the former trustee. William J. Miller, the new trustee, on February 27, 1880, receipted to Cox, his predecessor, for the two promissory notes of McBlair given for the purchase money of the property sold to him; and on June 1, 1880, the court at special term "ordered, adjudged, and decreed that said trustee proceed to readvertise and sell the real estate heretofore sold to John H. McBlair, at the cost and risk of said John H. McBlair the defaulting purchaser." From this decree of June 1, 1880, an appeal was taken in behalf of the defendants John G. McBlair, Virginia Smith, J. H. McBlair, Julia I. McBlair, Charles Ridgley McBlair, A. Jackson McBlair, Augusta Ten Eyck, Julia Ten Eyck, Jane Ten Eyck, Mary Ten Eyck, May Ten Eyck, John C. Ten Eyck, and John C. Harkness, trustee, which, however, does not appear by the record to have been prosecuted. On July 1, 1880, a separate appeal was taken from the same decree on behalf of the District of Columbia.

On December 27, 1880, it appears that another petition was filed by Williams and Gallant, setting up all the previous matters that had occurred in the course of the cause, and the failure on their part to obtain satisfaction of the amount due to them, and asking for a decree against John C. Harkness, as trustee of the estate of Gadsby, for payment of the same out of the funds in his hands as such. A decree to that effect was entered, from which Harkness appealed, and in the general term, on June 14, 1881, it was affirmed; and thereupon, the amount having been paid, it was ordered that satisfaction of the claim should be entered on July 16, 1881. On November 19, 1885, the appeal taken by the District of Columbia on July 1, 1880, from the decree of June 1, 1880, was placed on the calendar of the general term, and on February 1, 1887, that decree was affirmed, and it was ordered that "William J. Miller, the trustee appointed by the court for the purpose, be, and he hereby is, authorized and directed to readvertise and resell the real estate heretofore sold to John H. McBlair, at the risk and cost of the said John H. McBlair, the defaulting purchaser." From this decree the District of Columbia took the present appeal to this court.

Mr. **Henry E. Davis,** for the appellant:

The decrees of May 10, 1869, and July 16, 1872, respectively, directing and confirming the sale, are conclusive in this cause upon all parties.

Leadenham v. *Nicholson*, 1 Harris & G. 267; *Sands* v. *Codwise*, 4 Johns. 602.

A party aggrieved can appeal only from such parts of the decree as affect him.

Idley v. *Bowen*, 11 Wend. 238; Dan. Ch. Pl. & Pr. 1489, and note 3; *Pratt* v. *Johnson*, 6 Md. 397.

Where a party does not appeal from a decree the appellate court cannot reverse it for his benefit upon an appeal by other parties.

Lanahan v. *Latrobe*, 7 Md. 268; *Chittenden* v. *Brewster*, 69 U. S. 2 Wall. 196 (17:841); *The Quickstep*, 76 U. S. 9 Wall. 672 (19:769); *The Stephen Morgan*, 94 U. S. 599 (24:266); *Loudon* v. *Taxing District*, 104 U. S. 771 (26:923) and cases cited.

Mr. **J. J. Darlington**, for appellees:

The cause is *res judicata*, as against the present appellant, the District of Columbia, upon the record as it stands.

Phillips v. *Negley*, 117 U. S. 665 (29:1013); *Barrell* v. *Tilton*, 119 U. S. 637 (30:511); *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 (27:73); *Benjamin* v. *Dubois*, 118 U. S. 46 (30:52).

If the cause could be heard *de novo* upon the merits, no other decision than that arrived at by the general term in its decree of February 4, 1876, would be possible.

Thaw v. *Ritchie*, 5 Mackey, 215.

The only testimony in the case was that of the husband of one of the complainants, a witness absolutely incompetent to testify.

Re Heaton, 21 N. J. Eq. 221; *Lucas* v. *Brooks*, 85 U. S. 18 Wall. 436 (21:779).

No title can be given by a purchaser under an imperfect judicial sale, although his grantee pays value.

Williamson v. *Irish Presby. Cong.* 49 U. S. 8 How. 565 (12:1200); *Colclough* v. *Sterum*, 8 Bligh, 181; *Lutwych* v. *Winford*, 2 Brown, Ch. 251; *Williamson* v. *Berry*, 49 U. S. 8 How. 495 (12: 1170).

A party who occupies the position of a stakeholder need not join in an appeal or writ of error, but his rights will be protected by the court.

Fowler v. *Morrill*, 8 Tex. 154.

A judgment which is an entirety against several parties, whether in tort or assumpsit, if reversed as to one, must be reversed as to all.

Powers v. *Irish*, 23 Mich. 429; Bac. Abr. title, *Error*, M; *Sargeant* v. *French*, 10 N. H. 444; *Sheldon* v. *Quinlen*, 5 Hill, 441; *Walker* v. *Page*, 21 Gratt. 636.

One of several persons against whom a joint decree is rendered may appeal, and carry up the whole case for review.

Peer v. *Cookerow*, 14 N. J. Eq. 351; *Johnson* v. *Johnson*, 1 Dana, 364; *Emerick* v. *Armstrong*, 1 Ohio, 513; *Sullivan* v. *Thomas*, 6 S. C. 201.

Where the appeal is taken by one defendant, but the decree will necessarily affect other defendants who have not appealed, the appellate tribunal will treat the whole case as before it.

Grubb v. *Browder*, 11 Heisk. 299; *Parrott* v. *Palmer*, 3 Myl. & K. 632, 646; *Tod* v. *Stambaugh*, 37 Ohio St. 469.

Mr. Justice **Matthews** delivered the opinion of the court:

An objection is taken by counsel for the appellees to the consideration of the merits of the present appeal, on the ground that the matter involved therein had been previously and finally adjudged against the District of Columbia by the decree of the general term of February 4, 1876, reversing the decree of the special term directing a conveyance of the title of the premises in controversy to the appellant. It is alleged that this decree was final against the District of Columbia upon the right claimed in its petition, from which no appeal having been taken, it has thereby become conclusive. The point, however, is not well taken. The decree in question reversed the decree of the special term of August 7, 1875, and remanded the cause to the special term to be further proceeded with as the parties might be advised. It did not direct a dismissal of the petition of the District of Columbia, and was, therefore, not a final adjudication upon its right to some relief in accordance with the prayer of the petition.

Proceeding to consider the appeal upon its merits, we find that it involves but a single question, to wit, whether, because the District of Columbia has not fully paid the consideration for the conveyance made by McBlair and wife of the title to the premises in controversy, it has lost all right to obtain from the trustee, by order of the court, a conveyance of the title. The auditor, to whom the matter had been referred, reported that the market stock bonds delivered by the District of Columbia to McBlair as the consideration for his deed produced only $22,700. It seems to be assumed in this report and elsewhere throughout the case that the cash proceeds of these bonds were applied by McBlair to the repair and improvement of the buildings upon the remaining lots, to the benefit of the estate and the beneficiaries under the will, in the same manner and to the same extent as if those proceeds had gone into the hands of the trustee and been directly applied by him according to the order of the court. This certainly constitutes an equity in favor of the appellant to the extent of these payments, entitling it to have them credited upon McBlair's notes in the hands of the trustee, in satisfaction of that much of the original amount due on account of the sale. The appellant also has a further equity, on payment to the trustee of the additional amount necessary to make good the whole amount of the agreed price of the property sold, to have the McBlair notes canceled and a conveyance of the title by the trustee, discharged of all lien, on account of unpaid purchase money. This amount is the difference between $24,521.50, for which the property was sold to McBlair and $22,700, the amount of cash actually received from the proceeds of the bonds, being $1,821.50, with interest thereon from the time of the sale to McBlair. It is indeed contended, on the part of the District of Columbia, that the consideration agreed upon between it and McBlair has been fully satisfied by the delivery of the bonds, the guaranty that they should produce ninety-seven cents on the dollar being denied as a matter of fact. The auditor, however, has reported otherwise upon the fact, and the record does not furnish us with a means of testing the accuracy of his conclusion. We are of opinion, however, independently of that controversy, that the District of Columbia cannot avail itself of any agreement with McBlair to accept bonds instead of cash. Its obligation as the

assignee of his bid is to pay his notes in full in money according to their tenor; and it is, therefore, bound to make good the difference between what McBlair actually received from it in money and the amount called for by his notes. Any resale of the property ordered by the court should be only in case of a default on the part of the appellant in making this additional payment within some reasonable time to be fixed by the court. The decree ordering a resale, without regard to the previous payments, and the right to make such additional payments as should be ascertained to be due and required to be paid, was therefore erroneous.

Counsel for the appellees contend in argument that the application of the proceeds of the sale to repair and improve the buildings upon the unsold portions of the real estate was not a legitimate investment of such proceeds within the purview of the third section of the Act of Congress of August 18, 1856, which requires that the proceeds of such sale shall be held under the control and subject to the order of the court, and invested under its order and supervision upon real and personal security or in government securities. But that question was finally passed upon by the court below in the decree of May 10, 1869, directing the sale for the purpose prayed for. This decree, it is true, directs that the proceeds of the sale be brought into court to abide its future order; but the actual application of the proceeds of sale to the improvement of the other property was distinctly brought to the notice of the court by the petition of the District of Columbia, and was assumed as rightful throughout the whole history of the case, without objection from any of the parties in interest. It would be grossly inequitable to permit the appellees, at this stage of the cause, to insist upon the objection. The discretion to make such an investment of the proceeds of the sale is conferred upon the Supreme Court of the District of Columbia by the Act of Congress authorizing the sale. The District of Columbia, as purchaser from McBlair, of course, had full notice that the purchase money was unpaid, and was bound as purchaser to see to the application of its own payments; but as no question has been made upon the fact that the money paid by it has gone to benefit and improve the estate of the appellees in the manner and to the extent contemplated by the court in ordering the sale of the unimproved lots, the appellant has a right, upon payment of the additional amount due from McBlair on account of the sale, to have a conveyance, under the order of the court, by the trustee.

The decree of the Supreme Court of the District of Columbia appealed from is, therefore, reversed, and the cause remanded, with directions to ascertain the amount still due from McBlair on his notes, given on account of his purchase, after crediting thereon the amount realized by him from the sale of the market stock bonds; and, on payment of the amount thereof by the appellant, to decree a conveyance of the title of the parties to this cause by the trustee to the District of Columbia; and in default of such payment, within a reasonable time to be fixed therefor, to direct a resale of the said premises for the satisfaction thereof.

And it is so ordered.

HUGH MOTRAM BROOKS, Alias W. H. MAXWELL, Alias WALTER H. LENOX, Alias THEODORE CECIL D'ANGUIER, *Plff. in Err.*

v.

STATE OF MISSOURI.

(See S. C. Reporter's ed. 394–400

Jurisdiction to review state court—right or immunity under the Constitution, laws or treaties of United States, what is—federal question, when arises—impartial jury—ground of decision.

1. To give this court jurisdiction under section 709 of the Revised Statutes, because of a denial by a state court of any title, right, privilege, or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed in the state court at the proper time in the proper way; and the decision must be against the right so set up or claimed.

2. An objection to the admission of evidence because it was incompetent and irrelevant, and because the witness by his conduct has shown himself to be unworthy of belief, and not because its admission would be a violation of any provision of the Constitution or laws of the United States, is not setting up or claiming any title, right, privilege or immunity under the Constitution, laws or treaties of the United States.

3. On a motion to quash an indictment, an objection made that the indictment proceedings, imprisonment and restraint are illegal and unlawful and in violation of the Constitution and laws of the State, and without due process of law, does not set up or claim any right or immunity under the Constitution, laws or treaties of the United States.

4. An assignment of error that the court instructed the jury that they might find the defendant guilty of murder if they were satisfied from the evidence that he did murder the person named in the indictment in the manner charged in either of the counts, when one of the counts was bad, involves a question of general law only, not in any manner dependent upon the Constitution or laws of the United States.

5. The same is true of the instruction that the jury were to be governed by the law as given them by the court, and of the refusal to allow counsel to read in his argument parts of the opinion of the supreme court of the State in a case decided by that court, which, as was claimed, stated correctly the legal principles governing the defense, where no reference was made to any provision of the Constitution or laws of the United States which gave defendant any right.

6. A refusal by the court to admit anyone to the court room during the trial, unless they were jurors or witnesses or had some business with the court, where no reliance was placed in the trial court, or is placed here, upon any federal law, as supporting the objection made to this action of the court, does not present any question of federal law for our consideration.

7. Exceptions taken at the trial, to rulings, by means of which it is claimed defendant was deprived of an impartial jury, where it is not claimed that the Constitution of the United States guaranteed to him such a jury, presents no question of federal law. The sixth article of the Amendments contains no such guaranty as to trials in the state court.

8. Where the decision of the alleged federal question by the state court was not necessary to the judgment rendered by it, but the court also put its decision upon another ground which was conclusive against the defendant, and was not repugnant to any provision of the Constitution or laws of the United States, this court has no jurisdiction.

[No. 1150.]

Submitted Jan. 9, 1888. Decided Jan. 23, 1888.

IN ERROR to the Supreme Court of the State of Missouri, to review a conviction and sentence of plaintiff in error, for murder.

On motion to dismiss. *Granted.*

Reported below 10 West. Rep. 679, 92 Mo. 542.

The facts of the case are stated in the opinion.

Mr. **B. G. Boone,** *Atty-Gen. of Missouri,* for defendant in error, for motion to dismiss:

To give this court jurisdiction in error of a judgment of a state court it must appear affirmatively, on the face of the record, not only that the federal question was raised, but that it was decided, or that its decision was necessary to the judgment or decree rendered.

Chouteau v. *Gibson,* 111 U. S. 200 (28: 400); *Detroit City R. Co.* v. *Guthard,* 114 U. S. 133 (29: 118).

The writ of error ought not to be allowed if it appears from the face of the record that the decision of the federal question was so plainly right as not to require argument.

Re Spies, 123 U. S. 131 (*ante,* 80).

"Due process of law" is process due according to the law of the land.

Walker v. *Sauvinet,* 92 U. S. 90 (23: 678); Cooley, Const. Lim. marg. p. 356; Webster's Argument in *Dartmouth College* v. *Woodward,* 17 U. S. 4 Wheat. 519 (4: 630); *Ker* v. *Ill.* 119 U. S. 436 (30: 421); *Davidson* v. *N. O.* 96 U. S. 97 (24: 616).

There can be no constitutional question presented for review or determination here, when the record shows a conviction and judgment upon two counts of an indictment which are good and sufficient in law.

Hurtado v. *Cal.* 110 U. S. 516 (28: 232).

Messrs. **P. W. Fauntleroy** and *John I. Martin,* for plaintiff in error, in opposition:

The validity of a statute of the State of Missouri, as construed and applied to the facts in this case, was drawn in question on the ground of its repugnancy to the Constitution of the United States, and the decision of both state courts was in favor of its validity.

Furman v. *Nichol,* 75 U. S. 8 Wall. 44 (19: 370); *Pennywit* v. *Eaton,* 82 U. S. 15 Wall. 380 (21: 72); *Chicago L. Ins. Co.* v. *Needles,* 113 U. S. 574 (28: 1084).

The due process of law guaranteed by the Fourteenth Amendment to one on trial in the state courts, includes the right to a trial by an impartial jury.

Tenn. v. *Davis,* 100 U. S. 257 (25: 648); *Va.* v. *Rives,* 100 U. S. 313 (25: 667); *Ex parte Va.* 100 U. S. 339 (25: 676); *Civil Rights Cases,* 109 U. S. 3 (27: 836); 2 Story, Const. 4th ed. 668, § 1949; *Yick Wo* v. *Hopkins,* 118 U. S. 356 (30: 220).

Courts have the common-law power and right to grant new trials.

State v. *Adams,* 84 Mo. 310; *Rex* v. *Atkinson,* 5 T. R. 437, note; *State* v. *Lee,* 66 Mo. 165; *Ritter* v. *First Nat. Bank,* 3 West. Rep. 231, 87 Mo. 574; *State* v. *Barham,* 82 Mo. 67.

The after discovered incompetency or disqualification of a juror is good ground for granting a new trial.

State v. *Burnside,* 87 Mo. 343; *State* v. *Wyatt,* 50 Mo. 309; *State* v. *Taylor,* 64 Mo. 358; *State* v. *Culler,* 82 Mo. 623; *State* v. *Cook,* 84 Mo. 40; *State* v. *Gonce,* 3 West. Rep. 803, 87 Mo. 627.

By conspiracy and plot, the accused was compelled to testify against himself.

Boyd v. *U. S.* 116 U. S. 616 (29: 746); *State* v. *Mahly,* 68 Mo. 315; *State* v. *Patterson,* 73 Mo. 695; *State* v. *Phelps,* 74 Mo. 128; *State* v. *Hopkirk,* 84 Mo. 278; 2 Story, Const. 4th ed. 546, § 1788; *Entick* v. *Carrington,* 19 Howell, State Trials, 1029.

The federal question involved herein was properly raised.

Bridge Proprietors v. *Hoboken L. & I. Co.* 68 U. S. 1 Wall. 116 (17: 571); *Furman* v. *Nichol,* 75 U. S. 8 Wall. 44 (19: 370); *Pennywit* v. *Eaton,* 82 U. S. 15 Wall. 380 (21: 72); *Klinger* v. *Mo.* 80 U. S. 13 Wall. 257 (20: 635); *Edwards* v. *Elliott,* 88 U. S. 21 Wall. 532 (22: 487); *Murray* v. *Charleston,* 96 U. S. 432 (24: 760); *Smith* v. *Greenhow,* 109 U. S. 669 (27: 1080).

The Legislature, by section 1918, R. S. 1879, confined the cross examination of a defendant, when a witness, to any matter referred to in his examination in chief. This amendatory clause has been frequently ruled upon by this court; and when its behests have been disobeyed, a reversal of the judgment has been the invariable result.

State v. *McGraw,* 74 Mo. 573; *State* v. *Turner,* 76 Mo. 350; *State* v. *McLaughlin,* 76 Mo. 320; *State* v. *Porter,* 75 Mo. 171; *State* v. *Douglass,* 81 Mo. 231; *State* v. *Patterson,* 3 West. Rep. 226, 88 Mo. 88; *State* v. *Chamberlain,* 5 West. Rep. 386, 89 Mo. 129.

The result of the opinion of the majority is to repeal the statute as it now stands and to restore and re-enact the Law of 1877.

Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.

Cooley, Const. Lim. 5th ed. p. 435 [355], 436, [356].

When the trial court amended the bad count and made it a good count, and then authorized the jury to find a general verdict, the indictment was no longer the indictment of a grand jury, and the court had no power to proceed further with the trial, and its proceedings were, for the reasons above set out, a violation of the prohibition of the Fourteenth Amendment.

Ex parte Bain, 121 U. S. 1 (30: 849); *Md.* v. *Baldwin,* 112 U. S. 490 (28: 822); *Slaughter House Cases,* 83 U. S. 16 Wall. 36 (21: 394); *Ex parte Va.* 100 U. S. 339 (25: 676); *Civil Rights Cases,* 109 U. S. 3 (27: 835); *U. S.* v. *Cruikshank,* 92 U. S. 542 (23: 588); *Hurtado* v. *Cal.* 110 U. S. 516 (28: 232); *Mo.* v. *Lewis,* 101 U. S. 22 (25: 989); *Ker* v. *Ill.* 119 U. S. 436 (30: 421); 2 Coke's Institutes, 48.

In criminal prosecutions, the accused has the right to appear and defend by counsel. This is affirmed in the Sixth Amendment to the United States Constitution. The action of the St. Louis Criminal Court, in refusing to permit counsel for the accused to state to the jury what the law was, was a denial of this constitutional right and a denial of the due process of law guaranteed to him by the Fourteenth Amendment.

Cooley, Const. Lim. 5th ed. 405 (330); 2 Story, Const. 4th ed. 667, § 1949.

Plaintiff in error was denied the due process of law, guaranteed him by the Fourteenth Amendment, by being deprived of a public trial.

A deputy sheriff and a police officer, during a whole day, absolutely excluded the public from the court room and refused to permit anyone

to enter the room except jurors, witnesses in the case, and persons having some business to transact with the court.

Sec. 22, Bill of Rights of Missouri Const.; Mo. R. S. 1879, § 1036; 2 Story, Const. 4th ed. p. 548, 607, §§ 1791, 1949; *Hopt* v. *Utah*, 110 U. S. 574 (28: 262).

Public trial by an impartial jury is affirmed and recognized by the Sixth Amendment to the United States Constitution and in section 22, Bill of Rights of Missouri Constitution.

Counsel asked one of the jurors whether he had formed or expressed any opinion, but the court refused to permit an answer.

State v. *Taylor*, 64 Mo. 358; *State* v. *Mann*, 88 Mo. 589; § 1897, Rev. Stat. Mo. 1879; Cooley's Const. Lim. 5th ed. p. 3 (3); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 866 (6: 234); 2 Coke's Inst. 54; *Dodge* v. *Woolsey*, 59 U. S. 18 How. 331 (15: 401).

It is the duty of the judge of a criminal court to instruct the jury in all the law arising in the case whether asked for or not.

Hardy v. *State*, 7 Mo. 607; *State* v. *Matthews*, 20 Mo. 55; *State* v. *Schoenwald*, 31 Mo. 147; *State* v. *Jones*, 61 Mo. 232; *State* v. *Stonum*, 62 Mo. 596; *State* v. *Branstetter*, 65 Mo. 149; *State* v. *Kilgore*, 70 Mo. 558; *State* v. *Banks*, 78 Mo. 592; *State* v. *Brady*, 2 West. Rep. 131, 87 Mo. 142; *State* v. *Palmer*, 5 West. Rep. 387, 88 Mo. 568.

The jury are not permitted to convict upon the confession alone, but are required to look for and find in the evidence outside the confession corroborating proof of the *corpus delicti*.

Robinson v. *State*, 12 Mo. 592; *State* v. *Scott*, 89 Mo. 424; *State* v. *German*, 54 Mo. 526; *State* v. *Patterson*, 78 Mo. 695.

Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law.

Kring v. *Mo.* 107 U. S. 221 (27: 506); *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50 (19: 594).

The failure and refusal of the trial court to give the accused the benefit of the law requiring the court to instruct the jury upon all questions of law was a denial of the due process of law guaranteed by the Fourteenth Amendment.

2 Story, Const. 4th ed. p. 405; *State* v. *Heed*, 57 Mo. 252; *Rollins* v. *State*, 62 Ind. 46; *Adams* v. *State*, 65 Ind. 565.

The information upon which this warrant was issued was sworn to only according to the best information and belief of the affiant; and this was equivalent to no oath at all.

Bridgeford v. *Steamboat Elk*, 6 Mo. 356.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In *Spies* v. *Illinois*, 123 U. S. 131, 181 [*ante*, 80, 91], it was said that "To give us jurisdiction under section 709 of the Revised Statutes because of a denial by a state court, of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more."

Applying that rule to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the Constitution, laws, or treaties of the United States. Thus, when the testimony of McCullough was offered, the admission of which is now assigned for error, the objection made was not that its admission would be a violation of any provision of the Constitution or laws of the United States, but because it was "incompetent and irrelevant," coming as it did from a man who, by his conduct in procuring the statements from the defendant as to which it was proposed he should testify, had shown himself to be unworthy of belief in a court of justice, and because "The witness has shown that he held out an inducement, a promise, to the defendant for his statement, which renders it incompetent."

And so in respect to the ruling on the motion to quash the indictment, and to discharge the defendant from arrest, the only objection was "that said indictment, proceedings, imprisonment, and restraint are illegal and unlawful, and in violation of the Constitution and laws of of the State of Missouri, and without any due process of law or lawful authority whatsoever." The particular provisions of the Constitution of the State now relied on in support of this assignment of error are section 11 of the Bill of Rights, to the effect that "No warrant to * * * seize any person * * * shall issue without probable cause, supported by oath or affirmation reduced to writing;" and section 12, "That no person shall, for a felony, be proceeded against criminally, otherwise than by indictment."

Another of the assignments of error is that the court instructed the jury that they might find the defendant guilty of murder in the first degree if they were satisfied from the evidence that he did kill and murder the person named in the indictment "in the manner and form charged in either of the counts," when one of the counts was bad. As presented to the trial court at the time, the question involved in this part of the charge was one of general law only, and not in any manner dependent upon the Constitution or laws of the United States.

The same is true of the instruction that the jury were to be governed by the law as given them in charge by the court, and of the refusal to allow counsel to read in his argument parts of the opinion of the supreme court of the State, in a case decided by that court, which, as was claimed, stated correctly the legal principles bearing upon a part of the defense. No reference was made to any provision of the Constitution or laws of the United States which gave to the defendant any rights in this behalf.

In the progress of the trial, counsel for the defendant addressed the court as follows: "If the court please, we learn that there are two men stationed at the door, who refuse to admit anyone who is not a juror or witness or officer or some one having business in the court room. We object to that. We claim this is a public court room, and the trial should be public, and

the public ought to be admitted. We understand that they are there by order of the court." Upon this statement permission was asked "to introduce proof to show that, during the whole day of yesterday, and so far today, up to this time today, that a deputy sheriff and a police officer have been stationed at the door of the court room, who refuse, who have refused, to admit anyone to the court room unless they were jurors or witnesses or have some business with the court." The court refused this permission but did direct "That all persons be admitted to the court room until it is filled, all the seats are filled, reserving the right to the attorneys for the State and the defendant to bring within the bar such persons as the court may permit, giving preference to jurors who have been summoned here to be seated in the front seats outside of the bar." To this rule exception was taken, and it is assigned here as one of the errors on which our jurisdiction may rest. No reliance seems to have been placed in the trial court upon any federal law, and here section 22 of the Bill of Rights of the Missouri Constitution is alone cited as supporting the objection which was made. That section provides that "In criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county."

Others of the exceptions taken at the trial relate to rulings by means of which, it is claimed, the defendant was deprived of an impartial jury; but it does not appear to have been claimed that any provision of the Constitution of the United States guaranteed to him such a jury. That the sixth article of the Amendments contains no such guaranty as to trials in the state courts has always been held. *Spies* v. *Ill.* 123 U. S. 131, 166 [*ante*, 80, 86] and the cases there cited.

These are all the assignments of error which relate to the rulings in the progress of the trial, and they fail entirely to present any questions of federal law for our consideration. So far as appears, the trial court in its decisions was governed exclusively by the Constitution and laws of the State; and the supreme court in its opinion on this part of the case, which is in the record, makes no mention whatever of any claim of right under the Constitution or laws of the United States.

Section 1967 of the Revised Statutes of Missouri, relating to crimes and criminal procedure, is as follows:

"The motion for a new trial shall be in writing, and must set forth the grounds or causes therefor, and be filed before judgment, and within four days after the return of the verdict or finding of the court, and shall be heard and determined in the same manner as motions for new trials in civil cases."

The verdict was rendered June 5, 1886; and on the 9th of that month, before judgment was entered, the defendant filed a motion for a new trial. Afterwards, on the 17th of June, he presented and asked leave to file a supplemental motion for a new trial, setting up the following additional reason:

"1. Because Jesse F. Sears, one of the jurors who sat upon the trial of this cause, upon his examination on the *voir dire*, purposely and untruthfully answered the questions asked him by counsel for the State and the defense in such a manner as to indicate and cause said counsel to believe, and in such a manner that the defendant and his counsel did believe, he was a fair and impartial juror, and one who had no prejudice or bias in the case, and who had neither formed nor expressed any opinion as to the guilt or innocence of the accused, and thereby induced the defendant to accept him as a qualified juror in the case; whereas, in truth and in fact said juror was not a fair and impartial juror, and he had a prejudice and bias against the defendant herein, and had prior to his said examination upon his *voir dire*, on many occasions, expressed his opinion and declared that Maxwell, the above named defendant, was guilty of murdering his companion, Preller, and that he ought to be hung, and would be hung, and that hanging was too good for him, and other similar expressions, all of which was by said juror improperly and wrongfully concealed upon his examination upon his *voir dire*, and only came to the knowledge or hearing of the said defendant or either of his counsel long after the rendition of the verdict herein, and also after the filing of the first or original motion for a new trial herein, and after the expiration of the four days allowed by statute within which to file a motion for a new trial."

In support of this motion the defendant presented the affidavits of four persons, to the effect that they had each, on different occasions, heard the juror referred to express opinions of the character of those alleged, and also the affidavits of the defendant and his counsel that they had neither of them any "knowledge, idea, suspicion or intimation" of the "facts set out and stated" in the other affidavits until "after the expiration of the four days allowed by the statute within which to file a motion for a new trial."

The record then states that the motion for leave to "file said supplemental motion for a new trial and the aforesaid affidavits" was argued, and that "In this argument counsel for the defendant contended and made the point that if the statute, declaring that in criminal cases a motion for a new trial with the reasons therefor must be filed within four days after verdict, prevented the court from hearing the aforesaid supplemental motion for a new trial and the affidavits offered therewith and the matters and facts therein stated, and from granting defendant a new trial upon said facts if found to be true, then said statute was null and void as being in violation of the Constitution of the State of Missouri and of that of the United States, especially those provisions of the State Constitution declaring that 'In criminal prosecutions the accused shall have the right to * * * a speedy, public trial by an impartial jury of the county,' and that 'No person shall be deprived of life, liberty, or property without due process of law;' and those provisions of the United States Constitution which declare as follows, to wit: 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The court, after taking the matter under advisement, overruled the motion "on the ground that the court had no power or right under the statute to grant said request."

Upon this branch of the case the supreme court, according to its opinion in the record, ruled as follows:

"This statute is mandatory, and, according to the uniform ruling of this court since the case of *Allen* v. *Brown*, 5 Mo. 323, a refusal to grant a new trial on a motion made more than four days after the trial is not error; and it has been further held that, unless it affirmatively appears by the record that the motion for a new trial was filed within four days after trial, this court will not consider the question it presents. *Welsh* v. *St. Louis*, 78 Mo. 71; *Moran* v. *January*, 52 Mo. 523, and cases cited. In the case of *State* v. *Marshall*, 36 Mo. 400, when defendant was convicted of murder in the first degree, it is said: 'No exceptions will be noticed here when no motion for a new trial has been made, or, what is the same thing, when none is made within the time prescribed by law.' If authority is to be found putting it in the discretion of the court to authorize the filing of a supplemental motion for a new trial, in view of the time the court gave defendant to make proof of the matter set up in the motion which was filed in time, and in view of the length of time consumed in the trial, we would be unwilling to say that the court exercised its discretion arbitrarily, in refusing such an application."

It thus appears that, while upholding the statute, the court also put its decision on another ground which was equally conclusive against the defendant; to wit, that even if the trial court could, in its discretion, allow the additional reason for a new trial to be presented after the expiration of the four days, there had been no such abuse of that discretion in this case as would justify a reversal of the judgment on that account. That part of the decision is certainly not repugnant to any provision of the Constitution or laws of the United States, and it is of itself conclusive. It was fairly presented and necessarily involved in the case. It disposed of the supposed constitutional question presented in the argument, without a direct decision, upon a ground which cannot be reviewed by us, and which was not evasive merely, but real. *Chouteau* v. *Gibson*, 111 U. S. 200 [28: 400]; *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S. 126, 127 [28: 679, 680]; *Chapman* v. *Goodnow*, 123 U. S. 540, 548 [*ante*, 235, 238]. Such being the case, the decision of the alleged federal question was not necessary to the judgment rendered, and consequently is not sufficient to give us jurisdiction. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590, 636 [22: 429, 444].

The motion to dismiss is granted.

STATE NATIONAL BANK OF SPRINGFIELD, ILLINOIS, *Plff. in Err.*,
v.
JOHN L. DODGE.

(See S. C. Reporter's ed. 333-347.)

Deposits in bank from bankrupt estates—checks drawn by the court—separate accounts unnecessary—duty of bank—memoranda on checks—Rule 28.

1. Where deposits are made in a bank, by the clerk of the United States District Court, of sums received on account of the estates of bankrupts, the bank may keep its account with the district court as a general account, and is not required to keep a separate account with each bankrupt estate.

2. Where the deposits made in the bank were entered by it in the name of the United States District Court, without any name of any bankrupt, but with the number of the case; and the bank has paid out, upon checks drawn by the court, all the moneys deposited in it by the court, to parties entitled to receive the amounts of the checks from the court as moneys held in trust for them, *held*, that the bank had the right to presume that the court, as trustee, was properly performing its duties, and was bound to honor all checks drawn by the court as such trustee, and is not bound to refuse checks drawn in any particular case according to its number, beyond the amount deposited in the bank under that number.

3. The failure of the bank to keep such separate accounts, or its action in paying out all the funds deposited to the credit of the court on checks drawn generally, did not render the bank liable for the amount of checks drawn on it, in any case, after it had paid out all the funds deposited on checks drawn generally.

4. It was not the duty of said bank to keep the funds received in each case of bankruptcy as a separate fund, to be applied only to the payment of such checks as were drawn in and numbered in the particular case from which such funds were derived, there being no evidence of intention that the bank should be controlled by any numbers on the check in paying such check.

5. No bank is bound to take notice of memoranda or figures upon the margin of a check, which a depositor places there merely for his own convenience to preserve information for his own benefit; and in such case the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund.

6. Rule 28 in Bankruptcy does not require that the deposit should be made to the credit of each particular estate, but merely that the moneys should be deposited by the clerk; nor does such rule require that the bank should keep a separate account with each estate.

[No. 1118.]

Submitted Jan. 9, 1888. Decided Jan. 23, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois to review a judgment entered on division of opinion, in favor of plaintiff, on questions certified. *Reversed.*

The facts and case are fully stated in the opinion.

Messrs. Milton Hay and **Henry S. Greene,** for plaintiff in error:

The Bank had a right to presume that the court and its officers were properly performing their duty in the distribution of the trust fund.

Central Nat. Bank v. *Conn. Mut. L. Ins. Co.* 104 U. S. 54 (26:693).

Until notice to the contrary, the trustee is presumed to be in the performance of his duty.

Duncan v. *Jaudon*, 82 U. S. 15 Wall. 165 (21: 142).

The Bank had no right to treat the trust fund as the private property of the trustee.

Shaw v. *Spencer*, 100 Mass. 382; *Pannell* v. *Hurley*, 2 Col. C. C. 241; *Bodenham* v. *Hoskyns*, 2 De Gex, M. & G. 903; *Ex parte Kingston*, L. R. 6 Ch. App. 632; *Fifth Nat. Bank* v. *Hyde Park*, 101 Ill. 595.

The Bank dealt with the money in a trust capacity, and sustained no improper relations with the trustee.

11 Dan. Neg. Inst. § 1612 *a*; Morse, Banking, 274.

The Bank had no notice of any irregularity, and could not be held accountable for the distribution of the fund.

Otis v. *Gross*, 96 Ill. 618.

The duty to keep a separate account did not arise from any law of the United States.

Stat. at L. §§ 995, 996, 3642, 3648.

The duty of keeping separate accounts did not arise because of anything contained in Rule 28 in Bankruptcy.

The Supreme Court of Illinois, in *State Nat. Bank* v. *Reilly*, 11 West. Rep. 783, has decided this question in favor of the Bank.

Mr. **George Hunt**, for defendant in error:

In the case at bar plaintiff in error had actual notice from its own books as to what estates had funds in its depository; and it had actual notice on the face of every check drawn in a case from which no funds had been received, that there were no funds in the depository liable for the payment of such check.

Lowry v. *Commercial & F. Bank*, Taney, C. C. 310; *Shaw* v. *Spencer*, 100 Mass. 390; *Bodenham* v. *Hoskins*, 18 Eng. L. & Eq. 283; *Bank of U. S.* v. *Macalester*, 9 Pa. 475; *Internat. Bank* v. *Jones*, 7 West. Rep. 698, 119 Ill. 407.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought in the Circuit Court of the United States for the Southern District of Illinois, by John L. Dodge against the State National Bank of Springfield, Illinois, to recover a sum of money on an indebtedness alleged to have arisen under the circumstances set forth in the certificate of division of opinion hereinafter referred to. After issue joined, the parties filed a stipulation in writing that the cause should be tried before the court without the intervention of a jury. It was so tried before the court held by the circuit justice and the circuit judge; and, they having differed in opinion as to certain questions arising at the trial, which questions were embodied in such certificate of division, duly filed, a judgment was entered for the plaintiff, in accordance with the opinion of the circuit justice, for the sum of $2,326.80 and costs.

It is stated in the certificate that on the trial the court found the following facts:

"1. That the defendant was appointed depository for the United States District Court for the Southern District of Illinois about March 1, 1878.

"2. That on March 4, 1878, George P. Bowen, clerk of the district court, made the first deposit of funds belonging in the registry of said district court with said Bank, and the Bank then, by direction of clerk Bowen, opened an account with 'The United States District Court for the Southern District of Illinois,' and entered said deposit to the credit of said court, and that each deposit so made by the clerk was by the Bank entered on its book, and on the deposit book of the clerk, to the credit of the particular case, naming the case with the number, to which the funds so deposited belonged; that afterwards, by direction of the clerk, all deposits so made were entered by the Bank in the name of 'The United States District Court for the Southern District of Illinois,' dropping the name, but retaining the number of the case, as hereinafter specially set forth.

"3. That said clerk continued to make deposit of funds belonging in the registry of said court with said Bank, up to his death, which occurred in February, 1880, and said Bank continued to enter said deposits to the credit of the court in the manner directed by the clerk.

"4. That the entries of these deposits were made under direction of the clerk, both on the books of the Bank, and on the deposit book retained by the clerk, in the following manner, viz.:

1873, March 4th.	To dep. 1971 ..	$1,075 00
1874, January 30th.	To dep. 1425 ..	225 00
1875, January 11th.	To dep. 1590 ..	4,619 22
1876, January 24th.	To dep. 1637 ..	5,200 00

"5. That at the time each deposit was made the clerk brought to the Bank the money to be deposited, together with his depositor's book, and a ticket which would be like the following, differing only as to number, date, and amount:

'State National Bank,
Springfield, Ills., March 4, 1878.
'Deposited by George P. Bowen,
Clerk, current funds, No. 1971..$1,075 00;

whereupon, the cashier of the Bank would receive the funds and the ticket and enter in the clerk's deposit book, as well as in the books of the Bank, under the account with 'The District Court for the Southern District of Illinois,' as follows:

'1878, March 4th. To dep. 1971..$1,075 00;'

that the Bank understood, when these entries were made, that the numbers on either side of the account (as No. 1971 above) referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn.

"6. That case No. 2105 was pending on the bankruptcy side of the court, and, during the years 1879, 1880, and 1881, money to the amount of $38,300, realized from the estate of H. Sandford & Co., and belonging in said case, was paid into the registry of the court, and by the clerk Bowen, and his successor, Converse, deposited with said court, from time to time, and entered like all other deposits, to the credit of said court, each deposit of the item of this fund being accompanied by a ticket from the clerk like the following, differing only as to date and amount, viz.:

'State National Bank,
Springfield, Ills., July 25, 1879.
'Deposited by George P. Bowen, clerk, current funds, No.
2105.....$17,000 00;'

said deposit account in said case being in full as follows:

'The State National Bank of Springfield, Ills., in ac. with U. S. Dist. Court, S. Dist. Ills.

1879, July 25th.	To dep.		2105.....	$17,000 00
Aug. 7th.	"	"	2105.....	5,000 00
1880, Jan'y 10th.	"	"	2105.....	4,000 00
Oct. 14th.	"	"	2105.....	10,000 00
Nov. 12th.	"	"	2105.....	2,000 00
1881, Feb'y 25th.	"	"	2105.....	300 00'

"7. That the officers of the Bank, on receiving deposits accompanied by such ticket, understood the 'No. 2105' on the ticket to refer to a case of that number in the district court.

"8. That the orders drawn by the court on the Bank, for funds, in bankruptcy cases, were in the following form, the blanks being filled out to suit each case:

'Check No.—. Case No.—
In the District Court of the United States for the Southern District of Illinois.
In the Matter of—— ——, Bankrupt.
Springfield, Ills., —— —, 188–.
The State National Bank, U. S. depository.
Pay to the order of—— —— ——dollars, being in full for the dividend of——per cent. declared —— —, 18\–, on —— claim for $—— proven against said bankrupt estate.
$——. —— ——, *Clerk.*'
Countersigned:
—— ——, *Judge.*'

The 9th finding of fact sets forth that the checks or orders so drawn and in controversy in this case were six in number, each in the form of the blank set forth in finding No. 8. In two of the checks, the figure following the words "Check No." was the figure "2," in two others of them, the figure "3," in one of them, the figures "27," and in the remaining one, the figures "28." In each of them, the figures following the words "Case No." were "2105." One check numbered "2" was entitled "In the Matter of Andrew Gundy;" the other check numbered "2," "In the Matter of Joseph Bailey." One check numbered "3" was entitled "In the Matter of Abner P. Woodworth;" the other check numbered "3," "In the Matter of Joseph Bailey." Check No. 27 and Check No. 28 were each entitled "In the Matter of H. Sandford & Co." Each of the six checks was dated May 12, 1881, and each was payable "to the order of George Hunt, att'y for John L. Dodge." The Gundy check No. 2 was for $517.33, "in full for the dividend of 2½ per cent, declared April 30, 1881," on a claim for $20,693.33. The other check No. 2 was for $75.48, "in full for the dividend of $\frac{11}{100}$ per cent, declared April 30, 1881," on a claim for $22,874.98. One of the checks No. 3 was for $724.26, "in full for the dividend of 3½ per cent, declared April 30, 1881," on a claim for $20,693.33. The other check No. 3 was "in full for the dividend of $\frac{11}{100}$ per cent, declared April 30, 1881," on a claim for $20,693.33. Check No. 27 was for $160.12, "in full for the dividend of $\frac{7}{10}$ per cent, declared April 30, 1881," on a claim for $22.874.98. Check No. 28 was for $144.85, "in full for the dividend of $\frac{7}{10}$ per cent, declared April 30, 1881," on a claim for $20.693.33. Each check was signed by the clerk of the district court, and was countersigned by the district judge.

The findings then proceed as follows:

"9½. That Andrew Gundy, Joseph Bailey, Abner P. Woodworth, and Hiram Sandford were all members of the firm of H. Sandford & Co., whose case is numbered 2105 herein, and that all of said parties were each individually adjudged bankrupts in said cause.

"10. That said checks were presented at the Bank for payment and payment refused, and the checks were protested for nonpayment, June 27, 1881.

"11. That the funds actually belonging to said case No. 2105 and deposited with said Bank in manner aforesaid were sufficient to pay all checks drawn by the clerk, and countersigned by the judge, in favor of creditors in said case, including said checks in controversy, the funds so deposited amounting to $88,300, as aforesaid, and all checks drawn thereon, including the checks in controversy in this suit, amounting to $83,856.19, leaving a balance to the credit of said case of $4,943.81.

"12. That the Bank, before the presentation of the checks in controversy, had actually paid out, on checks similar to the above, signed by the clerk and countersigned by the judge, and differing only as to number of case, names, dates and amounts, all the funds ever deposited with it to the credit of the court, many of such checks being drawn, as indicated therein, in cases in which no deposits had been made by the clerk.

"13. That, from the time of the first deposit with said Bank, as depository of said court, up to the death of said Bowen, in February, 1880, the bank balanced the account with said court nine different times, returning all the checks to the clerk at each balancing, and entering the case No. and amount of each check so returned, in the depositor's book of the clerk, these balances being struck at the following dates, and showing each time the general balance to the credit of the court, as follows, viz.:

August 30th, 1877	$13.691 57
December 8th, 1877	11,024 74
January 5th, 1878	7,853 04
January 23d, 1879	8,594 00
February 28th, 1879	11,456 01
June 2d, 1879	27,095 36
August 2d, 1879	23,273 89
October 30th, 1879	21,244 48
January 10th, 1880	32,670 57

"14. That the last balancing of said account, showing how it stood when the Bank refused to pay the check in controversy, was in July, 1881, when the account showed a balance of $43.18 against the court.

"15. That the Bank always treated the account as an entirety, and paid out of it all checks drawn by the clerk and countersigned by the judge, until the deposits were exhausted; and, in so doing, the deposits were exhausted before the drawing and presentation of the checks in controversy, many of such checks so paid having been drawn in cases, as indicated by the numbers, in which no deposit had been made by the clerk.

"16. That the Bank was never served with a copy of the order of the district court appointing it a depository of the court; but its cashier was orally informed thereof by the clerk of the court, and thereafter the Bank acted as such depository, receiving and paying out money under the orders of the clerk, countersigned by the judge, as above given.

"17. That the Bank never was furnished with a copy of Rule 28 in Bankruptcy, and had no actual knowledge of the rule.

"18. That neither the clerk, Bowen, nor his successor, Converse, presented to the district court at each or any regular session of said court, after the defendant was so appointed depository, the account and vouchers required by section 798 of the Revised Statutes of the United States.

"19. That neither of these clerks made, or was required to make, at any time after the defendant was appointed depository, the monthly report provided for by Rule 28 in Bankruptcy.

"20. That the civil and criminal and admiralty cases in the district court are numbered from one, consecutively, and, at the time the

deposits in question were made, there were two cases numbered 2105, in the district court. There was no evidence that deposits were or were not made in this Bank in favor of, or checks drawn on, any other number 2105 than those drawn in this bankruptcy case."

Rule 28 in Bankruptcy, referred to in the seventeenth and nineteenth findings of fact, was in these words:

"The district court in each district shall designate certain national banks, if there are any within the judicial district, or, if there are none, then some other safe depository, in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited; and every assignee and the clerk of said court shall deposit all sums received by them severally, on account of any bankrupt's estate, in one designated depository; and every clerk shall make a report to the court of the funds received by him, and of deposits made by him, on the first Monday of every month. On the first day of each month, the assignee shall file a report with the register, stating whether any collections, deposits or payments have been made by him during the preceding month, and, if any, he shall state the gross amount of each. The register shall enter such reports upon a book to be kept by him for that purpose, in which a separate account shall be kept with each estate; and he shall also enter therein the amount, the date, and the expressed purpose of each check countersigned by him. No moneys so deposited shall be drawn from such depository, unless upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this rule shall be furnished to the depository so designated, and also the name of any register authorized to countersign said checks."

Section 798 of the Revised Statutes of the United States, referred to in the eighteenth finding of fact, was in these words: "At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court."

The certificate goes on to state that the judges found and agreed upon the foregoing facts, and differed in opinion on the following questions of law:

"First. Was it the duty of plaintiff in error to keep a separate account with each case in bankruptcy in which deposits were made in the bank?

"Second. Was it the duty of plaintiff in error to refuse any check drawn in the name of the court and countersigned by the judge thereof, unless such check specified the case in bankruptcy on account of which the same was drawn, and there were funds in the Bank to the credit of such cause?

"Third. Did the failure of the Bank to keep such separate accounts, or its action in paying out all the funds deposited to the credit of the court on checks drawn generally, leaving no funds to meet the checks in controversy, render the Bank liable in this action?

"Fourth. Did the fact that the defendant Bank paid out and exhausted all the funds placed to the credit of the court on checks some of which did not bear the number of any case from which funds had been derived, render the defendant liable on the checks in controversy, when, if separate accounts had been kept with each case or number, there would have been funds to the credit of case No. 2105 sufficient to satisfy said checks?

"Fifth. Notwithstanding the fact that the defendant Bank opened an account with 'The United States District Court for the Southern District of Illinois,' and credited the funds received in bankrupt cases generally to the credit of said court 'in the manner directed by the clerk' of said court, and notwithstanding the further fact that, from time to time, the Bank settled said account with said court as a general account, was it, nevertheless, the duty of said Bank to keep the funds received in each case of bankruptcy as a separate fund, to be applied only to the payment of such checks as were drawn in, and numbered in, the particular case from which such funds were derived?

"Sixth. Did the fact that the Bank understood, when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn, require the Bank to keep the funds belonging to such case for the payment of checks drawn therein, notwithstanding the fact that the account was opened and kept as a general account with the court, as directed by the clerk of the court, and had, from time to time, been settled with the court as a general account?

"Seventh. Did the fact that the Bank understood, when deposits were made, that the numbers on either side of the account, as 2105 in this case, referred to the case in which the deposit in the first place was made and in which the check in the second place was drawn, require the Bank to keep the funds belonging to such case for the payment of checks drawn therein?

"Eighth. Was the fact that the Bank understood, when deposits were made, that the numbers on either side of the account, as 2105 in this case, in which the deposit in the first place was made and in which the check in the second place was drawn, sufficient notice to the Bank of the nature of such deposit, to justify it in refusing to pay out any of the funds arising therefrom on checks drawn, as indicated therein, in cases in which no deposits had been made by the clerk?"

The certificate states that the circuit justice was of opinion that each of the eight questions should be answered in the affirmative, and that the circuit judge was of opinion that they should be answered in the negative. The

defendant has brought a writ of error to review the judgment.

Notwithstanding the various forms of the questions of law stated in the certificate, they substantially present but a single question, and that is whether the Bank was warranted in keeping its account with the district court as a general account, or whether it was its duty to keep a separate account with each bankrupt estate. The ruling of the circuit justice was that it was the duty of the Bank to keep such separate account with each bankrupt estate, and the judgment followed such ruling.

It being found as a fact that the funds actually belonging to case No. 2105, and deposited with the Bank in the manner stated in the findings, were sufficient to pay the checks in controversy, if the Bank had not, before the presentation of those checks, actually paid out, on like checks, differing only as to number of case, names, dates and amounts, all the funds ever deposited with it to the credit of the court, many of such checks being drawn in cases in which no deposits had been made by the clerk, it is claimed by Dodge that the money deposited belonging to case No. 2105 was improperly paid out by the Bank on checks drawn by the court on account of other cases. On the other hand, the Bank claims that the deposits were made and entered to the credit of the court, and that the checks drawn were drawn against a fund on deposit to the credit of the court, and not against a fund on deposit to the credit of any particular case; that the Bank had a right to presume that the court, as trustee, was properly performing its duty, and was bound to honor all checks drawn by the court as such trustee; and that the Bank was under no duty to keep accounts for the court, and to inform the court that it was drawing checks in cases in which there were no funds to the credit of the case in which the check was drawn.

It clearly appears, from the findings of fact, that the deposits made in the Bank by the clerk for the court were, according to the direction of the clerk, entered by the Bank in the name of the "United States District Court for the Southern District of Illinois," without any name of any bankrupt, but with a number opposite the deposit and its date and amount, both in the books of the Bank and in the deposit book retained by the clerk; and that the Bank has paid out, upon checks drawn by the court, all the moneys deposited in it by the court, on checks drawn by the court, to parties who were entitled to receive the amounts of the checks from the court, as moneys which the court held in trust for the holders of the checks. Under these circumstances, the only question is upon whom the loss shall fall, and whether it shall fall upon the Bank by reason of any violation by it of any duty which rested upon it.

It is insisted by Dodge that it was the duty of the Bank to so keep its accounts as not to pay out on a check drawn on account of a case other than No. 2105, moneys deposited to the credit of the court by a deposit opposite to which the number 2105 was found in the books of the Bank and in the deposit book of the court. The only fact in the case out of which such duty could arise was the fact of the existence of the number 2105 in the books of the Bank and in the deposit book of the court, and its absence from the face of the checks.

In the manner in which it kept the account, the Bank at all times followed the directions of the clerk; and we are unable to see anything in the transactions which implies any notice to or duty upon the Bank to keep or deal with the deposits made under each number as a separate account, especially in view of the balancings of the account stated in the thirteenth finding of fact. The claim on the part of Dodge is that it was the duty of the Bank, not merely to keep the funds of the court safely, but to refuse to honor the checks of the court if it found that the court was drawing checks in any particular case, according to its number, beyond the amount deposited in the Bank under that number; but we are of opinion that the Bank had a right to assume that these memoranda of numbers in the deposits and in the checks were merely for the convenience of the court and its officers, and that it also had a right to presume that the court and its officers were properly performing their duty in distributing its trust funds. *Central Nat. Bank* v. *Conn. Mut. L. Ins. Co.* 104 U. S. 54, 64 [26: 698, 698].

The deposits were made to the credit of the court, in accordance with section 995 of the Revised Statutes, which required that "All moneys paid into any Court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of of such court;" and section 996 provided that "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." The deposits being, as required, in the name and to the credit of the court, the Bank was authorized and required to honor all checks drawn by the court, and to pay them generally out of such deposits; and the order or check for withdrawing the money, in stating the cause in or on account of which it was drawn, was a memorandum imposing no duty upon the bank, but only operating for the convenience of the court and its officers, in keeping its accounts. The obvious purpose of the memoranda of numbers in the deposit book of the court and upon the checks, was to enable the court and the clerk to properly keep the accounts, and that the checks might operate as vouchers, showing the manner in which the moneys in any particular case were distributed, and to enable the clerk to show to the court that he had deposited the funds which he had received. There is no evidence anywhere of any intention that the Bank should be controlled by the numbers in paying any check drawn upon it.

Nor do we perceive that there is anything in Rule 28 in Bankruptcy which governs this subject. The requirement in that rule that "Every assignee and the clerk of said court shall deposits all sums received by them sever-

ally, on account of any bankrupt's estate, in one designated depository" seems to us to be abundantly satisfied by interpreting it as meaning that the assignee and the clerk shall deposit all sums received by them severally, that is, respectively, on account of any bankrupt's estate, in one designated depository. The requirement of Rule 28, that the check or warrant for drawing money from the depository shall state the account for which it is drawn, that is, the name of the estate, contains no indication that the Bank is expected to keep a separate account with each estate; because, if it had been the intention that a separate account should be opened with each estate, it would naturally have been required that each check should direct the bank to charge the amount to such particular estate. Such was not the requirement of the rule, and such was not the form of the check used. The rule was fully complied with in the present case. It did not require that the deposits should be made to the credit of each particular estate, but merely that the moneys should be deposited by the clerk. If it had been intended that the Bank should keep a separate account with each bankrupt case, the requirement of the rule that each check should specify the account for which it was drawn would have been superfluous, because no check otherwise drawn could or would have been paid.

It appears thus to have been plainly the sole purpose of the Rule that each check, when drawn and paid, should remain in the hands of the clerk, when returned to him by the Bank, as evidence not only of the payment by the Bank of the amount, but also that the court had paid the amount to the particular creditor in the particular case. Thus the check would become a voucher, not only as between the court and the bank, of the payment by the latter of so much money which had been on deposit in it to the credit of the court, but a voucher as between the court and the creditor, who had received the money on account of what was due to him in a particular bankrupt case.

No bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the Bank that the particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank. No facts are found in the present case which give to the figures which accompanied the deposits such a meaning as could require the Bank to open a separate account with each bankrupt estate, especially in view of the fact found in the second finding, that, after having had at one time the name of the case in which the deposit was made entered by the Bank on its book, and on the deposit book of the clerk, in the credit, the clerk directed afterwards that the name should be dropped in deposits, and that they should be entered simply in the name of the court, but retaining the number of the case. It must be assumed that this change in the manner of keeping the account had some object in view, and that object clearly must have been to avoid the keeping of separate accounts; and, if the keeping of separate accounts was in fact to continue to be required, in view of the use of the numbers in connection with the deposit tickets, an equal amount of labor, if not a greater amount, would have been caused to the Bank by the change, as was required of it before, without any possible object being accomplished by the change.

The questions certified are all of them answered in the negative; the judgment of the Circuit Court is reversed; and the case is remanded to that Court, with a direction to enter a judgment in favor of the defendant.

UNITED STATES, *Appt.*,

v.

DAVID MOUAT.

(See S. C. Reporter's ed. 303-308.)

Officers of navy, pay of—officer, who is—paymaster's clerk, law as to.

1. By the provision in the Naval Appropriation Act of June 30, 1876, that so much of the Army Appropriation Act of June 16, 1874 (which provides that only actual traveling expenses shall be allowed to any employees of the United States while engaged on public business), as is applicable to officers of the navy so engaged is repealed, Congress did not repeal the whole of that statute, but only selected a certain class of persons designated as officers of the navy to whom it should no longer apply, and the operation of that provision must be confined to those who are, properly speaking, officers of the navy.

2. Unless a person in the service of the Government holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, under the Constitution, an officer of the United States.

3. As there is no statute authorizing the secretary of the navy to appoint a paymaster's clerk, nor any Act requiring his approval of such an appointment, and the regulations of the navy do not require any such appointment or approval, a paymaster's clerk is not therefore an officer appointed by the President or under the authority of any law vesting such appointment in the head of a department, and is not an officer of the navy, within the meaning of the provision of the Act of June 30, 1876.

4. Congress may have used the word "officer" in other statutes in a more popular sense than the constitutional one, as will appear in the case of the *United States* v. *Hendee*, immediately following this.

[No. 1070.]

Submitted Dec. 14, 1887. Decided Jan. 23, 1888.

APPEAL from a judgment of the Court of Claims, in favor of appellee, for compensation for traveling expenses as paymaster's clerk. *Reversed.*

The case is stated by the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** *Asst. Atty.*, for appellant:

A paymaster's clerk is not an officer within the provisions of the Constitution of the United States.

U. S. v. *Germaine*, 99 U. S. 509 (25: 482).

A paymaster's clerk is allowed to certain paymasters in the navy.

R. S. §§ 1886-1888.

The manner of his appointment is fixed by naval regulations.

Nav. Reg. 1876, par. 9, p. 95; *U. S.* v. *Moore*, 95 U. S. 760 (24: 588); *U. S.* v. *Hartwell*, 73 U. S. 6 Wall. 388 (18: 830); *U. S.* v. *Germaine*, *supra*; *Ex parte Reed*, 100 U. S. 18 (25: 538); *Re Bogart*, 2 Sawy. 407.

If an officer at all, he is an officer attached to the pay corps.

Sec. 1378, R. S.

Mr. **Linden Kent**, for appellee:

The petitioner, as a paymaster's clerk, is an officer of the navy within the contemplation of the Act of June 30, 1876.

19 Stat. at L. p. 65; *U. S.* v. *Moore*, 95 U. S. 760 (24: 588).

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a judgment of the Court of Claims, in favor of David Mouat, for the sum of $83.28.

The question arises as to the compensation to be paid to Mouat for traveling expenses while acting as a paymaster's clerk. The Act of Congress of June 16, 1874, making appropriations for the support of the army for the next fiscal year, has appended to the clause providing for the transportation of officers and baggage, and for their traveling expenses, the following:

"*Provided*, That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for milages and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision." 18 Stat. at L. 72.

This proviso in its terms is applicable to every person holding employment or appointment under the United States, and seems to be one of those frequent cases in which Congress in a general appropriation bill has intentionally enacted some law reaching far beyond the general scope of the bill itself. Its obvious purpose was to abolish all payments for traveling expenses in which a specific allowance per mile was made by law, and to establish the more equitable principle of paying the actual expenses of persons traveling in the service of the Government. And it is to be observed that the universality of this principle is secured by the use of the two words "employment or appointment" in reference to persons serving under the Government of the United States.

Two years later, when Congress was making appropriations for the *naval* service, by the Act of June 30, 1876, the attention of that body seemed to be directed to the fact that it included officers of the navy, as well as all other officers of the Government. That Act contains the following provision:

"And so much of the Act of June 16, 1874, making appropriations for the support of the army for the fiscal year ending June 30, 1875, and for other purposes, as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses." 19 Stat. at L. 65.

By this declaration Congress did not repeal the whole of that statute. It did not even repeal it as applicable to the entire navy, but it selected a certain class of persons in the navy to whom it should no longer apply, and who should thereafter be relieved from keeping an account of their actual expenses while traveling for the Government, and should be allowed eight cents per mile in lieu thereof.

The class of persons thus relieved from the effect of the Act of 1874 is designated as "officers of the navy." No other person holding an employment or appointment under the United States, although in the navy, was thus relieved from the effect of that Act. As this is a special statute, exempting for particular reasons a certain class of persons from the operation of a general law, which was left to include all other persons in the employment of or holding an appointment under the Government of the United States, it is obviously proper to confine that class to those who are, properly speaking, officers of the navy. There is nothing in the context, nor in the reason, which may have been supposed to influence Congress in making this exception out of the general law, justifying its application to any other persons than those who are, strictly speaking, officers of the navy.

What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in *United States* v. *Germaine*, 99 U. S. 508 [25: 482]. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

We do not see any reason to review this well established definition of what it is that constitutes such an officer.

In response to this objection to the claimant as an officer of the United States, it is alleged that his appointment as paymaster's clerk, as shown by the finding of facts in the court of claims, although made by a paymaster in the United States Navy, has indorsed on it the approval of D. B. Harmony, Acting Secretary of the Navy. If there were any statute which authorized the head of the Navy Department to appoint a paymaster's clerk, the technical argument that the appointment in this case, although actually made by Paymaster Whitehouse and only approved by Harmony as acting secretary in a formal way, with the approval of a half dozen other officers, might still be considered sufficient to call this an appointment by the head of that department. But there is no statute authorizing the secretary of the navy to appoint a paymaster's clerk; nor is there any

Act requiring his approval of such an appointment; and the regulations of the navy do not seem to require any such appointment or approval for the holding of that position.

The claimant, therefore, was not an officer, either appointed by the President, or under the authority of any law vesting such appointment in the head of a department.

Section 1378 of the Revised Statutes enacts that "All appointments in the pay corps shall be made by the President, by and with the advice and consent of the senate." Sections 1386, 1387, and 1388 provide that certain classes of paymasters shall be allowed clerks.

It is obvious from the language of section 1378 that the pay corps is limited to officers commissioned by the President, and that clerks and others who are not so commissioned do not belong to the pay corps. The Naval Regulations of 1876, a copy of which is found in the brief of the appellant, so far as relates to this matter, provide very fully for these clerks, and the manner of their appointment; but nowhere is there any mention that it must be approved by the secretary of the navy; on the contrary, it is said that "Every officer entitled to a secretary or clerk may nominate him; but the appointment or discharge of a clerk by any officer not in command is subject to the approval of the commanding officer."

From all this it is clear that neither by the regulations nor by the statutes nor by any constitutional provision is the present claimant an officer of the navy. Undoubtedly Congress may have used the word "officer" in some other connections in a more popular sense, as will be shown in the case of *United States* v. *Hendee*, immediately following this, in which case it will be the duty of the court in construing such an Act of Congress to ascertain its true meaning and be governed accordingly.

The judgment of the Court of Claims is accordingly reversed, and the case remanded to that court, with instructions to dismiss it.

UNITED STATES, *Appt.*,
v.
GEORGE E. HENDEE.

See S. C. Reporter's ed. 309-315.)

Paymaster's clerk—increase of pay—officers of navy.

1. A paymaster's clerk is not, in the constitutional sense of the word, an officer of the United States; but the word "officer" is used by Congress in the Act of March 3, 1883, in a more general sense and includes a paymaster's clerk.

2. By the Act of 1883, an officer, in computing what increase shall be made to his statutory salary by reason of his previous service, has a right to count other service than that rendered in the character of an officer as defined by the Constitution of the United States; and a paymaster's clerk as an officer of the navy is to be credited with the actual time that he served as an officer or enlisted man in the regular or volunteer army, or navy, or both.

3. Within the meaning of that Statute which provides for increase of pay to officers of the navy according to the length of service, it was the intention of Congress to include services rendered as paymaster's clerk in the navy.

[No. 1071.]

Submitted Dec. 14, 1887. Decided Jan. 23, 1888.

APPEAL from a judgment of the Court of Claims in favor of the appellee, for compensation as paymaster in the navy beyond what he had been paid under the longevity provisions of the statutes during the time he served as a paymaster's clerk. *Affirmed.*

The facts of the case are stated in the opinion.

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** *Asst. Atty.*, for appellant:

A paymaster's clerk is not an officer of the navy, within the meaning of the Act, March 3, 1883, 22 Stat. at L. 473.

A paymaster's clerk is not an officer, within the provisions of the Constitution of the United States.

Art. 11, § 2, Const.; R. S. §§ 1386, 1387, 1388; Nav. Reg. 1876, par. 9, 95; *U. S.* v. *Moore*, 95 U. S. 760 (24:588); *U. S.* v. *Hartwell*, 73 U. S. 6 Wall. 385 (18:880); *U. S.* v. *Germaine*, 99 U. S. 508 (25:482); *Re Bogart*, 2 Sawy. 407.

He is not an officer recognized as such by Congress or naval regulation. The claimant was not an enlisted man while paymaster's clerk.

Messrs. **John Paul Jones** and **Robt. B. Lines,** for appellee:

Appellee, as a paymaster in the navy, is entitled to be credited with his service as paymaster's clerk, and to receive the longevity pay resulting from such credit.

Naval Appropriation Act of March 3, 1883; 22 Stat. at L. § 473; *Ex parte Reed*, 100 U. S. 18 (25: 538); *Re Bogart*, 2 Sawy. 407; *U. S.* v. *Moore*, 95 U. S. 760 (24:588); *U. S.* v. *Tinklepaugh*, 3 Blatchf. 430; *Vaughn* v. *English*, 8 Cal. 41; *U. S.* v. *Maurice*, 2 Brock. 103; *Ex parte Smith*, 2 Cranch, C. C. 693; *U. S.* v. *Hartwell*, 73 U. S. 6 Wall. 385 (18:880) *Thornley* v. *U. S.* 18 Ct. Cl. 117; *Bennett* v. *U. S.* 19 Ct. Cl. 387; *Palen* v. *U. S.*, Id. 394; *Muse* v. *U. S.* Id. 444; *Young* v. *U. S.* Id. 152; *U. S.* v. *Dunn*, 120 U. S. 249 (30:667).

Mr. Justice **Miller** delivered the opinion of the court:

George E. Hendee brought suit in the court of claims for compensation as a paymaster in the navy, beyond what he had been allowed and paid for his services. He recovered a judgment in that court for the sum of $8,178.01, of which $6.313.77 was not disputed. The disposition of the remainder, of $1,864.24, depends upon whether the period of time from October 10, 1861, to November 30, 1862, during which he served as a paymaster's clerk, should be counted, for the purpose of increasing his salary under the longevity provisions of the statutes.

This amount the accounting officer refused to allow, upon the ground that a paymaster's clerk is neither an officer nor an enlisted man in the navy; and as a consequence the time of an officer who has been such a clerk is not entitled to be computed under the provisions of the Act of March 3, 1883, on that subject. That statute provides as follows:

"And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service

had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service." 22 Stat. at L. 478.

In the opinion of the Chief Justice, rendered in the court of claims, the single issue raised is the question of law whether or not a paymaster's clerk is an officer of the navy within the meaning of said Act.

We have just decided, in the case of *United States* v. *Mouat*, 124 U. S. 303 [*ante*, 463], that a paymaster's clerk is not, in the constitutional sense of the word, an officer of the United States; but we added also that Congress may have used the word "officer" in a less strict sense in some other connections, and in the passage of certain statutes might have intended a more popular signification to be given to that term. And in regard to the Act of 1883, we think that its proper construction requires that the officer, when subsequently coming to compute what increase shall be made to his statutory salary by reason of his previous service, has a right to count other service than that rendered in the character of an officer, as defined by the Constitution of the United States. Its language is, that "All officers of the navy shall be credited with the actual time they may have served as officers or enlisted men."

The claimant here is an officer of the navy, and is, therefore, to be credited with the actual time that he served as an officer or enlisted man in the regular or volunteer army or navy, or both. We think the words "officers or enlisted men in the regular or volunteer army or navy, or both," were intended to include all men regularly in service in the army or navy, and that the expression "officers or enlisted men" is not to be construed distributively as requiring that a person should be an enlisted man, or an officer nominated and appointed by the President, or by the head of a Department, but that it was meant to include all men in service, either by enlistment or regular appointment in the Army or navy. We are of opinion that the word "officer" is used in that statute in the more general sense which would include a paymaster's clerk; that this was the intention of Congress in its enactment, and that the collocation of the words means this, especially when it is added that they "shall receive all the benefits of such actual service in all respects and in the same manner as if said service had been continuous and in the regular navy."

In *Ex parte Reed*, 100 U. S. 13 [25: 538], the court said: "The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay roll, and are paid accordingly. They may also become entitled to a pension and to bounty land. * * * If these officers are not in the naval service, it may well be asked who are."

In the *Case of Bogart*, who was brought before *Judge* Sawyer of the circuit court on a writ of *habeas corpus*, that judge took the same liberal view in regard to the position of a paymaster's clerk in the navy—holding that as an officer of the navy he was subject to be tried by a court martial, and accordingly remanded him to the custody of that court for trial. In the opinion he says: "Was the petitioner, while a clerk of a paymaster in the navy, on duty in the manner before stated, a person in the naval service of the United States within the meaning of this Act? It is contended on his behalf that he was not. But upon this point we entertain no doubt. He was not merely an employé or servant of the paymaster; but on the contrary, as we have seen from the regulations of the navy, set out in the statement of facts, he was an officer of the navy." 2 Sawy. 396.

In the opinion of *Chief Justice* Richardson, delivered in the court of claims in the case now under review, the same view was ably argued; and while we do not concede that a paymaster's clerk is, for all purposes and in the general sense of that term, an officer of the navy, we believe that within the meaning of the statute now under consideration, providing for increase of pay to officers of the navy according to length of service, that it was the purpose of the framers of that Act to include service rendered as a paymaster's clerk in the navy.

The judgment of the Court of Claims is, therefore, affirmed.

IRON SILVER MINING COMPANY, *Plff. in Err.*, *v.* JOSEPH REYNOLDS ET AL.

(See S. C. Reporter's ed. 374-384.)

Knowledge of mines in government land—effect of on patent—belief is not knowledge.

1. Under section 2333 of the Revised Statutes, which excepts from the grant of a patent any vein or lode of quartz or other rock bearing gold, etc., "known to exist," such words refer to the knowledge of the existence of a vein or lode within the boundaries of the claim by the person seeking to acquire a patent, and not to the intent of the party to acquire a lode which may or may not exist, and of which he had no knowledge; and belief, after examination, in the existence of a lode, is not knowledge of the fact.

2. There may be difficulty in determining whether such knowledge in a given case was had; but between mere belief and knowledge there is a wide difference, and they are not equivalent terms; and the court cannot make them synonymous by its charge, and thus in effect incorporate new terms into the Statute.

3. An instruction to the jury that if an application for a patent is made with intent to acquire a title to a lode or vein which may exist in the ground beneath the surface of a placer claim, a patent issued upon such application cannot operate to convey such lode or vein, and that such intention, formed on investigation, and belief in the existence of a valuable lode, would amount to knowledge under the Statute, is erroneous.

[No. 960.]

Submitted Jan. 4, 1888. Decided Jan. 23, 1888.

IN ERROR to the Circuit Court of the United States for the District of Colorado, to review a judgment in favor of defendant in an action

for the possession of certain mining grounds in Colorado.

Reversed.

Same case on former writ of error reported in 116 U. S. 687 (29: 774).

Statement by *Mr. Justice* **Field:**

This is an action for the possession of certain mining ground situated in what is known as the California Mining District, in Lake County, Colorado. The plaintiff is a corporation created under the laws of New York. The defendant Reynolds is a citizen of the State of Illinois, and the defendant Morrisey is a citizen of Colorado. The complaint alleges that on the first of January, 1884, the plaintiff was the owner and possessed of a tract of mining land in the mining district and county of Colorado mentioned, consisting of $198\frac{48}{100}$ acres, more or less, the metes and bounds of which are given as described in the patent of the United States issued therefor; that whilst thus the owner and possessed of the same, and on the first of May, 1884, the defendants entered upon a portion of the said mining land, which is designated as "the northwest portion of the said described premises at and near the north and east line" thereof, and wrongfully and unlawfully ousted the plaintiff therefrom, and from that time have wrongfully and unlawfully withheld the possession thereof; that the value of this portion of the mining land, from which the plaintiff has been ousted, is over $50,000; and that its rents and profits whilst the defendants have held possession, with the damage caused by them, are $10,000. The plaintiff, therefore, demands judgment for the possession of the premises and for the sum of $10,000 damages. The claim described in the complaint is designated in the patent of the United States as the Wells and Moyer placer claim, and is thus described in the subsequent pleadings and proceedings of the case.

The defendants' answer sets up three defenses:

1.—The first consists of a specific denial of the several allegations of the complaint.

2.—The second is this: that at the times charged in the complaint the defendant Reynolds was, and still is, the owner and in the actual possession of two lode mining claims called respectively the "Crown Point Lode" and the "Pinnacle Lode," adjoining on the north the Wells and Moyer placer claim, the veins of which lodes, in their course downward, dip into and underneath the exterior lines of the placer claim; and that in working and following such veins the defendant Reynolds, as owner, and the defendant Morrisey, under the license of Reynolds, entered underneath the exterior surface lines of the placer claim, following the veins as parcel of the premises embraced in the survey of their lode claims, and have not otherwise entered upon the premises described or claimed by the plaintiff, or ousted the plaintiff therefrom.

3.—The third defense is this: that at the time of the survey, entry and patent of the said Wells and Moyer placer claim, a certain lode, vein or deposit of quartz, or other rock in place, carrying carbonates of lead and silver-bearing ore of great value, called the Pinnacle Lode, and a certain other lode, vein or deposit, carrying like minerals of great value, called the Crown Point Lode, were known and claimed to exist within the boundaries and underneath the surface of the placer claim described in the complaint, and the fact that such vein or veins were claimed to exist, and did exist, within said premises was known to the patentees of the placer claim at the times mentioned, and that in their application for a patent they were not included, but, by the patent issued upon such application, were expressly excluded therefrom.

To the answer the plaintiff replied, traversing the defenses set up, and for a further replication alleged that at all times charged in the answer of the defendants, it has been and still is the owner, and in actual possession of the Rock lode mining claim, and the Dome lode mining claim, which adjoin, immediately on the north side, the said Pinnacle and Crown Point mining claims, and that within their exterior boundaries there is a vein, lode, lead and valuable mineral deposit of quartz, and other rock in place, bearing silver and lead, which, on its dip and downward course, enters into and underlies the land adjoining, a portion of which consists of ground covered by the said Crown Point and Pinnacle lode mining claims; and that any portion or part of any vein, lode, lead, or valuable mineral deposit which is found or developed underneath the surface of the Crown Point and Pinnacle lode claims is a part and portion of the said Rock and Dome lodes, veins, and mineral deposits.

This action was twice tried by the circuit court. On the first trial the plaintiff below, which is also the plaintiff in error here, obtained a verdict in its favor. Being brought to this court the judgment was reversed aud the cause remanded for a new trial. The case is reported in 116 U. S. 687 [29: 774].

On the present trial, to establish its title, the plaintiff gave in evidence:

1. Three location certificates of the Wells and Moyer placer claim, made on the 23d of March, 1878.

2. A certificate showing application for a patent May 16, 1878.

3. A certificate of entry issued July 22, 1878.

4. The patent to Wells and Moyer from the United States, dated March 11, 1879, which contained the following conditions:

First. That the grant was restricted within the boundaries described, and to any veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits thereafter discovered within those limits and which were not claimed or known to exist at the date of the patent.

Second. That should any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises at the date of the patent, the same were expressly excepted and excluded from it.

Third. That the premises conveyed might be entered by the proprietors of any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein, lode or deposit, should the same or any part thereof be

found to penetrate, intersect, pass through, or dip into the mining ground or premises granted.

5. Deeds of conveyance from Wells and Moyer, the placer patentees, to Storms and Leiter, dated October, 1878, and from the latter to the plaintiff, dated March, 1880.

The plaintiff then offered in evidence a patent of the United States for the Rock and Dome lode mining claims, and deeds conveying the title thereof from the patentees to the Iron Silver Mining Company, for the purpose of showing that the lode, which, since the issue of the Wells and Moyer placer patent, has been ascertained to dip into and extend within the boundaries of the patented claim, has its top, apex and outcrop within the Rock and Dome lode mining claims; and of tracing the right to that vein or lode from its top, apex, or outcrop into the territory in dispute in this action.

The introduction of this evidence was objected to by the defendants, on the ground that there was no issue of the kind in the pleadings; and the objection was sustained by the court, to which ruling the plaintiff excepted.

On the trial the defendants, though they gave in evidence their title to the Crown Point and Pinnacle lodes, admitted that they did not rely, in support of their title to the premises in controversy, upon the existence of any apex cropping out within the surface lines of the said lodes, which they could lawfully pursue and hold under their patents. The case was therefore limited to the single question whether the title of the plaintiff under the patent was affected by knowledge of the patentees, at the time of their application for a patent, that a lode or vein existed at the place in controversy within their placer claim. The question as tried was one of knowledge on the part of the placer patentees, or whether the premises in dispute were a known vein or lode, within the exception of the patent.

Section 2333 of the Revised Statutes, under which the patent issued, is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of $5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The evidence offered by the defendants, as to the knowledge of the patentees, was of a vague, uncertain and unsatisfactory character. It consisted principally of impressions, beliefs and inferences on the subject, drawn from loose statements made, or theories advanced, by the patentees, or persons alleged to have been interested in the claim, or the supposed motives of their conduct. The court, among other things, instructed the jury that it was unnecessary to state "what circumstances may be sufficient to affect a patentee with knowledge as declared by the statute; for if in any case it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein;" and that "That intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

To this instruction the plaintiff excepted.

The jury found for the defendants, and upon their verdict judgment was entered, which is brought to this court for review.

***Messrs.* L. S. Dixon and Frank W. Owers,** for plaintiff in error:

The popular or received import of words furnishes the general rule for the interpretation of public laws.

Maillard v. *Lawrence*, 57 U. S. 16 How. 251, 261 (14: 925, 930).

Under the Statutes, § 2331, the placer claimant can have but one location at any time as locator, although as purchaser from other locators he may hold many more.

St. Louis Smelting & Ref. Co. v. *Kemp*, 104 U. S. 636 (26: 875).

The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface.

Deffeback v. *Hawke*, 115 U. S. 406 (29: 427).

An exception or reservation, until the grantor or his assigns exercise the rights reserved, is inoperative; and the whole premises vest in the grantee, who may maintain trespass against the stranger, or even against the grantor or his assigns, for an entry on the land for any purpose other than that specified in the reservation.

Dygert v. *Matthews*, 11 Wend. 35; *Cutts* v. *Spring*, 15 Mass. 134.

In such case the plaintiff in ejectment must prevail against a trespasser, and in all cases except where a better title is shown in the defendants.

Winans v. *Christy*, 4 Cal. 70; *Hutchinson* v. *Perley*, 4 Cal. 33; *Jackson* v. *Harder*, 4 Johns. 202; *Jackson* v. *Denn*, 5 Cow. 200; *Boggs* v. *Merced Mining Co.* 14 Cal. 279; *Fremont* v. *Flower*, 17 Cal. 200.

The words "vein or lode known to exist," as used in section 2333, will be held to mean a vein or lode that has been discovered, that has been developed or located, and that has metes and bounds at the date of the application for placer claim.

Iron Silver Min. Co. v. *Sullivan*, 16 Fed.

Rep. 829; *Mantle* v. *Noyes*, 5 Mont. 275; *Raunheim* v. *Dahl*, 6 Mont. 167.

Should a subsequent locator, to the placer, by virtue of a lode claim located without the placer, after the date of application for patent for the placer, seek the right to enter the placer by virtue of his apex, the exercise of such right would be a trepass upon the placer owner.

Pacific Coast Min. & M. Co. v. *Spargo*, 8 Sawy. 645.

The existence of a vein in the vicinity of a placer does not raise any presumption of its existence, in part or whole, within the placer.

The plaintiff in error, though presumably innocent, is sought to be convicted of a constructive fraud against the government by the introduction in evidence of the fraud of another party.

U. S. v. *Iron Silver Min. Co.* 24 Fed. Rep. 569.

Evidence as to the character of the ground is inadmissible.

Correa v. *Frietas*, 42 Cal. 339.

Messrs. **G. W. Kretzinger, T. M. Patterson, C. S. Thomas,** and **R. S. Morrison,** for defendants in error:

A vein or lode of valuable deposits does not include a placer mining claim.

Moxon v. *Wilkinson*, 2 Mont. 424; R. S. U. S. § 2329.

Section 2329 must be taken and construed in connection with section 2333.

Heydenfeldt v. *Daney Gold & S. Min. Co.* 93 U. S. 638 (23: 996).

The object of section 2333 was to except a lode or vein out of the placer patent.

Reynolds v. *Iron Silver Min. Co.* 116 U. S. 687 (29: 774).

Possession *per se* evidences present occupation by right, for the law will not presume a wrong.

Ricard v. *Williams*, 20 U. S. 7 Wheat. 105 (5: 409).

The presumption arising from possession alone, aided by the general denial, placed the burden upon the plaintiff to establish by proof a paramount title.

Pitkin v. *Yaw*, 18 Ill. 253; *Wood* v. *Morton*, 11 Ill. 547; *Hardy* v. *Johnson*, 68 U. S. 1 Wall. 374 (17: 503).

The words "exception" and "reservation" are used synonymously in grants and have the same effect.

Bowman v. *Wathen*, 2 McLean, 392; *Greenleaf* v. *Birth*, 31 U. S. 6 Pet. 310 (8: 409).

The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it.

Walker v. *Whitehead*, 83 U. S. 16 Wall. 317 (21: 357).

A party must recover on the strength of his own title.

Watts v. *Lindsey*, 20 U. S. 7 Wheat. 161 (5: 424).

The record in this case contains no assignment of error.

Portland Co. v. *U. S.* 82 U. S. 15 Wall. 1 (21: 113); *Ryan* v. *Koch*, 84 U. S. 17 Wall. 19 (21: 611); *Maxwell* v. *Stewart*, 88 U. S. 21 Wall. 71 (22: 564); *Treat* v. *Jemison*, 87 U. S. 20 Wall. 652 (22: 449).

A patent issued subsequent to the passage of the Act of 1870 may embrace a placer mining claim consisting of more than 160 acres, and including as many contiguous locations as the patentee had secured prior to his application.

St. Louis Smelting & Ref. Co. v. *Kemp*, 104 U. S. 636 (26: 875); *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 449 (27: 227).

Claims usually called placers include all forms of deposit, except veins of quartz or other rock in place.

Carlyon v. *Lovering*, 1 Hurl. & N. 784.

The essential peculiarities of a placer mine are that the ore or metal is found, not in place but mixed with the loose soil and can only be obtained by washing, or booming, or by hydraulic works.

Lode mines, on the contrary, are worked by shafts and inclines; the ore being won by blasting, and when won, crushed and reduced in mills.

Veins and lodes known to exist when the patent was asked for are excluded from the grant.

Reynolds v. *Iron S. Min. Co.* 116 U. S. 698 (29: 776); *Clary* v. *Hazlitt*, 67 Cal. 286; *Mantle* v. *Noyes*, 5 Mont. 275.

Reservations are exceptions and exclusions in the full sense of the term.

3 Washburn, Real Property, 3d ed. 369 *et seq.*

In construction of grants between the government and the citizen, the construction is always against the grantee and in favor of the government.

Id. 171, 172; *Kennedy* v. *McCartney*, 4 Port. 141; *Allegheny* v. *Ohio & P. R. R. Co.* 26 Pa. 355; *Dubuque & P. R. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 88 (16: 509).

In ejectment, plaintiff must recover upon the strength of its own title.

Sedgwick & Wait, Trial of Title to Land, 438; *Cobb* v. *Lavalle*, 89 Ill. 331; *Watts* v. *Lindsey*, 20 U. S. 7 Wheat. 158 (5: 423); Abbott, Trial Ev. 691; Tyler, Ejectment, 72; *Reynolds* v. *Iron S. Min. Co.* 116 U. S. 698 (29: 778).

The plaintiff cannot recover a life estate, an estate tail or by possession, under a count claiming an estate in fee simple.

Almond v. *Bonnell*, 76 Ill. 536; *Breed* v. *Osborne*, 113 Mass. 318; *Rawson* v. *Taylor*, 57 Maine, 343; *Forsyth* v. *Rowell*, 59 Maine, 131.

It cannot assert one estate in its pleadings and establish its right to the premises by proving another.

Winstanley v. *Meacham*, 58 Ill. 97; *Rupert* v. *Mark*, 15 Ill. 540; *Ballance* v. *Rankin*, 12 Ill. 420.

Although a person's location may appear to be along the line of the top, apex or outcrop of the vein, it cannot prevail against a senior location on the dip of the lode.

Iron Silver Min. Co. v. *Murphy*, 3 Fed. Rep. 868; *Iron Mine* v. *Loella Mine*, 2 McCrary, 121; *VanZandt* v. *Argentine Min. Co.* 2 McCrary, 160; *Argentine Min. Co.* v. *Terrible Min. Co.* 122 U. S. 478 (30: 1140); *Sullivan* v. *Iron Silver Min. Co.* 109 U. S. 550 (27: 1028); *Pacific Coast Min. & M. Co.* v. *Spargo*, 8 Sawy. 645.

Mr. Justice **Field** delivered the opinion of the court:

As seen by the statement of the case, the patent of the United States to Wells and Moyer of their placer claim, within the surface lines of which, drawn down vertically, the premises in

controversy are situated, contains several conditions, and among others that the premises may be entered by the proprietors of any vein or lode of quartz, or other rock in place, bearing gold, silver or other valuable deposits, for the purpose of extracting and removing the ore from them, should they be found to penetrate into the premises. This exception is founded upon the statute, which provides that the owners of any mineral vein, lode or ledge situated on the public domain, the location of which was made after the 10th day of May, 1872, should have the exclusive right of possession and enjoyment, not only of all the surface included within the lines of their locations, but also the exclusive right of possession and enjoyment "of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." (Sec. 2322.) The defendant Reynolds set up in his answer, that he is the owner of the Crown Point mining lode and the Pinnacle mining lode, adjoining the placer claim of the plaintiff, and that he and the defendant Morrisey, as his licensee, entered the premises in controversy by following the veins of their lodes from their outcropping within their surface lines. But on the trial the defendants disclaimed any right to the demanded premises under any apex or outcroppings of their lodes within the surface lines thereof, and rested their defense upon another exception of the patent, namely: that if any vein or lode of quartz, or other rock in place, bearing gold, silver, or other valuable deposit, was claimed or known to exist within the premises described at the date of the patent, the same was excluded from the grant. This exception is founded upon and limited by the statute which we shall presently consider.

When this case was formerly before us, it was held that if a lode or vein of gold or silver was *known to exist* within a placer claim at the time the application for a patent was made, the patentee could not recover its possession, even as against a mere intruder. The patentee having no title to such lode or vein by reason of its exception from his patent under the statute, could not enforce any legal right to it against anyone, being bound to rely upon the strength of his own title and not the weakness of his adversary's. The defendants, therefore, on this trial, placed their defense upon this exception; and the question for determination was, whether the lode or vein in question was *known to exist* at the time the application for a patent was made.

In anticipation of this defense, and to establish title to the demanded premises, if not sufficiently covered by the patent for the placer claim, the plaintiff offered in evidence a patent of the United States for the Rock and Dome lode mining claims, and a deed of them to the plaintiff from the patentees, for the purpose of showing that the lode which, since the issue of the patent of the placer claim, has been ascertained to dip into and extend within the boundaries of that claim, has its apex or outcrop within the boundaries of these lode claims; but the court refused to admit the patent, and the plaintiff excepted. In thus ruling there was plain error. If the fact thus sought to be established existed, it would force the defendants from their position of intruders without title, and compel them to show prior title in themselves to the premises or to surrender them to the plaintiff.

It is not readily perceived on what ground the ruling of the court rested. The plaintiff did not base its action upon any particular source of title; it simply averred that it was the owner and possessed of certain described mining ground, from a portion of which the defendants had ousted it and wrongfully withheld the possession. The patent was evidence of the grant of the whole of the described premises, if no portion was excepted from its operation either in terms or by force of the statute. But if any portion was excepted for any cause, the duty fell on the plaintiff to furnish title to such excepted portion from some other source, and that the court, by its ruling, refused to permit the plaintiff to do.

The exception in the patent from its grant of any vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, or other valuable deposit, if "claimed or known to exist," is in terms broader than the language of section 2333, under which the patent was issued. The statute does not except veins or lodes "*claimed* or known to exist," but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent, and not that of the date of the patent, to take the vein or lode out of its grant. Section 2333, as stated by this court when the case was first here, makes provision for three distinct classes of cases:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then, on payment of the sum required for a vein claim and twenty-five feet on each side of it at $5.00 an acre, and $2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time, within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

The question under this section, which must control and limit any conflicting exception expressed in the patent, is: When can it be said that a vein or lode is "known to exist" within the boundaries of a placer claim for which a patent is sought? The language of the statute appears to be sufficiently intelligible in a general sense; and yet it becomes difficult of interpretation when applied to the determination of rights asserted to such veins or lodes from the possession, or absence, of such knowledge at the time application is made for the patent. At the outset, as stated when the case

was here before, the inquiry must be whether the alleged knowledge must be traced to the applicant, or whether it is sufficient that the existence of the vein or lode was at the time of the application generally known. If general knowledge of such existence should be held sufficient, the inquiry would follow as to what would constitute such general knowledge, so as to create an exception to the grant, notwithstanding the ignorance of the patentee. Such suggestions indicate the difficulties of some of the questions which may arise in the application of the statute.

The court below instructed the jury that it was unnecessary to declare what circumstances might be sufficient to affect a patentee with knowledge as prescribed by the statute, "for if, in any case, it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer claim, it is believed a patent issued upon such application cannot operate to convey such lode or vein;" and further, that "that intention could be formed only upon investigation as to the character of the ground, and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

This instruction is plainly erroneous. The statute speaks of acquiring a patent with a knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact.

There may be difficulty in determining whether such knowledge in a given case was had; but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.

Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent. As well observed by the court, when the case was here before, it is better that all questions as to what kind of evidence is necessary, and we may add sufficient, to prove the knowledge required by the statute, should be settled as they arise.

For the errors mentioned, ***the judgment must be reversed, and the case remanded for a new trial.***

UNITED STATES, *Appt.*,

v.

FREDERICK FRERICHS.

(See S. C. Reporter's ed. 315-320.)

Judgment against collector, how paid—when a claim against the United States—who may recover—effect of payment.

1. Under section 3220 of the Revised Statutes, the Commissioner of the Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized on appeal to him, to repay all damages and costs recovered against any collector, in any suit brought against him by reason of anything done in the performance of his official duty.

2. When, after the recovery against the collector, he appeals to the Commissioner of Internal Revenue, under said section, for the payment of the judgment, it is not improper to consider the application as one for the payment to the plaintiff in the judgment, and such payment is plainly authorized by said section.

3. Where both the Commissioner and Secretary of the Treasury allowed the claim to the plaintiff in the judgment, it was thus created a claim in his favor against the United States, and he is entitled to recover the amount of the claim in the court of claims.

4. The payment of the amount of the judgment would satisfy the demand of the judgment creditor against the United States, and he is only required to enter satisfaction on the receipt of the money; and his suit therefor, based upon the allowance of the claim, is sufficient agreement on his part to receive the amount in satisfaction of the judgment.

[No. 658.]

Submitted Jan. 5, 1888. Decided Jan. 23, 1888.

APPEAL from a judgment of the Court of Claims in favor of the appellee, for the amount of a judgment recovered against a collector of internal revenue for the wrongful seizure of property. *Affirmed.*

Reported below, 21 Ct. Cl. 16.

The case is fully stated in the opinion.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **R. A. Howard,** *Asst. Atty-Gen.*, for appellant:

A suit to recover upon a judgment brought by a judgment creditor of the party in whose favor it was rendered is without any legal sanction.

Freeman, Judg. § 437.

Though the judgment was rendered by mistake in Coster's name instead of the claimant's, he could not recover on it.

4 Wait, Actions & Defenses, 186.

Concurrent conditions are mutual conditions precedent.

Anson, Contracts, 289.

The allowance was to Coster and for his benefit, not for the benefit of the judgment creditor.

Dunnegan v. *U. S.* 17 Ct. Cl. 247; *Nixon* v. *U. S.* 18 Ct. Cl. 448.

The award to the claimant is conclusive, unless it be impeached in some appropriate form.

Anson, Contracts, 195-200 *et seq.*; *U. S.* v. *Kaufman*, 96 U. S. 567 (24: 792); *Johnston* v. *U. S.* 18 Ct. Cl. 217.

Mr. **Edward Salomon,** for appellee:

This statute does not direct by whom the appeal or claim shall be made to the commissioner, or to whom payment of the "damages and costs recovered" shall be made.

Dunnegan v. *U. S.* 17 Ct. Cl. 247; *Nixon* v. *U. S.* 18 Ct. Cl. 448.

The proposed allowance by the commissioner, the approval of the Secretary of the Treasury, and the certification of the allowance of the claim of the judgment, all go together and must be construed together.

Dunnegan v. *U. S. supra; Sybrandt* v. *U. S.* 19 Ct. Cl. 461.

The court of claims has jurisdiction.

U. S. Real Estate Sav. Bank, 104 U. S. 728 (26: 908).

Where one person makes a promise to another for the benefit of a third person that third person may maintain an action upon it, although he was not privy to the consideration of such promise.

Lawrence v. *Fox*, 20 N. Y. 268; *Burr* v. *Beers*, 24 N. Y. 178; *Secor* v. *Lord*, 3 Keyes, 525; *Coster* v. *Albany*, 43 N. Y. 399, 410; *Arnold* v. *Lyman*, 17 Mass. 400; *Hall* v. *Marston*, Id. 575; *Brewer* v. *Dyer*, 7 Cush. 337.

The contemporaneous construction of those who act under the law, and carry its provisions into effect, is entitled, not only to very great respect, but should be allowed to turn the scale in doubtful cases.

Edwards v. *Darby*, 25 U. S. 12 Wheat. 210 (6: 604); *U. S.* v. *Alexander*, 79 U. S. 12 Wall. 177 (20: 381); *U. S.* v. *Moore*, 95 U. S. 763 (24: 589); *U. S.* v. *Pugh*, 99 U. S. 265 (25: 322); *Hahn* v. *U. S.* 107 U. S. 402 (27: 527); *Brown* v. *U. S.* 113 U. S. 568 (28: 1079).

It is not necessary that the petition should contain an averment of the satisfaction of the judgment recovered against the collector, or that the claimant had been or was ready to enter such satisfaction upon payment of the judgment.

Little v. *U. S.* 19 Ct. Cl. 331; *Arkansas Cotton Cases*, 12 Ct. Cl. 642, par. xiii; *Burke* v. *U. S.* 18 Ct. Cl. 240.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the United States from a judgment of the court of claims, awarding to Frederick Frerichs a recovery of the sum of $10,130.31. The case was decided by that court on a demurrer to the petition, alleging that sufficient facts were not set forth to constitute a cause of action. The demurrer was overruled, and the defendants declined to plead further.

The facts set forth in the petition are in substance as follows: On the 23d of January, 1878, Frerichs commenced an action in the Superior Court of the City of New York against one Charles R. Coster, a collector of internal revenue, to recover damages for the wrongful seizure of the property of Frerichs made by Coster on May 22, 1876, for alleged violations of the internal revenue laws. The action was removed by Coster into the Circuit Court of the United States for the Southern District of New York. Issue was joined, and, at a trial before the court and a jury, there was a verdict for the plaintiff, and a judgment against Coster, on the 21st of January, 1885, for $10,130.31 and costs. On the 24th of January, 1885, Coster appealed to the Commissioner of Internal Revenue, under section 3220 of the Revised Statutes, for the payment of the judgment. On the 27th of January, 1885, the Commissioner of Internal Revenue addressed a letter to the Secretary of the Treasury, setting forth the history of the case. By this letter it appeared that the original seizure of the property of Frerichs was made under the direction of a revenue agent connected with the office of the supervisor of internal revenue, and was, on the same day, reported to the District Attorney of the United States and the Commissioner of Internal Revenue; that a suit for the forfeiture of the property was immediately brought in the District Court of the United States; and that, in June, 1876, the Treasury Department instructed the district attorney to dismiss the proceeding for forfeiture and to receive a certificate of probable cause of seizure and a waiver of any claim for damages. The district attorney, as a condition of releasing the property, required that Frerichs should sign a certificate of probable cause. Frerichs' counsel replied that, while he was willing to waive damages, he was not willing to sign a paper which would confess that the officers of the Government had a right to seize the property. Nothing being done, the seizure case proceeded to trial, and resulted in a judgment in favor of Frerichs, on the 14th of May, 1877, and an award of a return to him of the seized property. The district court, on December 18, 1877, denied a motion made on the part of the United States for a certificate that there was reasonable cause of seizure. On the 31st of July, 1879, on a writ of error taken by the United States, the circuit court affirmed the judgment dismissing the information and the order denying the motion for a certificate of reasonable cause of seizure. The United States sued out a writ of error from this court to review the proceedings in the circuit court, and raised the question here, *U. S.* v. *Abattoir Place*, 106 U. S. 160 [27: 128], that there was error in refusing to grant a certificate of reasonable cause of seizure. This court held that the action of the district court on the motion could not be reviewed, either by the circuit court or by this court. In the suit brought by Frerichs against Coster, the circuit court was asked to grant a certificate of probable cause of seizure, but refused to do so. After reviewing the various proceedings, the Commissioner of Internal Revenue stated to the Secretary of the Treasury that he proposed to allow the claim for $10,130.31, "to be paid to Frederick Frerichs upon due entry of satisfaction of the said judgment." On the 29th of January, 1885, the Treasury Department decided that, under section 3220 of the Revised Statutes, the Commissioner of Internal Revenue had authority, with the approval of the Secretary of the Treasury, to make the proposed payment without any certificate from the court of probable cause of seizure, inasmuch as that section provided as follows: "Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages

and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty." On the 31st of January, 1885, the Secretary of the Treasury addressed a letter to the Commissioner of Internal Revenue, stating that he approved of the proposal of the commissioner "to allow the claim for $10,130.31, to be paid to Frederick Frerichs upon the due entry of satisfaction of the said judgment." On the same day, the commissioner certified that the claim for that amount had been examined and allowed. On the second of February, 1885, the Fifth Auditor of the Treasury Department certified to the First Comptroller of the Treasury that he had examined and adjusted an account between the United States and the Commissioner of Internal Revenue, and found that the sum of $10,130.31 was due from the United States for the payment of the judgment against Coster, payable to Frerichs. On the 10th of February, 1885, the First Comptroller of the Treasury disallowed the claim, and no part of it has ever been paid.

The petition to the court of claims states that the claim is founded upon section 3220, and upon the fact that it has been allowed and certified to be paid by the Commissioner of Internal Revenue, with the approval aforesaid of the Secretary of the Treasury.

In the opinion of the court of claims delivered in the present case (21 Ct. Cl. 16), it is stated that the First Comptroller disallowed the claim "for the reason that there was no certificate of probable cause issued and not sufficient evidence that the seizure was justified." The court of claims held that the proper party was entitled to recover the amount of the claim, and that, as between Frerichs and Coster, Frerichs was the proper party.

It is contended for the United States that Coster, and not Frerichs, was the proper party to recover the amount of this claim, and that Frerichs has not alleged that he has satisfied the judgment, nor his readiness to satisfy it on payment of the amount; and it is urged that the award of the Commissioner of Internal Revenue was made in favor of Coster, under the provisions of section 3220, upon the application of Coster.

It is true that the petition alleges that Coster applied for the payment of the judgment; but this is entirely consistent with the payment of the judgment to Frerichs, inasmuch as the petition alleges that the judgment is wholly unpaid. Section 3220 provides that the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to repay all damages and costs recovered against any collector in any suit brought against him by reason of anything done in the due performance of his official duty. When, after the recovery against the collector for such damages and costs, he appeals to the Commissioner of Internal Revenue, under section 3220, for the payment of the judgment, it is not improper to consider the application as one for the payment to the plaintiff in the judgment. Such payment is plainly authorized by section 3220; and it is apparent upon the papers above recited, that both the Commissioner and the Secretary of the Treasury allowed the claim, to be paid to Frerichs, as did also the fifth auditor. The claim was thus created as a claim in favor of Frerichs against the United States; and it would be a mere circuity to pay the amount to Coster when Frerichs is the real creditor of the United States, and when the payment directly to Frerichs by the United States would render it certain that Frerichs would receive the money and could thereupon enter a satisfaction of the judgment. It may be added that as section 3220, in its first clause, provides for the refunding of taxes and penalties to the person from whom they are collected, that is, to the person to whom the moneys so to be refunded are due, it is in harmony with such provision that the moneys and damages to be repaid under the second and third clauses should be paid to the person who recovers the judgment for them, if the judgment is not paid by the defendant.

It is stated in the opinion of the court of claims in this case, that it has been the uniform practice of the Commissioner of Internal Revenue and the Secretary of the Treasury, from the first enactment of the refunding statute, to make allowance, in cases of this character, to the judgment creditor, "and not to require the collector first to pay the same out of his own money, and then himself to apply for repayment from the public treasury."

It is objected that Frerichs has not agreed to receive the amount in satisfaction of his judgment against Coster. But the averment in the petition, that the proposal of the commissioner, which was approved by the Secretary of the Treasury, was a proposal to allow the claim to be paid to Frerichs upon due entry of satisfaction of the judgment, is an adoption by Frerichs of the terms upon which the allowance was made, and is in substance, an agreement by Frerichs to receive the amount in satisfaction of the judgment. Nothing more could be required of Frerichs, under the award, than to enter satisfaction of the judgment simultaneously with the receipt of the money.

The payment of the amount of the judgment would *ipso facto* satisfy the demand of Frerichs against the United States, because it is provided by section 1092 of the Revised Statutes that "the payment of the amount due by any judgment of the court of claims, and of any interest thereon allowed by law," "shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy."

The judgment of the Court of Claims is affirmed.

UNITED STATES, *Appt.*,
v.
JOHN BOND.

(See S. C. Reporter's ed. 301-303.)

A private of the marine corps, who was one of the marines who composed the organization known as the "Marine Band," and who performed on the capitol grounds and on the President's grounds under proper orders, is entitled to receive the additional pay provided by section 1613 of the Revised Statutes.

[No. 657.]

Submitted Jan. 9, 1888. Decided Jan. 23, 1888.

APPEAL from a judgment of the Court of Claims, awarding the appellee additional pay. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. H. Garland,** *Atty-Gen.*, and *Felix Brannigan, Asst. Atty.*, for appellant:

In section 1613, Revised Statutes, the words "noncommissioned officers" and "privates" are an inadvertence, a misdescription of the membership of the band; and can have no effect to enlarge the membership of the band, as against the express provision in section 1596, which prescribes "thirty musicians for a band."

Bac. Max. 96, reg. 25; 59 reg. 131; 1 Mackeld. Civ. Law, 169, § 175; Inst. 2, 20, 30; *Shore* v. *Wilson*, 9 Cl. & Fin. 555–567; Taylor, Law of Ev. §§ 1057–1092; *U. S.* v. *Freeman*, 44 U. S. 3 How. 556 (11:724).

The court takes judicial notice of the Navy Register.

U. S. v. *Philbrick*, 120 U. S. 52 (30:559).

The old law is a valuable source of information as to the meaning of the language used in the revision.

U. S. v. *Bowen*, 100 U. S. 508 (25:631); *Taylor* v. *Delancy*, 2 Caines, Cas. 149.

Mere change of phraseology shall not be deemed or construed a change in the law.

Yates' Case, 4 Johns. 317; *Burnham* v. *Stevens*, 33 N. H. 247; *Ash* v. *Ash*, 9 Ohio St. 383; *Conger* v. *Barker*, 11 Ohio St. 1; *Crosswell* v. *Crane*, 7 Barb. 191; *Ennis* v. *Crump*, 6 Tex. 34; *Dominick* v. *Micheal*, 4 Sandf. 374; *Goodell* v. *Jackson*, 20 Johns. 722; *Theriat* v. *Hart*, 2 Hill, 380; *Hoffman* v. *Delihanty*, 13 Abb. Pr. 388; *Re Brown*, 21 Wend. 316; *Allen* v. *Ramsey*, 1 Met. (Ky.) 635.

Contemporaneous exposition of a law by officers who were required to construe and apply its provisions is entitled to weight.

U. S. v. *Philbrick, supra; U. S.* v. *Hill*, 120 U. S. 169 (30:627); *Viterbo* v. *Friedlander*, Id. 707 (30:776); *U. S. Graham*, 110 U. S. 219 (28: 126); *U. S.* v. *Temple*, 105 U. S. 97 (26: 967).

Mr. **James E. Padgett,** for appellee.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a judgment of the court of claims awarding to John Bond, the appellee, the sum of $72.27.

The following facts were found by that court, upon which this judgment was rendered in favor of the claimant, and from which the present appeal is taken:

"Claimant enlisted in the United States Marine Corps at the marine barracks, Washington, D. C., October 29, 1879, as a private, was assigned to duty with the marine band at the time of his enlistment, and remained and performed duty with the band as a private from that time until May 1, 1881, when he was rated as a musician. Prior to this last mentioned date he was at no time rated as a musician, although playing in the band.

Between the date of enlistment and May 1, 1881, the organization known as the marine band performed, under proper order, on the capitol grounds and on the President's grounds. Prior to May 1, 1881, claimant received no additional compensation for such service."

Section 1613 of the Revised Statutes reads as follows:

"The marines who compose the corps of musicians known as the 'Marine Band' shall be entitled to receive at the rate of four dollars a month each in addition to their pay as noncommissioned officers, musicians, or privates of the marine corps, so long as they shall perform, by order of the secretary of the navy or other superior officer, on the capitol grounds or the President's grounds."

In the opinion of the court of claims it is said that—

"The claimant was a 'private of the marine corps.' He was one of the marines who composed the organization known as the 'Marine Band.' He performed on the capitol grounds and on the President's grounds, under proper order; and, thus falling within the phraseology of the statute, he should have received the additional pay."

In this statement we entirely concur, and see no reason to disturb the judgment of the court, which is accordingly affirmed.

UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE, *Plff. in Err.*, *v.* ELECTA L. WATERS.

(See S. C. Reporter's ed. 369, 370.)

Upon stipulation between the parties, the judgment in this action is reversed, costs of this court to be paid by the plaintiff in error, and cause remanded, with instructions to proceed in accordance with stipulation.

[No. 356.]

Submitted Jan. 23, 1888. Decided Jan. 23, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio. *Reversed.*

Mr. **J. O. Winship,** for plaintiff in error.

Mr. **J. H. Hoyt,** for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In this case the parties have stipulated as follows:

"The controversy between the parties hereto, having been amicably adjusted, it is now stipulated and agreed between us that as to the proceedings now pending in the Supreme Court of the United States, docketed as case No. 356, wherein the Union Mutual Life Insurance Co. of Maine is plaintiff in error, and Electa L. Waters is defendant in error, an entry shall be made by said court, as upon the trial thereof, that the judgment of the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, shall be reversed, and the said cause remanded to the circuit court, and a judgment be entered against said defendant for costs herein, and that said mandate shall be issued at once."

It is therefore, on motion, ordered that the judgment be, and the same is hereby, reversed, costs in this court to be paid by the plaintiff in error, and the cause remanded, with instructions to proceed in accordance with such stipulation.

EDWARD C. MARSHALL ET AL., Admrs. of ELISHA G. MARSHALL, Deceased, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 391–393.)

Pay of colonel on retired list.

A colonel on the retired list of the Army, is entitled only to receive 75 per centum of the pay of his rank on the active list, and is not entitled to receive, in addition thereto, longevity increased pay under section 1262 of the Revised Statutes.

[No. 318.]

Submitted Jan. 5, 1888. Decided Jan. 23, 1888.

APPEAL from a judgment of the Court of Claims, dismissing appellants' petition for increased pay, alleged to be due their intestate as colonel on the retired list of the army. *Affirmed.*

The facts are stated in the opinion.

Mr. **R. B. Warden,** for appellants:

The decision of the court of claims in this case was a mere reaffirmation of the case of *Roberts* v. *U. S.* 10 Ct. Cl. 288.

In *U. S.* v. *Tyler*, 105 U. S. 244 (26:985), the supreme court held that retired officers of the army are entitled to the percentage increase pay provided for commissioned officers of the army by section 1262, R. S.

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robt. A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** *Asst. Atty.*, for appellee:

Claimants contend that although by their estimate a retired colonel should receive more than 75 per centum of the current pay of an officer of same length of service on the active list, he would be entitled thereto because the pay received by him would not exceed the maximum amount of $4,500.

This contention has already been twice decided adversely to the claimants.

Roberts v. *U. S.* 10 Ct. Cl. 283; *Tyler* v. *U. S.* 16 Ct. Cl. 236.

Mr. Justice **Harlan** delivered the opinion of the court:

Elisha G. Marshall, the intestate of the appellants, served as a cadet from July 1, 1845, to July 1, 1850; was in the active service of the army, in different positions, from the latter date until September 11, 1867, when he was placed on the retired list, with the rank of colonel, and thereafter served continuously, until April 11, 1882, on the retired list of the army.

The claim made by his administrators is that "the pay of his grade, as provided by law," is $2,625, and that he was entitled, from and after July 1, 1870, to 40 per cent on that sum for length of service—in all, to the sum of $3,675 per annum; whereas, he was only allowed and paid the sum of $3,375 per annum, or 75 per centum of the maximum pay of a colonel in active service.

The following sections of the Revised Statutes were brought forward from the Act of Congress, approved July 15, 1870, entitled "An Act Making Appropriations for the Support of the Army for the Year Ending June 30, 1871, and for Other Purposes," 16 Stat. at L. 315–320.

"Sec. 1261. The officers of the army shall be entitled to the pay herein stated after their respective designations; * * * colonel: three thousand five hundred dollars a year. * * *

"Sec. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, 10 per centum of their current yearly pay for each term of five years of service.

"Sec. 1263. The total amount of such increase for length of service shall in no case exceed 40 per centum on the yearly pay of the grade as provided by law."

"Sec. 1267. In no case shall the pay of a colonel exceed four thousand five hundred dollars a year, or the pay of a lieutenant-colonel exceed four thousand dollars a year."

"Sec. 1274. Officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired."

The contention in behalf of the appellants is that under section 1274 a colonel upon being retired should receive 75 per centum of the pay of his rank or grade on the active list, and in addition thereto, such longevity increase pay as length of service shall entitle him to under section 1262, without regard to what his current pay might have been had he remained on the active list. It is insisted that Colonel Marshall was entitled to receive, after five years' service from July 1, 1870, $2,887.50; that is, $2,625, or 75 per centum of the colonels' grade pay of $3,500, and $262.50, or 10 per centum of his current yearly pay during that period; and, upon the same basis, $3,176.25 after ten years of service; $3,493.87, after fifteen years of service; and $3,675 after twenty years of service—the increase stopping at the last sum, by reason of the provision in section 1263, that the total amount of longevity increase shall not exceed 40 per cent of the yearly pay of the grade.

The construction of the statutes which this view would require cannot be sustained. When it is provided, in respect to officers in active service that in no case shall the "pay of a colonel exceed four thousand five hundred dollars a year," and that "officers retired from active service shall receive 75 per centum of the pay of the rank upon which they are retired," there is no room left for construction. Colonel Marshall was retired upon the rank of colonel. The annual maximum pay of that rank was and is $4,500. He received 75 per centum of that maximum pay, and, therefore, received all that Congress authorized to be paid to him as a colonel on the retired list.

Judgment affirmed.

HOWARD C. CHAPIN, *Plff. in Err.*,

v.

JOSEPHINE F. STREETER, Exrx. of JAMES STREETER, Deceased.

(See S. C. Reporter's ed. 360–364.)

Taxes on partnership property—duty of partner to pay—effect of nonpayment.

1. It is the duty of a partner, who is in possession of partnership property and in use of it, at the time, to pay the taxes thereon, which are a joint liability upon the property of the firm.

2. Where one partner rented of his copartner his undivided half of the partnership property, and paid his own half of the taxes thereon, and suffered the undivided half of the property to be sold for the taxes of the copartner, and afterwards rented the undivided half of the property so sold from the purchaser at the tax sale, he cannot be allowed the amount he has paid to such purchaser for rent, in an action brought by the copartner on the original lease to recover the rent due thereon.

3. The partner thus in possession of the property and in the use of it was not discharged from his obligation to the county to pay the taxes levied on the property, by the statements of his copartner that, if he paid the copartner's half of the taxes, the latter would not allow the same to him in their transactions as partners, nor repay him.

[No. 222.]

Submitted Jan. 4, 1888. Decided Jan. 23, 1888.

IN ERROR to the Circuit Court of the United States for the District of Colorado, to review a judgment against the plaintiff in error for rent. *Affirmed.*

The facts are stated in the opinion.

Mr. **L. C. Rockwell,** for plaintiff in error:

One tenant in common may pay his own aliquot part of the taxes and then, if the property is sold for the other part of the taxes, he may buy his cotenant's interest.

Freeman, Cotenancy & Partition, § 158; *Page* v. *Webster*, 8 Mich. 263, 265; *Butler* v. *Porter*, 13 Mich. 292; *Braker* v. *Devereaux*, 8 Paige, 513; *Ronkendorff* v. *Taylor*, 29 U. S. 4 Pet. 361 (7: 886).

Mr. **Sam. P. Rose,** for defendant in error:

The firm, and not the individual members, is to be considered the owner of its property for the purposes of the statute in regard to taxes.

Stockwell v. *Brewer*, 59 Me. 286; *State* v. *Parker*, 34 N. J. L. 71.

Sales of a different or a less interest than that of which the judgment debtor was seised, have in several cases been adjudged to be void.

Freeman, Void Judicial Sales, § 36; *Gordon* v. *Lewis*, 1 Sumn. 525; *Brown* v. *Clifford*, 38 Me. 210.

It is doubtful whether a sale of an undivided interest in lands, based upon an assessment of the entire estate, could be under any circumstances upheld in the absence of express statute authority for such a proceeding.

See Cooley, Taxation, 2d ed. 493; *Roberts* v. *Chan Tin Pen*, 23 Cal. 259; *Cragin* v. *Henry*, 40 Iowa, 158.

A firm, and each partner jointly with all the others, is liable for the firm tax and every part it.

Meyer v. *Dubuque County*, 49 Iowa, 193.

Taxes may be imposed on a firm in the firm name.

Hubbardston Lumber Co. v. *Covert*, 35 Mich. 260.

The firm, for the purposes of taxation, continues to exist until its affairs are wound up, or until the firm property is disposed of.

Oliver v. *Lynn*, 130 Mass. 143.

The detention of the property for a longer time than the specified ten days renders the treasurer a trespasser *ab initio*, and sale made after that time is void.

Brackett v. *Vining*, 49 Me. 356; *Pierce* v. *Benjamin*, 14 Pick. 356; *Noyes* v. *Haverhill*, 11 Cush. 338.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Colorado.

James Streeter, who was plaintiff below, recovered a judgment against Howard C. Chapin, the defendant below, for the sum of $7,118.44. The case was tried by a jury, and the court instructed them to find for the plaintiff. To this instruction the exception was taken upon which the case turns here.

It appears from the bill of exceptions that in the years 1880 and 1881 the plaintiff and defendant were copartners in the business of keeping the Clarendon Hotel in Leadville, Lake County, Colorado, each owning an undivided one half of the hotel and the furniture and personal property therein; that on the 31st day of October, 1881, this partnership was dissolved; and the defendant rented of the plaintiff the undivided half of this hotel and the furniture and personal property therein, for the term of two years. This contract was evidenced by a written instrument, which was introduced at the trial; and by other evidence it was shown on the part of the plaintiff that at that time there remained due and unpaid, for rent and interest on the several installments as they became due, the sum of $7,118.44. The defendant offered evidence to show that on the first day of May, 1882, the plaintiff and defendant "were indebted to the County of Lake, for taxes assessed against them on their joint property, to wit, the said hotel property and furniture, for the years 1880 and 1881, the sum of six hundred and thirty dollars.

"That, to satisfy the sum of three hundred and fifteen dollars of said taxes and the costs of sale, the treasurer of said Lake County distrained, advertised, and sold the undivided one-half of the furniture and other personal property in and about the said hotel, owned by the said Streeter and Chapin jointly."

At that sale one John W. Jacque purchased the undivided one half of this furniture and other personal property in and about the hotel, owned by said Streeter and Chapin jointly, for $106, which was paid by him to the county treasurer.

It further appeared that previous to such distraint and sale Chapin, the defendant, had paid said treasurer one half of the amount of $680 assessed against the property. The advertisement of the sale is copied in full in the bill of exceptions. The most important part of it is the notice by the treasurer of Lake County that he distrained the personal property of Streeter for delinquent personal taxes, and would sell the same on the 16th day of May, 1882, at the Clarendon Hotel, in the City of Leadville, or so much thereof as would be necessary to satisfy the sum of $315.90. The property was described as the furniture of sixty-five bedrooms in that hotel, consisting of beds and bedding, chairs, washstands, bureaus, and carpets in each room; also the furniture of thirty-two bedrooms in the Tabor Opera House building, on the upper floor, three billiard tables and fixtures, bar fixtures, other office and kitchen furniture, and all the other personal property of Streeter in those buildings.

The defendant also proved that he afterwards

rented the undivided one half of the property so sold from Jacque at the rate of $275 per month, and that from the time of the sale until this suit was brought such rent amounted to the sum of $5,575.

The defendant also offered to prove by his own statement that prior to the sale of this property for taxes, Streeter frequently notified him not to pay any taxes on his part of the property owned by them in common, either real or personal, and that he had declared that if he did pay such taxes on his half of the property, he would not allow it to him in their transactions as partners, nor would he pay it to him; but the court refused to allow the introduction of this testimony.

This being all the evidence, the court charged the jury that the plaintiff was entitled to recover the rent according to the contract, as to the amount of which there was no controversy. They were, therefore, directed to find a verdict for the sum of $7,113.44, which was done.

It was the duty of Chapin, who was in possession of the property and in use of it at the time, to have paid the taxes. The $315 of taxes for which the distraint was made was, notwithstanding the payment of one half of the original amount by Chapin, a joint liability upon the property of the firm. So much of the property as was necessary to pay the taxes should have been sold; being personal property, the proceedings under distraint contemplated a seizure by the treasurer, and when a sale was made a delivery by him to the purchaser.

Again, this being the joint or partnership debt of both, the payment of one half of it by Chapin did not discharge him from the obligation of paying the other half to the treasurer of Lake County. The sale, therefore, was a sale for the payment of his debt, a debt for which he was as liable to the county as Streeter, and which the officer was as much bound to make out of his property, or out of that of the partnership, as he was out of that which belonged to Streeter. Being in the exclusive possession and control of it during the term of the lease, by virtue of his own written contract, it was his duty to have paid this tax, and thus protected the property from sale. Through this possession, and the rent which he was paying monthly to Streeter, he had the means of protecting his own interest, and securing the repayment to himself of Streeter's half of the taxes. The obligation which he was under to protect that property by the payment of a debt for which he was personally liable is clear.

This obligation was not satisfied or discharged by the statement of Streeter to him, that if he paid Streeter's half of the taxes he would not allow it to him. Streeter could not thus make a law for the conduct of this partnership property, and governing the rights growing out of the contract of lease; nor would this statement of his, if it had been permitted to be proved, have discharged Chapin from his obligation to the county to pay the taxes levied on this property. Instead of paying the taxes, as appears from the evidence, Chapin, under a sale of this property which it was his duty to have prevented by such payment, and without any disturbance of his possession, or any attempt to disturb it by force or by legal proceedings, has voluntarily paid to Jacque over $5,000 as rent upon that which the latter pretended to buy for the price of $106.

The following authorities, if any are needed, support this view of the subject:

Section 2250 of the General Laws of Colorado provides that "All taxes levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such tax is paid; and if such tax shall not be paid on or before the first day of January next succeeding such levy, it is hereby made the duty of the county treasurer to collect the same by distress and sale of any of the personal property so taxed, or of any other property of the person assessed." See also, *Stockwell* v. *Brewer*, 59 Me. 286; *State* v. *Parker*, 34 N. J. L. 71; *Eberstein* v. *Oswalt*, 47 Mich. 254; *Meyer* v. *Dubuque County*, 49 Iowa, 198.

The judgment of the Circuit Court is affirmed.

ELIZABETH MATTHEWS, Extx. of JOHN MATTHEWS, Deceased, *Appt.*,

v.

IRON CLAD MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 347-351.)

Infringement of letters patent—when reissue is invalid.

1. In an action for the infringement of reissued letters patent, where it is evident that if the original patent had remained unaltered there would have been no infringement, and the reissue was taken out seven years after the original patent, and a year or two after the patentee knew that the defendant was making the article alleged to be an infringement, and the specification in the reissue is substantially the same as the original specification, showing that there was no defect in the original and no error or mistake in framing it, *held*, that the claim is to be construed and limited by the description in the original specification, and that the patentee is no better off than if he had not taken out a reissue, and that he cannot recover.

2. Where the claim is enlarged in the reissue by omitting an essential element of the patentee's invention, the reissue is invalid.

[No. 119.]

Argued Dec. 21, 22, 1887. Decided Jan. 23, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a bill in equity for the infringement of reissued letters patent for an improvement in soda water fountains. *Affirmed.*

Reported below in 22 Blatchf. 427.

The material facts are stated in the opinion.

Mr. **Arthur v. Briesen,** for appellant:

Exhibits introduced by a party without needful explanation do not deserve and will not receive much consideration.

Putnam v. *Vom Hofe*, 19 Blatchf. 68; *Miller* v. *Smith*, 18 Off. Gaz. 1048.

Every man has a right to make an improvement in a machine and evade a previous patent, provided he does not invade the rights of the patentee.

Burr v. *Duryee*, 68 U. S. 1 Wall. 574 (17: 659).

If, in place of the elements omitted, another

is substituted which has been newly discovered, or which was not known at the date of the patent to be an equivalent, and which performs a new function, then it constitutes a new invention, and is not an infringement of the combination.

Rees v. *Gould*, 82 U. S. 15 Wall. 187 (21: 39).

But in the present case it cannot be held that the mixture of lead and tin in the solder is a new invention, or that it performs a new function.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 556 (20: 42).

Messrs. **Frederic H. Betts** and *Ernest C. Webb*, for appellee:

The substitution of one material for another is not invention, if the result is only greater cheapness and durability of the product.

Hotchkiss v. *Greenwood*, 52 U. S. 11 How. 248 (13: 683); *Hicks* v. *Kelsey*, 85 U. S. 18 Wall. 670 (21: 852); *Smith* v. *Goodyear D. V. Co.* 93 U. S. 486 (23: 952).

The mere putting in of an inner tin vessel is a simple aggregation of parts and not a combination.

Hailes v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22: 241); *Rubber Coated H. T. Co.* v. *Welling*, 97 U. S. 7 (24: 942); *Double Pointed Tack Co.* v. *Two Rivers Mfg. Co.* 109 U. S. 117 (27: 877); *Pickering* v. *McCullough*, 104 U. S. 310 (26: 749); *Slawson* v. *Grand Street P. P. & F. R. R. Co.* 107 U. S. 649 (27: 576); *Reckendorfer* v. *Faber*, 92 U. S. 347 (23: 719).

Results are not patentable, but only the means used to produce results.

Case v. *Brown*, 69 U. S. 2 Wall. 325 (17: 817); *Electric R. R. Signal Co.* v. *Hall R. Signal Co.* 114 U. S. 87 (29: 96).

The reissue in suit was specially designed to include the defendant's fountain, which did not infringe the original patent.

Miller v. *Bridgeport Brass Co.* 104 U. S. 350 (26: 783); *James* v. *Campbell*, Id. 356 (26: 786); *Matthews* v. *Boston Machine Co.* 105 U. S. 54 (26: 1022); *Bantz* v. *Frantz*, Id. 160 (26: 1013); *Johnson* v. *Flushing & N. S. R. R. Co.* Id. 539 (26: 1162); *Gage* v. *Herring*, 107 U. S. 640 (27: 601); *Clements* v. *Odorless Excav. Apparatus Co.* 109 U. S. 641 (27:1060); *McMurray* v. *Mallory*, 111 U. S. 97 (28: 365); *Turner & S. Mfg. Co.* v. *Dover Stamping Co.* Id. 319 (28: 442).

The occurrence and existence of an actual mistake in taking out the original patent must be proved.

Mahn v. *Harwood*, 112 U. S. 354 (28: 665); *Eachus* v. *Broomall*, 115 U. S. 429 (29: 419); *Brown* v. *Davis*, 116 U. S. 237 (29: 659); *Ives* v. *Sargent*, 119 U. S. 652 (30: 544); *Parker & W. Co.* v. *Yale Clock Co.* 123 U. S. 87 (*ante*, 100).

There is no case here for a reissue.

Giant Powder Co. v. *California Vigorit Powder Co.* 6 Sawy. 510; *Coon* v. *Wilson*, 113 U. S. 268 (28: 963); *McMurray* v. *Mallory*, *supra*; *Burr* v. *Duryee*, 68 U. S. 1 Wall. 531 (17: 650).

The reissue, 8834, is invalid, because the specification does not state the whole truth with reference to the alleged invention.

Curtis, Patents, 4th ed. 256; *Liardet* v. *Johnson*, Web. Pat. Cas. 53; *Wood* v. *Zimmer*, Id. 82; *Morgan* v. *Seaward*, Id. 175-182; Walker, Patents, § 518.

Positive and direct evidence of intentional suppression of the whole truth is not required in order to render a patent void.

Walker, Patents, § 518; *Gray* v. *James*, 1 Pet. C. C. 394; *Dyson* v. *Danforth*, 4 Fish. Pat. Cas. 133.

To overcome the force of the answer, the supporting proof must be equivalent to that of two witnesses.

Slessinger v. *Buckingham*, 17 Fed. Rep. 454.

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity for the infringement of letters patent, issued June 25, 1872, and reissued August 5, 1879, for an improvement in soda water fountains.

The opinion delivered by the circuit court in dismissing the bill is reported, and drawings of the fountain of each party given, in 22 Blatchford, 427.

The only claim relied on at the argument of this appeal was the second claim of the reissue, being the one most like the single claim of the original patent. The specifications, the drawings therein referred to, and the claims in question, were alike in the two patents, differing only, as shown below, by omitting in the reissue the words of the original patent which are printed in brackets, and by inserting the words printed in italics, and three additional claims immaterial to the present inquiry. After a general reference to the drawings, the specification proceeds as follows:

"My invention consists in a novel construction of a tin lined steel fountain for soda water and other aerated or gaseous liquids, such fountain combining lightness with strength, and being of cylindrical form and uniform dimensions, or thereabout, throughout its length, thereby adding to the convenience of packing and handling; also being exempt from expansion or permanent lateral distension by the interior pressure to which it is subjected, thus preserving its form and contributing to its durability. Fountains for the like purpose, as previously made, have been largely expansive, and retained the set given to them by extension, and being otherwise objectionable.

"In the accompanying drawing, A represents a block tin interior body of cylindrical form with hemispherical or reduced ends, the same constituting the tin lining of the fountain, and being provided at one of its ends with a neck *b*, for introduction of the usual or any suitable connections by which the fountain is charged and its contents drawn off, said neck receiving or having screwed into it a screw coupling *c*, secured by a nut and washer *d e*, on the exterior of an outer end cap B, for making the connection. C is the exterior shell or body proper, made of galvanized sheet steel, as may also be the end caps B B′, which are soldered to or over the extremities of the same, and constitute, as it were, parts of said body C that [closely] surrounds or fits over the tin lining A. The end caps B B′ are united to the body C, without flanges or projections, by tin joints, as at *f f*, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do. Bands *g g* of brown paper or other nonconducting ma-

terial are introduced between the tin lining A and steel body C, at the ends of the latter, to prevent the tin of the lining from being melted by the heat used in making the pure tin joints *f f*. The fountain is also filled with water for the same purpose, prior to making said joints.

"The non-stretching character of the body C, by reason of the same being of steel, insures the fountain, preserving its shape; and the absence of end flanges provides for the close packing of a series of such formations when transporting or storing them.

["What is here claimed, and desired to be secured by letters patent, is—"] "*I claim*

"The tin vessel A, incased by a [steel] cylinder C, and ends B B' [soldered to the latter], in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified."

It has been argued for the plaintiff that the patent is for the combination of an inner flexible vessel of tin or its equivalent, with an outer vessel of steel or its equivalent, the outer vessel being composed of a central cylinder and of end caps that are slipped on to the cylinder and united thereto by tin solder or its equivalent.

But the only claim of the original patent is for "the tin vessel, incased by a steel cylinder, and ends soldered to the latter, in the manner substantially as described;" and the manner described in the specification of fastening the end caps to the body of the outer shell is, "without flanges or projections, by tin joints, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do."

The patentee himself testified that when he made his invention he knew of others having used iron fountains lined with sheet block tin; that the first fountains he made were soldered with tin and lead solder, usually known as soft solder, and he found that would not do, and therefore adopted a solder of pure tin; and that he dispensed with rivets, because they prevented the fountain being repaired without tearing the shell in taking out the rivets.

In short, by the terms of the specification and claim, in the then existing state of the art, and according to the intention of the patentee, his patent was limited to a fountain in which the caps were connected with the outer cylinder by pure tin solder, without rivets or flanges.

In the fountain made by the defendant, on the other hand, the caps are fastened to the body at both ends by a solder of half tin and half lead, as well as by rivets, and there are vertical flanges at one end, through which the rivets pass. It is quite clear, therefore, that if the original patent had remained unaltered, there would have been no infringement.

The reissue was taken out seven years after the original patent, and a year or two after the patentee knew that the defendant was making such a fountain as is now alleged to be an infringement.

The repetition of the original specification in the reissue, word for word (except only in the unimportant variation of omitting the word "closely" in speaking of the fitting of the shell to the lining) as well as the testimony of the patentee, proves that there was no defect or insufficiency in the original specification, and no error, inadvertence or mistake in framing it.

If the omission, in the claim of the reissue, after the mention of the outer cylinder and the ends, of the words "soldered to the latter," before the words "in the manner substantially as described," still leaves the claim to be construed and limited by the previous description in the specification, the patentee is no better off than if he had not taken out a reissue.

But if the effect of omitting the words in question is to extend the claim to a fountain, the outer cylinder and ends of which are fastened together in any other manner than by a solder of pure tin, the claim is enlarged by omitting an essential element of the patentee's invention, and the reissue is invalid, by the settled law of this court. *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 [26: 783]; *Mahn* v. *Harwood*, 112 U. S. 354 [28: 665]; *Parker & W. Co.* v. *Yale Clock Co.* 123 U. S. 87 [*ante*, 100].

Decree affirmed.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,
v.
GEORGE F. HALL.

(See S. C. Reporter's ed. 444–458.)

Damages for breach of contract—recoverable against telegraph company for neglect and mistake in sending message.

1. The damages for which a party may recover for a breach of a contract are such as naturally and ordinarily flow from the nonperformance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent.

2. Where a telegraph company in sending a message omitted to give the proper address, and its delivery was thereby delayed for a day, until the oil thereby ordered to be purchased had advanced in price beyond what it was at the time when the message, if correctly addressed, would have been delivered, and the person to whom it was addressed omitted, by reason of such advance in price, to purchase the oil ordered, and it does not appear that it was the purpose of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale, or that he would have resold the oil, if purchased, the next day at the advanced price on that day, or that he could have resold at a profit at any subsequent day,—the only damage for which he is entitled to recover against the telegraph company for such negligence is the cost of transmitting the delayed message; and not the difference between the value of the oil if it had been purchased on the day when the message ought to have been delivered, and the market price to which it had risen on the next day.

[No. 85.]

Argued and submitted Nov. 30, 1887. Decided Jan. 30, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of Iowa upon a certificate of a division of opinion between the judges upon certain questions which arose during the course of the trial. *Judgment reversed.*

Statement of the case by *Mr. Justice* **Matthews**:

This was an action at law brought in the Circuit Court of Polk County, Iowa, by George F. Hall, against the Western Union Telegraph

Company, and by the defendant removed, on the ground of citizenship, to the Circuit Court of the United States for the Southern district of Iowa. The action was for the recovery of damages for alleged negligence on the part of the defendant in delaying the delivery of a telegraphic message received by it from the plaintiff at Des Moines, in the State of Iowa, to be delivered to the party to whom it was addressed at Oil City, in the State of Pennsylvania. The cause was submitted to the court, a jury having been waived in writing. A judgment was rendered in favor of the plaintiff for the sum of $1,800. The cause is brought here by a writ of error upon a certificate of a division of opinion between the judges upon certain questions which arose during the course of the trial, which questions, together with the facts necessary for their determination are certified to us as follows:

"The court finds the following as the material facts in the case:

"The plaintiff, at eight o'clock A. M., November 9, 1882, furnished to the defendant, a telegraph company engaged in the business of receiving and sending telegraph dispatches, at its office in Des Moines, Ia., a message in the following form, and plainly written on one of the usual blank forms furnished by the Company:

'Form No. 2.

'The Western Union Telegraph Company.

'All messages taken by this Company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company that said Company shall not be liable for mistakes or delays in the transmission or delivery or nondelivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of message to any point on the lines of this Company can be insured by contract in writing, stating agreed amount of risk and payment of premium thereon, at following rates, in addition to the usual charge for repeated messages, viz: one per cent for any distance not exceeding 1,000 miles, and two per cent for any greater distance. No employé of the Company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The Company will not be liable for damages in any case where the claim is not presented in writing in sixty days after sending the message.

'Norvin Green, *President.*

'Thos. T. Eckert, *General Manager.*

'Receiver's No. —. Time filed, 8 A. M. — check.

'Send the following message, subject to the above terms, which are agreed to.

'11 | 9, 1882.

'To Chas. T. Hall, Exchange, Oil City, Pa.:

'Buy ten thousand if you think it safe. Wire me.

Geo. F. Hall.

'Read the notice and agreement at the top.'

"The same being furnished and received by the defendant for immediate transmissal to Charles T. Hall, at Oil City, Penna., the usual and ordinary charge therefor being paid by plaintiff. Through the negligence and want of ordinary care on the part of defendant's employé at Des Moines the message so received was forwarded to Oil City, Penna., in an imperfect condition, in this, that the name of the party to whom it was addressed was wholly omitted. The message was received at Oil City, Penna., at 11 o'clock A. M. November 9.

"The operator of defendant at Oil City sent the message to the building known as the Exchange, which was used by a board of trade engaged in the business of buying and selling petroleum, the hours of business extending from 10 A. M. until 4 P. M. The officers of the exchange or board of trade refused to receive the dispatch in question, and thereupon the operator at Oil City telegraphed to Des Moines for the purpose of ascertaining to whom the dispatch should be delivered, and thus ascertaining for whom it was intended, delivered it to Charles T. Hall at six o'clock P. M., November 9, 1882. Had it not been for the error in sending the dispatch without including the name of Charles T. Hall it would have been delivered to him at Oil City at 11.30 A. M. November 9, 1882. The meaning of the dispatch was to direct Charles T. Hall to buy ten thousands barrels of petroleum, if in his judgment it was best to do so. Had the dispatch upon its first receipt at Oil City, Penna., been promptly delivered to Charles T. Hall he would by twelve M. of November 9, have purchased ten thousand barrels of petroleum at the then market price of $1.17 per barrel for the plaintiff. When the dispatch was delivered to Charles T. Hall the exchange had been closed for that day, so that said Hall could not then purchase the petroleum ordered by plaintiff. At the opening of the board the next day the price had advanced to $1.35 per barrel, at which rate said Charles T. Hall did not deem it advisable to make the purchase, and hence did not do so.

"It is not disclosed in the evidence whether the price of petroleum has advanced or receded since that date, November 10, 1882. The operators acting for the defendant had no other knowledge of the meaning or purpose of the dispatch than is to be gathered from the message itself.

"The plaintiff brought this action to recover damages for the failure to properly and promptly transmit the dispatch in question in the Circuit Court of Polk County, Iowa, the original notice being served upon the defendant on the 22d day of December, 1882. Under the Statutes of Iowa, actions in the courts of that State are commenced by serving upon the defendant an original notice, which is signed by the plaintiff or his attorney, and is addressed to the defendant. No summons or writ under the seal of the court is issued. The notice in this case was addressed to the defendant, and, after entitling the cause, proceeded as follows: 'You are hereby notified that on or before the 22d day of December, 1882, the petition of plaintiff in the above entitled cause will be filed in the office of the Clerk of the Circuit Court of the State of Iowa in and for Polk County, Iowa, claiming of you the sum of fifteen hundred dollars, as money justly due from you as a loss and damage suffered by the plaintiff by reason of your negligent failure to send and deliver a telegram, as set forth in said petition, on November 9, 1882, from plaintiff to Chas. T. Hall, at Oil City, Pa., and that unless you appear thereto and defend before noon of the second day of of the January Term, A. D. 1883, of the said court, which will commence on the second day January, A. D. 1883, default will be entered against you and judgment rendered thereon. Crom. Bowen and Whiting S. Clark, attorneys for plaintiff.'

"No other presentation of the claim was made by plaintiff. Upon the foregoing facts it is the opinion of the presiding judge that the law is with the plaintiff, and that he is entitled to judgment in the sum of eighteen hundred dollars; and it is so ordered as the judgment of the court.

"The judges holding said circuit court, and before whom said cause was tried, hereby certify that on said trial of said cause they were divided in opinion and were unable to agree upon the following questions of law arising on said trial and necessary to be determined in order to finally determine said cause, to wit:

"1. Can the defendant, having in the usual line of its business accepted said message from the plaintiff for transmissal to the party named therein at Oil City, Pa., and having received its usual charge for such service, be heard to say that it was not bound to exercise ordinary care in transmitting the same, and that it is only liable to the plaintiff in damages in case of gross negligence on its part?

"2. Under the contract legally existing between the plaintiff and defendant, whereby the latter assumed the duty of forwarding said message, the same being an unrepeated message, was the defendant bound only to the exercise of slight care or to the exercise of ordinary care?

"3. Under the contract legally existing between plaintiff and defendant, whereby the defendant assumed the duty of forwarding said message, the same being an unrepeated message, can the defendant, in any event, be held to respond in damages beyond the amount paid to the Company for forwarding the said dispatch?

"4. Admitting the liability of defendant to respond in damages beyond the sum paid for forwarding the message, what rule is to govern in ascertaining the same? Are the damages merely nominal, or is plaintiff entitled to the difference in value of the oil at the time it would have been purchased for plaintiff had the message been properly forwarded and the value at the time it could have been purchased after the actual delivery of the message to Charles T. Hall, at Oil City, Pa., it being admitted that he did not make the purchase for the reason that, in his judgment, the price on the morning of November 10, 1882, was too high to justify purchasing.

"5. Was the message so obscure and uncertain on its face that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded?

"6. Was the service of the original notice in this cause a sufficient compliance with the clause in the contract providing that 'The Company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message'? If not, is the right of recovery barred by the failure to present the claim in writing?"

Messrs. **Wager Swayne** and **Rush Taggart,** for plaintiff in error:

The suit cannot be maintained without previous notice in writing, within sixty days after sending the message.

The contract is explicit that the Company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

Bumstead v. *Dividend Mut. Ins. Co.* 12 N. Y. 81; *Mason* v. *Harvey*, 8 Exch. 819; *Roach* v. *New York & E. Ins. Co.* 30 N. Y. 546; *Ripley* v. *Ætna Ins. Co.* 30 N.Y. 168; May, Fire Ins. §§ 5, 460, 461; *Riddlesbarger* v. *Hartford F. Ins. Co.* 74 U. S. 7 Wall. 390 (19: 259); *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264 (22: 556); *Farnham* v. *Camden & A. R. R. Co.* 55 Pa. 58; *Lewis* v. *Great Western R. R. Co.* 5 Hurl. & N. 867; *Wolf* v. *W. U. Tel. Co.* 62 Pa. 83; *Cole* v. *W. U. Tel. Co.* 33 Minn. 227; *W. U. Tel. Co.* v. *McKinney*, 5 Tex. Law Rev. 178; *Young* v. *W. U. Tel. Co.* 65 N. Y. 163; *Heimann* v. *W. U. Tel. Co.* 57 Wis. 562.

That a telegraph company has not promptly and correctly delivered a message does not by itself support a conclusion of negligence on the part of the company.

W. U. Tel. Co. v. *Carew*, 15 Mich. 525.

The only recovery which can be sustained is for the amount of tolls paid.

Hart v. *Pennsylvania R. R. Co.* 112 U. S. 331 (28: 717).

Telegraph companies are not insurers of the safe delivery of every message intrusted to them.

Tyler v. *W. U. Tel. Co.* 60 Ill. 428; *Grinnell* v. *W. U. Tel. Co.* 113 Mass. 299; *Birney* v. *New York & W. Print. Tel. Co.* 18 Md. 341; *Ellis* v. *American Tel. Co.* 13 Allen, 226; *W. U. Tel. Co.* v. *Carew*, 15 Mich. 582; *Schwartz* v. *Atlantic & P. Tel. Co.* 18 Hun, 157; *Breese* v. *U. S. Tel. Co.* 48 N. Y. 132; *Pinckney* v. *W. U. Tel. Co.* 19 S. C. 71, *S. C.* 45 Am. Rep. 499, note, 765; Lawson, Contracts of Carriers, 8; *Hart* v. *W. U. Tel. Co.* 66 Cal. 579; *Passmore* v. *W. U. Tel. Co.* 78 Pa. 238; *Aiken* v. *W. U. Tel. Co.* 5 S. C. 358.

The Telegraph Company can be held liable only for gross misconduct or culpable negligence.

McAndrew v. *Electric Tel. Co.* 17 C. B. 3; *Wann* v. *W. U. Tel. Co.* 37 Mo. 472; *Clement* v. *W. U. Tel. Co.* 137 Mass. 463; *Lassiter* v. *W. U. Tel. Co.* 89 N. C. 334; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232; *Becker* v. *W. U. Tel. Co.* 11 Neb. 87; *W. U. Tel. Co.* v. *Neill*, 57 Tex. 288; S. C. 44 Am. Rep. 589; *W. U. Tel. Co.* v. *Carew*, 15 Mich. 525; *White* v. *W. U. Tel. Co.* 14 Fed. Rep. 710; *Jones* v. *W. U. Tel. Co.* 18 Fed. Rep. 717.

Upon no hypothesis of negligence can the assessment of damages as made by the court be sustained.

Milwaukee & St. P. R. Co. v. *Kellogg*, 94 U. S. 474 (24: 258); *Griffin* v. *Colver*, 16 N. Y. 489; *Masterton* v. *Brooklyn*, 7 Hill, 61; *W. U. Tel. Co.* v. *Graham*, 1 Col. 230; *S. C.* Allen, Tel. Cas. 578; *Kiley* v. *W. U. Tel. Co.* 39 Hun, 158.

Speculative, contingent and remote damages are excluded.

Beaupre v. *Pacific & A. Tel. Co.* 21 Minn. 155; *Lowery* v. *W. U. Tel. Co.* 60 N. Y. 198.

The damages recoverable are nominal [only.

Shields v. *Washington Tel. Co.* Allen, Tel. Cas. 5; *Kinghorne* v. *Montreal Tel. Co.* 18 U. C. Q. B. 60; *Stevenson* v. *Montreal Tel. Co.* 16 U. C. Q. B. 530; *Landsberger* v. *Magnetic Tel. Co.* 32 Barb. 530; *Baldwin* v. *U. S. Tel. Co.* 45 N. Y. 744; *Smith* v. *W. U. Tel. Co.* 83 Ky. 104; *Pennington* v. *W. U. Tel. Co.* 67 Iowa, 631; *McColl* v. *W. U. Tel. Co.* 7 Abb. N. C. 151; *Hibbard* v. *W. U. Tel. Co.* 33 Wis. 558.

Messrs. **Chas. A. Clark, Crom. Bowon** and **Whiting S. Clark**, for defendant in error:

Sufficient facts are not found and stated by the court below upon which the first, second and third questions can be based.

Unless this is clearly and distinctly done the questions become general, abstract, hypothetical and outside the case, and will not be answered by this court.

Daniels v. *Chicago & R. I. R. R. Co.* 70 U. S. 3 Wall. 256 (18:225); *Havemeyer* v. *Iowa County*, 70 U. S. 3 Wall. 304 (18: 42); *Norris* v. *Jackson*, 76 U. S. 9 Wall. 127 (19: 609).

It may well be denied that either the fourth or sixth question presents a distinct point of law as required.

Williamsport Nat. Bank v. *Knapp*, 119 U. S. 357 (30: 446) and cases therein cited.

The court below found that the mistake in the message was through the negligence of the defendant's employé.

The liability of telegraph companies in such cases is decisively established notwithstanding the stipulations for exemption from liability for negligence.

Birney v. *New York & W. Pr. Tel. Co.* 18 Md. 341; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 248; *Baldwin* v. *U. S. Tel. Co.* 45 N. Y. 744; *Breese* v. *U. S. Tel. Co.* 48 N. Y. 140; *Bartlett* v. *W. U. Tel. Co.* 62 Me. 209; *W. U. Tel. Co.* v. *Griswold*, 37 Ohio St. 301; *W. U. Tel Co.* v. *Fenton*, 52 Ind. 1; *Abraham* v. *W. U. Tel. Co.* 23 Fed. Rep. 315; *Parks* v. *Alta Cal. Tel. Co.* 13 Cal. 422; *White* v. *W. U. Tel. Co.* 14 Fed. Rep. 710; *True* v. *International Tel. Co.* 60 Me. 9; *Wann* v. *W. U. Tel. Co.* 37 Mo. 482; *Candee* v. *W. U. Tel. Co.* 34 Wis. 471; *Hibbard* v. *W. U. Tel. Co.* 33 Wis. 558; *Thompson* v. *W. U. Tel. Co.* 64 Wis. 531; *Sweatland* v. *Illinois & M. Tel. Co.* 27 Iowa, 456; *Manville* v. *W. U. Tel. Co.* 37 Iowa, 214; *Tyler* v. *W. U. Tel. Co.* 60 Ill. 421; *W. U. Tel. Co.* v. *Tyler*, 74 Ill. 168; *N. Y. Cent. R. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357 (21:627); Whart. Neg. § 763; *Wolf* v. *W. U. Tel. Co.* 62 Pa. 83; *Marr* v. *W. U. Tel. Co.* 3 S. W. Rep. 496.

A common carrier cannot stipulate for exemption from the consequences of his own negligence or that of his servants.

Hart v. *Pennsylvania R. R. Co.* 112 U. S. 338 (28:720); *New Jersey S. Nav. Co.* v. *Merchants Bank*, 47 U. S. 6 How. 344 (12:465); *York Mfg. Co.* v. *Illinois Cent. R. R. Co.* 70 U. S. 3 Wall. 107 (18:170); *N. Y. Cent. R. R. Co.* v. *Lockwood*, *supra*; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264 (22:556); *Ogdensburg & L. C. R. R. Co.* v. *Pratt*, 89 U.S. 22 Wall. 123 (22:827); *Bank of Ky.* v. *Adams Exp. Co.* 93 U. S. 174 (23:872); *Grand Trunk R. Co.* v. *Stevens*, 95 U. S. 655 (24:535).

The authorities are uniform in support of the damages recovered in the court below in this case.

U. S. Tel. Co. v. *Wenger*, 55 Pa. 262; *Squire* v. *W. U. Tel. Co.* 98 Mass. 232; *Tyler* v. *W. U. Tel. Co.* 60 Ill. 421; *Turner* v. *Hawkeye Tel. Co.* 41 Iowa, 458; *Rittenhouse* v. *Independent Line of Telegraph*, 44 N. Y. 263; *New York & W. Pr. Tel. Co.* v. *Dryburg*, 35 Pa. 298; *Leonard* v. *New York, A. & B. Electro Magnetic Tel. Co.* 41 N. Y. 544; *Washington & N. O. Tel. Co.* v. *Hobson*, 15 Gratt. 122; *W. U. Tel. Co.* v. *Graham*, 1 Col. 230; *W. U. Tel. Co.* v. *Fenton*, 52 Ind. 1; *Marr* v. *W. U. Tel. Co.* 3 S. W. Rep. 496.

"Was the message so obscure and uncertain on its face that the defendant should not be held to know that it pertained to a transaction involving loss and damage if the message was not properly and promptly forwarded?"

Messages similar or of less plain import have been held sufficient in the following cases:

Squire v. *W. U. Tel. Co.* and *Tyler* v. *W. U. Tel. Co. supra*; *W. U. Tel. Co.* v. *Griswold*, 37 Ohio St. 301; *True* v. *International Tel. Co.* 60 Me. 9; *Sprague* v. *W. U. Tel. Co.* 6 Daly, 200; *Manville* v. *W. U. Tel. Co.* 37 Iowa, 214; *Thompson* v. *W. U. Tel. Co.* 64 Wis. 531; *Candee* v. *W. U. Tel. Co.* 34 Wis. 471; *W. U. Tel. Co.* v. *Graham*, 1 Col. 230; *U. S. Tel. Co.* v. *Wenger*, 55 Pa. 262.

Was the notice of the claim sufficient?

Smith v. *Chicago, R. I. & P. R. Co.* 56 Iowa, 721; *Blackington* v. *Rockland*, 66 Me. 334; *Sawyer* v. *Naples*, 66 Me. 454; *Southern Exp. Co.* v. *Caldwell*, *supra*.

Mr. Justice **Matthews** delivered the opinion of the court:

The view we take of this case requires us, in answer to the fourth question certified, to say that, in the circumstances disclosed by the record, the plaintiff was entitled only to recover nominal damages, and not the difference in value of the oil if it had been purchased on the day when the message ought to have been delivered and the market price to which it had risen on the next day. As the judgment was rendered in his favor for the latter sum, it must be reversed on that account, and, upon the facts found by the court, judgment rendered for nominal damages only, which finally disposes of the litigation. It, therefore, becomes unnec-

essary to consider or decide any of the other questions certified to us.

It is found as a fact that if the dispatch upon its first receipt at Oil City had been promptly delivered to Charles T. Hall, to whom it was addressed, he would by twelve o'clock on that day have purchased ten thousand barrels of oil at the market price of $1.17 per barrel, on the plaintiff's account. He was unable to do so in consequence of the delay in the delivery of the message. On the next day the price had advanced to $1.35 per barrel, and no purchase was made because Charles T. Hall, to whom the message was addressed, did not deem it advisable to do so, the order being conditional on his opinion as to the expediency of executing it. If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff's account on the next day or not; or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold it is altogether uncertain. If he had not done so, but had continued to hold the oil bought, there is also nothing in the record to show whether up to the time of the bringing of this action, he would or would not have made a profit or suffered a loss; for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase. The only theory, then, on which the plaintiff could show actual damage or loss is on the supposition that, if he had bought on the ninth of November, he might and would have sold on the tenth. It is the difference between the prices on those two days which was in fact allowed as the measure of his loss.

It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November ninth, and of making a profit by selling on the tenth, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place.

It has been well settled since the decision in *Masterton* v. *Brooklyn*, 7 Hill, 61, that a plaintiff may rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself as the direct and immediate result of its fulfillment. In the language of the Supreme Judicial Court of Massachusetts in *Fox* v. *Harding*, 7 Cush. 516: "These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." This rule was applied by this court in the case of *Philadelphia, W. & B. R. R. Co.* v. *Howard*, 54 U. S. 13 How. 307 [14: 157]. In *Griffin* v. *Colver*, 16 N. Y. 489, the rule was stated to be that "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familar rules on the subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

In *Booth* v. *Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487, the rule was stated to be that "The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the nonperformance; they must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent." In *White* v. *Miller*, 71 N. Y. 133, it was said: "Gains prevented, as well as losses sustained, may be recovered" as profits, "when they can be rendered reasonably certain by evidence, and have naturally resulted from the breach."

In cases of executory contracts for the purchase or sale of personal property, ordinarily the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract is broken. This rule may be varied according to the principles established in *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L. J. Exch. 179, where the contract is made in view of special circumstances in contemplation of both parties. That well known case, it will be remembered, was an action against a carrier to recover damages occasioned by delay in the delivery of an article, by reason of which special injury was alleged. In the application of the rule to similar cases, where there has been delay in delivering by a carrier which amounts to a breach of contract, the plaintiff is not always entitled to recover the full amount of the damage actually sustained; *prima facie* the damages which he is entitled to recover would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered and their value at the time when they are in fact delivered. *Horne* v. *Midland R. Co.* L. R. 8 C. P. 131; *Cutting* v. *Grand Trunk R. Co.* 13 Allen, 381. Any loss above this difference sustained by the plaintiff, not arising directly from the delay, but collaterally by reason of special circumstances, can be recovered only on the ground that these special circumstances, being in view of both parties to the contract, constituted its basis. *Simpson* v. *London & N. W. R. Co.* L. R. 1 Q. B. Div. 274. So the loss of a market may be made an element of damages against a carrier for delay in delivery, where it was understood, either expressly or from the circumstances of the case, that the object of delivery was to get the bene-

fit of the market. *Pickford* v. *Grand Junction R. Co.* 12 Mees. & W. 766. In *Wilson* v. *Lancashire & Y. R. Co.* 9 C. B. N. S. 632, the plaintiff was held entitled to recover for the deterioration in the marketable value of the cloth by reason of delay in the delivery, whereby the season for manufacturing it into caps, for which it was intended, was lost.

The same rule, by analogy, has been applied in actions against telegraph companies for delay in the delivery of messages, whereby there has been a loss of a bargain or a market. Such was the case of *United States Tel. Co.* v. *Wenger*, 55 Pa. 262. There the message ordered a purchase of stock, which advanced in price between the time the message should have arrived and the time when it was purchased under another order, and the advance was held to be the measure of damages. There was an actual loss, because there was an actual purchase at a higher price than the party would have been compelled to pay if the message had been promptly delivered, and the circumstances were such as to constitute notice to the company of the necessity for prompt delivery. The rule was similarly applied in *Squire* v. *Western Union Tel. Co.* 98 Mass. 232. There the defendant negligently delayed the delivery of a message accepting an offer to sell certain goods at a certain place for a certain price, whereby the plaintiff lost the bargain, which would have been closed by a prompt delivery of the message. It was held that the plaintiff was entitled to recover, as compensation for his loss, the amount of the difference between the price which he agreed to pay for the merchandise by the message, which if it had been duly delivered would have closed the contract, and the sum which he would have been compelled to pay at the same place in order, by the use of due diligence, to have purchased a like quality and quantity of the same species of merchandise. There the direct consequence and result of the delay in the transmission of the message was the loss of a contract which, if the message had been duly delivered, would by that act have been completed. The loss of the contract was, therefore, the direct result of the defendant's negligence, and the value of that contract consisted in the difference between the contract price and the market price of its subject matter at the time and place when and where it would have been made. The case of *True* v. *International Tel. Co.* 60 Me. 9, cannot be distinguished in its circumstances from the case in 98 Mass. 232, and was governed in its decision by the same rule. The cases of *Manville* v. *W. Union Tel. Co.* 37 Iowa, 214, and of *Thompson* v. *Western Union Tel. Co.* 64 Wis. 531, were instances of the application of the same rule to similar circumstances, the difference being merely that in these the damage consisted in the loss of a sale instead of a purchase of property, which was prevented by the negligence of the defendant in the delivery of the messages. In these cases the plaintiffs were held to be entitled to recover the losses in the market value of the property occasioned, which occurred during the delay.

Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value are clearly within the rule for estimating damages. Of this class examples are to be found in the cases of *Turner* v. *Hawkeye Tel. Co.* 41 Iowa, 458, and *Rittenhouse* v. *Independent Line of Telegraph*, 44 N. Y. 263; but these have no application to the circumstances of the present case. Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day. The only damage, therefore, for which he is entitled to recover is the cost of transmitting the delayed message.

The judgment is accordingly reversed, and the cause remanded, with directions to enter a judgment for the plaintiff for that sum merely.

JOHN W. BRAZEE, *Appt.*,
v.
NICHOLAS SCHOFIELD ET AL.

(See S. C. Reporter's ed. 495–505.)

Donation Act of Oregon—joint settlement by husband and wife—heirs, when estopped—division between heirs—irregularities in partition and sale.

1. Under the Donation Act of Oregon, the notice required to be given to the surveyor-general, of the claim of the settler, may be given after his death by his widow, where the public survey of the land had not been made during his life.

2. The law contemplates, in all its provisions, that where a settlement on lands has been joint, by the husband and wife together, the benefit of the donation intended for both should be secured, in the case of the death of either, to his or her heirs.

3. Where a patent of the United States was issued upon the supposed compliance of the patentee with the requirements of the Donation Act, one who derives his title through conveyances of the heirs of the deceased settler under the patent is estopped from setting up that the requirements of the Donation Act were not complied with, or that the grantees under the patent, the widow and children of the deceased settler, were not entitled under the Act to the land.

4. Where the conditions for the acquisition of the title to the entire donation tract had been complied with, and nothing remained to be done by the officers of the government except to divide the land between the widow and heirs, it is not for others to complain that the surveyor-general has carried out a division agreed upon between the widow and heirs themselves.

5. Where a partition has been made between the heirs, by a probate court having jurisdiction over proceedings for partition and over the sale of property of minors, the long acquiescence of a minor, after he became of age, in the proceedings had for the partition and sale of his property, is equivalent to an express affirmance of them, even if they are affected with such irregularities as, upon his prompt application after becoming of age, would have justified the court in setting them aside.

[No. 114.]

Argued and Submitted Dec. 16, 1887. Decided Jan. 30, 1888.

APPEAL from a judgment of the Supreme Court of the Territory of Washington affirming a judgment of a District Court of that Territory in favor of defendants in an action for the possession of a tract of land. *Judgment affirmed.*

The facts and case are fully stated in the opinion.

Mr. **Leander Holmes,** for appellant:

Appellees' purchase and possession lacked the ingredients of legal ouster, good faith or color of title, and they could not hold adversely.

Jackson v. *Waters*, 12 Johns. 365.

A deed or judicial proceeding which is a nullity can never lay the foundation of an adverse possession.

Livingston v. *Peru Iron Co.* 9 Wend. 512; *Lincoln* v. *Tower*, 2 McLean, 478; *Reber* v. *Gilson*, 1 Pa. 55; *King* v. *Randlett*, 33 Cal. 318.

Unless these appellees can show title through a court having jurisdiction, their possession is of no value.

Walker v. *Turner*, 22 U. S. 9 Wheat. 541 (6: 155).

The refusal or neglect of Amos M. Short to file a claim in his lifetime deprived his widow and children of any interest in a donation claim through him.

Vance v. *Burbank*, 101 U. S. 521 (25: 931); *Hall* v. *Russell*, 101 U. S. 510 (25: 832).

Notice to the surveyor-general was the first act which brought the occupant within the operation of the law. Without this notification, the occupant could not acquire any legal relation to the land.

Fitzpatrick v. *Dubois*, 2 Sawy. 435.

The notification of the widow could not cure her husband's neglect, nor clothe his children with any right in the land.

Vance v. *Burbank*, *supra*.

As neither the administrator nor the probate court had any power or jurisdiction to make said partition, said alleged partition proceedings were absolutely null and void, and cannot, and do not, bind any of these heirs or his assigns from asserting their after-acquired title.

Statutes of W. Ty. 1854, § 8; *Hanner* v. *Silver*, 2 Oreg. 336; *Traver* v. *Tribou*, 8 Sawy. 511, 520; *Adams* v. *Rockwell*, 16 Wend. 816.

The answer fails to show that appellees are entitled to equities at all.

Teal v. *Walker*, 111 U. S. 242 (28: 415).

There can be no estoppel by bargain and sale deeds of one's right, title and interest in lands, except the interest the party then owns; and a warranty cannot enlarge it.

Coakley v. *Perry*, 3 Ohio St. 344; *Hanrick* v. *Patrick*, 119 U. S. 175 (30: 406).

When the deed does not on its face purport to convey an indefeasible estate, but only the right, title and interest of the grantor, the doctrine of estoppel has been held not to apply.

White v. *Brocaw*, 14 Ohio St. 343; *Adams* v. *Ross*, 30 N. J. L. 509; *Blanchard* v. *Brooks*, 12 Pick. 47; *Brown* v. *Jackson*, 16 U. S. 3 Wheat. 452 (4: 432).

Nor can there be any estoppel against the legal owner of the land for anything said, done or allowed before his title became vested.

Bayler v. *Commonwealth*, 40 Pa. 37; *Doe* v. *Oliver*, 2 Smith, Lead. Cas. 7th Am. ed. *651; *Farmers L. & T. Co.* v. *McKinney*, 6 McLean, 8; *Blanchard* v. *Brooks*, 12 Pick. 47–66; *Sampeyreac* v. *U. S.* 32 U. S. 7 Pet. 222 (8: 665).

It must appear that the party claiming the benefit of the estoppel was misled and deceived by the party sought to be estopped.

Wythe v. *Smith*, 4 Sawy. 24; *Hill* v. *Epley*, 31 Pa. 334; *Boggs* v. *Merced Min. Co.* 14 Cal. 379; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 456 (27: 229); *Henshaw* v. *Bissell*, 85 U. S. 18 Wall. 255 (21: 835); *Brant* v. *Virginia Coal & I. Co.* 93 U. S. 326 (23: 927); 2 Pom. Eq. Jur. pars. 806, 807; *Trenton Bkg. Co.* v. *Duncan*, 86 N. Y. 221.

Nor can a party claim the benefit of any kind of estoppel when it is apparent from the answer that he knew, or had the means to know, at the time of the want of title, or the character of the title.

Steel v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447 (27: 226); *Smith* v. *Cash Mut. F. Ins. Co.* 24 Pa. 320; *Commonwealth* v. *Moltz*, 10 Pa. 527–531.

No one is required to assert his title before he has it.

Bigelow v. *Topliff*, 25 Vt. 273; *Hill* v. *Epley*, 31 Pa. 331; *Fisher* v. *Mossman*, 11 Ohio St. 42; *Crest* v. *Jack*, 3 Watts, 238.

No equitable estoppel can spring from mere silence or acquiescence in any case, unless it was a duty to speak.

Hill v. *Epley*, 31 Pa. 331; *Taylor* v. *Ely*, 25 Conn. 250; *Strong* v. *Ellsworth*, 26 Vt. 366; *Sutton* v. *Wood*, 27 Minn. 362.

Even the receipt of the proceeds of the sale cannot preclude the assertion of an after-acquired title.

Doe v. *Oliver*, 2 Smith, Lead. Cas. 7th Am. ed. *653; *Hanrick* v. *Patrick*, 119 U. S. 175 (30: 406).

Nor could a deed pass an after-acquired title by estoppel unless the deed or deeds alleged conveyed future estates, or titles to be acquired.

See *Varick* v. *Edwards*, 11 Paige, 289; *Edwards* v. *Varick*, 5 Denio, 664; *Lloyd* v. *Lloyd*, 2 Connor & L. 592; *S. C.* Drury & W. 369; *Sparrow* v. *Kingman*, 1 N. Y. 242–246; *Jackson* v. *Wright*, 14 Johns. 193; *Jackson* v. *Bradford*, 4 Wend. 622.

This doctrine of estoppel should not be enforced, unless all the circumstances concur which are necessary to the creation of an equitable estoppel.

Boggs v. *Merced Min. Co.* 14 Cal. 279; *Crest* v. *Jack*, 3 Watts, 238; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 456 (27: 229).

No executory or contingent interest can be conveyed, either by common-law grant or by the Statute of Uses.

Pelletreau v. *Jackson*, 11 Wend. 110; *Jackson* v. *Waldron*, 13 Wend. 178; *Edwards* v. *Varick*, 5 Denio, 665; *Davis* v. *Hayden*, 9 Mass. 514; *Blanchard* v. *Brooks*, 12 Pick. 47–66; *Ham* v. *Ham*, 14 Me. 351; *Kinsman* v. *Loomis*, 11 Ohio, 475; *Frank* v. *Darst*, 14 Ill. 304; *Sparrow* v. *Kingman*, 1 N. Y. 242; *Bell* v. *Twilight*, 26 N. H. 401.

Nor will a special warranty against the grantor operate by way of estoppel on a future interest.

Comstock v. *Smith*, 13 Pick. 116; *Wight* v. *Shaw*, 5 Cush. 56–64.

These appellees got nothing by a guardian's deed executed long prior to his ward's investi-

ture of title, and while the title and right of title was still in the government.

Morehouse v. *Phelps*, 62 U. S. 21 How. 294 (16:140); *Farmers L. & T. Co.* v. *McKinney*, 6 McLean, 1; *Sampeyreac* v. *U. S.* 32 U. S. 7 Pet. 222 (8:665); *Blanchard* v. *Brooks*, 12 Pick. 47–66.

Messrs. **B. F. Dennison** and **Rufus Mallory**, for appellees:

All essential facts within the issues not expressly found by the court are presumed to have been found in such a way as to support the judgment.

Servanti v. *Lusk*, 43 Cal. 288; *Hixon* v. *Brodie*, 45 Cal. 275; *Kusel* v. *Sharkey*, 46 Cal. 3; *Thompson* v. *O'Neil*, 41 Cal. 685; *Warner* v. *Holman*, 24 Cal. 228.

The partition as made in 1856 is now valid and binding as a judicial partition.

Campbell v. *Wallace*, 12 N. H. 362; *Piatt* v. *Hubbel*, 5 Ohio, 243; *McGregor* v. *Reynolds*, 19 Iowa, 228.

A partition may become binding by acquiescence.

Freem. Coten. & P. § 535; *Millican* v. *Millican*, 24 Tex. 439; *Jackson* v. *Richtmyer*, 13 Johns. 376; *White* v. *Clapp*, 8 Met. 370; *McQueen* v. *Fletcher*, 4 Rich. Eq. 152; *McGregor* v. *Reynolds*, 19 Iowa, 228; *Piatt* v. *Hubbel*, 5 Ohio, 243; *McMahan* v. *McMahan*, 13 Pa. 381.

Proceedings in partition can not be collaterally impeached for an irregularity, error, or omission.

White v. *Clapp*, 8 Met. 365; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 157 (7:381); *Dilworth* v. *Rice*, 48 Mo. 124; *Grignon* v. *Astor*, 43 U. S. 2 How. 319 (11:283).

Such proceedings, if void originally, may be ratified.

Maple v. *Kussart*, 53 Pa. 348; *Tooley* v. *Gridley*, 3 Smedes & M. 493; Freem. Void Sales, § 48.

The partition as made in 1856 is valid and binding as a voluntary parol partition.

Wood v. *Fleet*, 36 N. Y. 499.

A parol partition is valid, where possession is taken and held.

Moore v. *Kerr*, 46 Ind. 468; *Lanterman* v. *Williams*, 55 Cal. 60; *Buzzell* v. *Gallagher*, 28 Wis. 678; *Eaton* v. *Tallmadge*, 24 Wis. 217; *Booth* v. *Adams*, 11 Vt. 156; *Pope* v. *Henry*, 24 Vt. 560; *Long* v. *Dollarhide*, 24 Cal. 218.

The subsequent conveyances produced a valid and binding partition.

These conveyances operate as an estoppel.

Varnum v. *Abbott*, 12 Mass. 474.

Parol partitions, when executed by possession taken and mutually acquiesced in by the parties for a long time, will be recognized and enforced in equity.

Kennedy v. *Kennedy*, 43 Pa. 417; *Massey* v. *McIlwain*, 2 Hill, Eq. 424; *Pope* v. *Henry*, 24 Vt. 560; *Goodhue* v. *Barnwell*, Rice, Eq. 236; *Tomlin* v. *Hilyard*, 43 Ill. 302; Freem. Coten. & P. § 402, and cases cited. *Ebert* v. *Wood*, 1 Binn. 218.

Where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits.

Brant v. *Virginia Coal & I. Co.* 93 U. S. 326 (23:927).

The widow and those claiming under her are forever estopped from denying the validity of the partition of the west half of the claim among the children.

Wiseman v. *Macy*, 20 Ind. 289; *Drake* v. *Wise*, 36 Iowa, 476; *Bullis* v. *Noble*, 36 Iowa, 618.

When a settler under section 4 of the Donation Act dies intestate, after complying with the Act, and before patent issues, his estate terminates; and the remainder at once vests in his children as the direct donees of the United States, and not by descent as the heirs of such settler.

Misner v. *Vaughn*, 2 Sawy. 269.

The Donation Act is a present grant upon conditions subsequent. Upon compliance with the conditions the legal title at once vests before patent issues.

Lee v. *Summers*, 2 Oreg. 260; *Blakesly* v. *Caywood*, 4 Oreg. 279.

A parol agreement for partition of land, if carried into effect and if fair and equal, will be binding upon all, whether *femes covert* or not, if their husbands join, or minors, if with the consent of their guardians.

Calhoun v. *Hays*, 8 Watts & S. 127; *Ebert* v. *Wood*, 1 Binn. 216; *McConnell* v. *Carey*, 48 Pa. 345.

A minor, after coming of age may ratify the acts of his guardian.

Johnston v. *Furnier*, 69 Pa. 449.

A court of equity will compel the specific performance of a parol partition, as of any other contract relating to lands, whenever it has been carried into execution by the parties.

Goodhue v. *Barnell*, Rice, Eq. 236; *Tomlin* v. *Hilyard*, 43 Ill. 302; Freem. Coten. & P. § 402; *McPherson* v. *Cunliff*, 11 Serg. & R. 426.

The issuing of the patent is a ministerial act, and is mere evidence of title.

Dolph v. *Barney*, 5 Oreg. 191; *Chapman* v. *School Dist. No. 1*, 1 Deady, 108; *Murray* v. *Murray*, 6 Oreg. 26.

The alleged defect is not a jurisdictional one.

Mohr v. *Manierre*, 101 U. S. 417 (25:1052); *Comstock* v. *Crawford*, 70 U. S. 3 Wall. 396 (18:34); *Grignon* v. *Astor*, 43 U. S. 2 How. 319 (11:283).

The validity of the sale cannot be collaterally attacked.

Thompson v. *Tolmie*, 27 U. S. 2 Pet. 165 (7:384); *Mohr* v. *Manierre*, and *Comstock* v. *Crawford*, *supra*; *Mulford* v. *Beveridge*, 78 Ill. 455; *Beauregard* v. *New Orleans*, 59 U. S. 18 How. 497 (15:469); *McPherson* v. *Cunliff*, 11 Serg. & R. 422; *Benson* v. *Cilley*, 8 Ohio St. 614.

Equity will always aid the defective execution of a valid power.

Story, Eq. §§ 97, 98; *Segee* v. *Thomas*, 3 Blatchf. 11.

The ratification of a void sale may be by acts and acquiescence.

Maple v. *Kussart*, 53 Pa. 348; *Sims* v. *Everhardt*, 102 U. S. 312 (26:89).

The voidable deed of an infant may be ratified after coming of age.

Hastings v. *Dollarhide*, 24 Cal. 195; *Robert* v. *Morrin*, 27 Mich. 306; *McPherson* v. *Cunliff*, 11 Serg. & R. 422.

The plaintiff is not a trustee of an express trust. No trust is declared, much less defined.

Murray v. *Walker*, 31 N. Y. 399; *Mills* v. *Murry*, 1 Neb. 327; *Corcoran* v. *Brown*, 8 Cranch, C. C. 143.

A conveyance by one out of possession, where the land is held adversely to the grantor, is inoperative and void as against the person holding adversely.

Jackson v. *Demont*, 9 Johns. 55; *McMahan* v. *Bowe*, 114 Mass. 140; *Backus* v. *Byron*, 4 Mich. 535; *Powell* v. *Brandon*, 24 Miss. 343; *Dadmun* v. *Lamson*, 9 Allen, 85; *Bradstreet* v. *Huntington*, 30 U. S. 5 Pet. 402 (8:170); *Hogan* v. *Kurtz*, 94 U. S. 776 (24:319).

The opinion of the court below in this case is not in conflict with the doctrine of equitable estoppel.

2 Pom. Eq. Jur. 272, 273; *Corcoran* v. *Brown*, 8 Cranch, C. C. 143; *French* v. *Spencer*, 62 U. S. 21 How. 228 (16:97); *Herbert* v. *Adams*, 4 Mason, 15; *Young* v. *Babilon*, 91 Pa. 280; *Blair* v. *Wait*, 69 N. Y. 113; *Woodward* v. *Tudor*, 81 *Pa. 382; *Townsend* v. *Chappell*, 79 U. S. 12 Wall. 681 (20:436); *Morgan* v. *Chicago & A. R. R. Co.* 96 U. S. 716 (24:743).

In the absence of a bill of exceptions, setting forth evidence, no error can be assigned in respect to facts found by the court when the parties waive a trial by jury.

Prentice v. *Stearns*, 118 U. S. 435 (28:1059).

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us on appeal from the Supreme Court of the Territory of Washington. The action was brought by the plaintiff below, who is appellant here, for the possession of a tract of land in Clarke County, in that Territory, containing about 85 acres, more or less, of which he alleges that he is the owner and entitled to the possession, but which the defendants wrongfully withhold from him, and have done so for the last six years, and of which they have during that time appropriated the rents and profits.

The plaintiff, in support of his alleged title to the premises, relies upon conveyances thereof from the heirs of Amos M. Short, in whose name and that of Esther Short, his wife, a patent of the United States was issued on the 18th of October, 1877, for a tract of land embracing the premises, in supposed compliance with the Act of Congress of September 27, 1850, for the protection of settlers in the Territory of Oregon.

The defendants assert title to the premises through a conveyance thereof of an earlier date by the guardian of one of the said heirs, made under the direction of the probate court of the county after partition had been had between the heirs, of their respective interests.

It appears that on the 8th of March, 1848, Amos M. Short, and Esther Short his wife, settled upon a tract of land in the present County of Clarke and Territory of Washington, then constituting part of the Territory of Oregon, claiming the same under the laws of the Provisional Government of the country, which the inhabitants had established as early as 1845. By those laws each settler was entitled to 640 acres, upon complying with certain conditions as to their improvement. On the 14th of August, 1848, Congress passed an Act establishing a government for the Territory. 9 Stat. at L. 323. The 14th section recognized and continued in force the laws of the Provisional Government, so far as the same were not incompatible with the Constitution of the United States and the principles and provisions of the Act; but all laws making grants of land, or otherwise affecting or encumbering the title to lands, were declared to be void. Afterwards, on September 27, 1850, Congress passed an Act commonly called the Donation Act of Oregon, by which the substantial benefits of the laws of the provisional government in the acquisition of titles to lands were secured to settlers. It is entitled "An Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to Settlers of the Said Public Lands." 9 Stat. at L. 496. By the 4th section of this Act a grant of land was made to every white settler or occupant of the public lands in Oregon above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law, of his intention to become a citizen, or who should make such declaration, on or before the first day of December, 1851, and who was at the time a resident of the Territory, or might become a resident before December 1, 1850, and who should reside upon and cultivate the same for four consecutive years, and otherwise conform to the provisions of the Act. The grant was of 320 acres of land if the settler was a single man; but if a married man, or if he should become married within one year from the first day of December, 1850, then it was of 640 acres; one half to himself and the other half to his wife, to be held by her in her own right, the surveyor-general to designate the part inuring to the husband and that to the wife, and enter the same on the records of his office.

The section further provided that in all cases where such married persons had complied with the provisions of the Act, so as to entitle them to the grant, whether under the late Provisional Government of Oregon or since, and either should die before the patent was issued, the survivor, and children or heirs of the deceased, should be entitled to his share or interest in equal proportions, except where he should otherwise dispose of it by will.

By the 6th section the settler was, within three months after survey of the land, or where the survey had been made before the settlement commenced, then within three months from its commencement, to notify the Surveyor-General of the United States for the Territory of the precise tract claimed by him under the Act. By the 7th section he was, within twelve months after the survey, or where the survey had been made before the settlement, within that period after its commencement, to prove to the satisfaction of the surveyor-general, or of such other officer as might be appointed for that purpose, that the settlement and cultivation required had been commenced, specifying the time of the commencement; and after the expiration of four years from the date of such settlement, whether made under the laws of the Provisional Government or not, to prove in like manner by two disinterested witnesses the continued residence and cultivation required by the 4th section. Such proof being made, the surveyor-general, or other officer appointed for that purpose, was to issue a certificate, setting forth the facts and specifying the land to which the party was entitled, and to return the proof

thus taken to the Commissioner of the General Land Office; and if he found no valid objection thereto, a patent was to issue for the land according to the certificate, upon its surrender.

By an Act passed on the 14th of February, 1853, the Donation Act was amended (10 Stat. at L. chap. 69, p. 158), extending the provisions of the original Act to the first of December, 1855, and requiring any person entitled to the benefit of the 4th section of that Act, who was a resident in the Territory on or prior to December 1, 1850, to file with the Surveyor-General of the Territory, in advance of the time when the public surveys should be extended over the particular land claimed by him, if such surveys had not been previously made, a notice setting forth his claim to the benefits of that section.

The four years' residence and cultivation required of Amos M. Short by the Donation Act were completed on the 8th of March, 1852. On the 9th of January, 1858, he died intestate, leaving his widow and ten children surviving him. Letters of administration on his estate were issued to her by the Probate Court of Clarke County, and she was appointed guardian of the minor children. Subsequently she surrendered her letters of administration, and one S. Burlingame was appointed administrator in her place, she continuing guardian of the minor children, with exception of one of them, Alfred D. Short, of whom another was appointed guardian. On the 4th of October, 1853, assuming to follow the Amendatory Act of February 14, 1853, she filed with the Surveyor-General of the Territory the notice in writing required by that Act, showing that her deceased husband, by his residence upon and cultivation of the land, had complied with the provisions of the Donation Act, and as such was entitled to its benefit. On the 26th of May, 1860, the map of the survey of public lands, including the donation land claim, was approved by the surveyor-general; and on the 19th of June following the final proof of settlement, residence upon, and cultivation of the land was made, and on the 31st of July, 1874, the donation certificate was issued, by which the west half of the claim was assigned to Amos M. Short, and the east half to his wife Esther, who had died on the 28th of June, 1862. A patent for the donation claim was issued to them and their heirs, bearing date October 18, 1877, by which the west half of the claim was allotted and granted to Amos M. Short and his heirs, and the east half was allotted and granted to Esther Short and her heirs. The patent was issued in this form, notwithstanding the death of Amos and Esther Short, pursuant to section 2448 of the Revised Statutes, re-enacting the provisions of the Act of May 20, 1836, which declares that "Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

Some years after the issue of this patent the heirs of Amos and Esther Short conveyed their interest in the land in controversy to the grantors of the plaintiff.

It would seem that sometime in the year 1855, or in 1856, the heirs of Amos M. Short and his widow agreed among themselves upon a division of the donation claim. The widow took the east half and the children the west half. In July, 1856, the part thus by agreement assigned to the children was, by order of the probate court, upon their application, partitioned among them. It was divided into ten parts, one of which was allotted to each child. The value of the different allotments was appraised and, where necessary to equalize their valuation, owelty was allowed. Of one of the heirs, Grant H. Short, a minor, a guardian was appointed, who subsequently, by order of the probate court, sold the property of his ward for the purpose of raising money with which to pay his just debts, and to furnish him the necessary means of living. The sale was made at auction to the highest bidder, and the defendant, Nicholas Schofield, became the purchaser, and a deed was executed to him bearing date April 29, 1865. He went at once into possession and put improvements upon the property to the value of $2,000, and ever afterwards paid the annual taxes thereon.

The title thus obtained by the defendant is assailed by the plaintiff, upon the alleged ground that no right to the donation claim was acquired by the residence and cultivation of Amos M. Short, he not having notified the surveyor-general of his claim; and that the notice by Esther Short, in October, 1853, being given after his death, was of no efficacy; and that therefore no interest in any part of the land passed to his heirs to be partitioned or sold.

It is undoubtedly true that the Donation Act requires for the completion of the settler's right to a patent, not only that he should reside upon the land and cultivate it for four years, but that he should notify the surveyor-general of the precise land he claims. The object of the law was to give title to the party who had resided upon and cultivated the land, and who was, therefore, in equity and justice better entitled to the property than others who had neither resided upon nor cultivated it. But it was also of importance to the government to know the precise extent and location of the land thus resided upon and cultivated. It was necessary to enable the government to ascertain what lands were free from claims of settlers, and thus subject to sale or other disposition. There was nothing, however, in the information to be communicated which rendered it necessary that it should proceed from the husband alone. So long as he remained the head of the family settlement there was a manifest propriety in its proceeding from him; but in case of his death it is not perceived why it might not come with equal efficacy from his widow, who then took his place as the head of the family. The law contemplates in all its provisions that where a settlement has been joint, by the two together, the benefit of the donation intended for both should be secured, in case of the death of either, to his or her heirs. It is true, the notice to the surveyor-general was the first proceeding which informed the public authorities of the intention of the occupant to avail himself of the benefits of the Act, and of the acceptance of the proffered grant. But without the residence and

cultivation required, the notice would be of no efficacy. By the original Act they might precede the notice, if the public surveys had not been extended over the land. Until such survey was made no notice to the surveyor-general was required, and yet the occupant was not for the want of it to lose the grant which the Act contemplated as a reward for his continued residence and cultivation. It was the amendatory Act of 1853 which required notice to be given to the surveyor-general in advance of the public surveys; and such notice could only be given by the widow, the husband being then dead. The event calling upon him to give the notice had not occurred during his life, that is, the survey of the land had not been made. He was not therefore in fault for not giving it. Under these circumstances it is not perceived why the widow might not give it, she and her children being directly interested in the matter. To hold otherwise, and thus impose a great loss upon them, would seem to be contrary to the general purpose of the Act, which was to extend its protection to them as well as to the father and husband whenever his residence and cultivation had continued for the required period. Indeed, by the 8th section of the Act of 1850 it was provided that upon the death of any settler before the expiration of the four years continued possession required, the rights of the deceased should descend to the heirs at law of such settler, including his widow, where one was left, in equal parts, and that proof of compliance with the conditions of the Act up to the time of his death should be sufficient to entitle them to a patent. Much more would it seem should the widow and children be secured in the donation, where the residence and cultivation had continued for the whole period required, and be permitted to perform any future act to establish their rights, required by reason of subsequent legislation. Besides, the Act of 1864, amending the Donation Act declares that a failure to file the notice within the time fixed should not work a forfeiture. 13 Stat. at L. 184. We are of opinion, therefore, that the notice given by the widow in October, 1853, was sufficient to preserve the donation claim in its entirety.

The case of *Hall* v. *Russell*, 101 U. S. 503 [25:829] does not conflict with these views. There the husband died after residence of less than a year, and it was held that he had acquired no devisable interest in the property; the interest which the widow and heirs might take under the 8th section upon such limited residence and cultivation by the deceased husband was as donees of the government, and not by descent.

There is another view of this case which would seem to conclude the appellant as to the sufficiency and legality of this notification by the widow. The patent of the United States was issued upon the supposed compliance of the patentees with the requirements of the Donation Act. That instrument is not in the record, but we must presume that it follows the usual form of such instruments, and recites the compliance of the patentees with the requirements of the Act, and the production to the proper officers of satisfactory proof on that point. The appellant derives all the title he asserts through conveyances of the heirs of the deceased settler under the patent. As well observed by the Supreme Court of the Territory, under these circumstances these heirs and their grantees are estopped from "saying to the prejudice of any grantee of theirs, but that the husband and ancestor, Amos Short, deceased, duly resided upon and cultivated for the prescribed period the the donation land claimed known as his, or that by virtue of a full compliance with the essential requirements of the Donation Act, his widow and children were, at the date of his death, in January, 1853, entitled under the Act to that land claim."

The conditions for the acquisition of the title to the entire donation tract having been complied with, upon the notice given by his widow in October, 1853, followed by proof of the continued residence and cultivation required by the Act, what remained to be done by the officers of the government was, to divide the land between the widow and heirs, assigning to her one half part and to the heirs the other half. They having agreed to a division between themselves, it is not for any others to complain of the arrangement, if the surveyor-general afterwards conformed to their wishes in that respect.

As to the objections taken to the want of jurisdiction in the Probate Court of Clarke County to make the partition between the heirs, or to authorize the guardian of Grant H. Short to sell his interest, only a few words need be said. That the probate court was at that time vested with jurisdiction over proceedings for the partition of real property among joint owners, and over proceedings for the sale of the property of minors, upon proper application and showing, appears from the statutes of the Territory then in force. See Act touching the relation of guardian and ward of 1855; and Act respecting executors and administrators, and the distribution of real and personal property of 1854; Laws of Territory, of 1854, p. 300, 1855, p. 14. Whatever objections, therefore, there may be to the action of the probate court, they cannot arise from want of jurisdiction over the subjects considered, but must exist, if having any foundation, in defective proceedings, or insufficient averments. And of objections of this character we can only say that the facts touching the partition and sale are not sufficiently disclosed by the transcript to enable us to pass upon the objections. The records of the application for the partition, and of the guardian to sell, and of the proceedings taken in either matter, are not before us. It appears, however, that for many years after they came of age no objection was made by the heirs, who were minors at the time, to any of the proceedings in partition. On the contrary, they proceeded at once, after the partition, to exercise control by themselves or guardians appointed by the probate court, over the several parts alloted to them; and some of the heirs sold and conveyed to others their respective portions. The court below expressly finds that the heirs, who were minors in 1856, after becoming of full age adopted the partition as made and assented to by their guardians in that year. The minor, Grant H. Short, whose property was sold to one of the defendants, received the benefit of the moneys obtained upon the sale; they were used to pay some just debts incurred for him, and to furnish him the necessaries of life. For

eleven years after he became of age he made no objection to the proceedings, or by any act indicated his intention to disaffirm the sale or deed made by his guardian; and then, in 1878, he gave to the grantors of the appellant a deed of his interest in the donation claim. In the mean time the property had greatly increased in value by the improvements put upon it by the purchaser and his grantee, Mary Schofield.

Under these circumstances we think the Supreme Court of the Territory was correct in its conclusion that the long acquiescence of the minor, after he became of age, in the proceedings had for the sale of his property, was equivalent to an express affirmance of them, even were they affected with such irregularities as, upon his prompt application after becoming of age, would have justified the court in setting them aside.

Judgment affirmed.

THOMAS C. PORTER ET AL., Late Copartners, *Plffs. in Err.*,
v.
ALANSON W. BEARD, Collector of Customs.

(See S. C. Reporter's ed. 429–433.)

Action to recover excess of duties—when not maintained.

1. Under section 3011 of the Revised Statutes, a suit cannot be maintained against a collector to recover an excess of duties paid upon merchandise imported, unless the payment, in addition to being made under protest, was made in order to obtain possession of the merchandise.

2. Where the importers had paid the estimated amount of duties and had obtained possession of the goods, and a suit was brought by the United States against them to recover the difference between the amount so paid and a larger amount at which the collector had subsequently liquidated the duties, the importers cannot, in case they pay such difference, recover it back. They can obtain the benefit of the exemption from the duties sued for, if they are in fact illegally imposed, only by a defense in the suit brought by the United States to recover them.

[No. 133.]

Argued Jan. 19, 1888. Decided Jan. 30, 1888.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment for defendant in an action to recover of the Collector of Customs an alleged excess of duties paid under protest. *Judgment affirmed.*

Reported below, 15 Fed. Rep. 880.

The facts are fully stated in the opinion.

Mr. **Chas. Levi Woodbury**, for plaintiffs in error:

The lien of the United States on the import exists until the lawful duties on it are actually paid by the importer.

R. S. §§ 3058, 2503.

Levying the duty constitutes a lien on the import.

U. S. v. *350 Chests Tea*, 25 U. S. 12 Wheat. 498 (6:706); *Harris* v. *Dennie*, 28 U. S. 3 Pet. 292 (7:683); *Conard* v. *Pacific Ins. Co.* 31 U. S. 6 Pet. 281 (8:399); *Meredith* v. *U. S.* 38 U. S. 13 Pet. 486 (10:258).

The duties due upon goods imported constitute a personal debt as well as a lien on the goods.

Act 1842, § 12, 5 Stat. at L. 561; R. S. § 2964.

The Collector cannot release the goods from the lien.

Minturn v. *U. S.* 106 U. S. 438 (27:208); *Hart* v. *U. S.* 95 U. S. 318 (24:480); *Boyd* v. *U. S.* 116 U. S. 624 (29:748).

Only the Statute of Limitations terminates the lien.

R. S. §§ 2882, 2987, 2924, 2839, 2804, 5445; *Wood* v. *U. S.* 41 U. S. 16 Pet. 342 (10:987).

The authority to search for and seize the *rem* by virtue of any law respecting the revenue is given by the Revised Statute, sections 3071, 3072, 3061, 3065 and 3066.

Stockwell v. *U. S.* 80 U. S. 13 Wall. 546 (20:494); *Iasigi* v. *Whitney*, 68 U. S. 1 Wall. 333 (17:687).

The liquidation by the Collector is not made final and conclusive against the United States.

Watt v. *U. S.* 15 Blatchf. 30; *U. S.* v. *Phelps*, 17 Blatchf. 316.

The liquidation of the duties is an act distinct and subsequent to the estimate at the application for a permit.

Marriott v. *Bruns*, 50 U. S. 9 How. 636 (13:289); *Trenlett* v. *Adams*, 54 U. S. 13 How. 307 (14:157).

The neglect of the Collector would not discharge the lien of the United States for unpaid duties.

Moke v. *Barney*, 5 Blatchf. 276.

The errors of the circuit court have excluded the plaintiffs from a hearing on the merits.

U. S. v. *Ellsworth*, 101 U. S. 174 (25:864).

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for defendant in error:

Because the payment under protest was voluntary, and not made to obtain possession of the said twenty-five packages, the plaintiffs could not maintain their action.

Arnson v. *Murphy*, 109 U. S. 238 (27:922); *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 137 (9:378); *U. S.* v. *Schlesinger*, 120 U. S. 113 (30:606).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought in the Circuit Court of the United States for the District of Massachusetts, by the members of the copartnership firm of Cushing, Porter & Cades, against Alanson W. Beard, Collector of Customs, to recover the sum of $694.05, as an alleged excess of duties, paid under protest, on merchandise imported by that firm into the Port of Boston. The case was tried before the court on the written waiver of a jury. There was an agreed statement of facts in the case, but either party had the right to introduce further evidence. There are no separate findings of fact and of conclusions of law, nor is there any general finding for either party; but there is accompanying the record an opinion of the court, which is reported in 15 Fed. Rep. 880, which concludes by directing a judgment for the defendant, and such judgment was accordingly entered; and to review it the plaintiffs have brought a writ of error.

There is a bill of exceptions made by the plaintiffs, which states that all of the facts material to the bill of exceptions are contained in the statement of agreed facts, which is thereto attached and made a part of the exceptions; that, upon the trial of the cause, the counsel for the defendant asked the court to rule that, as

it appeared that 25 of the packages of merchandise in question had been delivered to the plaintiffs by the defendant before the payment of the duties thereon sued for, the plaintiffs had not shown themselves entitled, as a matter of law, to maintain this action against the defendant, so far as those packages were concerned, because such payment of duties, although made under protest, was voluntary, and was not made to obtain possession of the goods; that the court adjudged that, as a matter of law, when the plaintiffs paid the additional duties demanded by the Collector upon the 25 packages, the defendant had no means of compelling the payment, and that, as the payment was voluntary, the plaintiffs could not recover the money; that the plaintiffs excepted to each of these rulings; that the court thereupon refused to consider further the agreed facts and the testimony which had been adduced before it as to the subject matter of the protest in relation to those packages; and that the plaintiffs excepted to such refusal.

It appears, by the agreed statement of facts, that all of the goods in question were delivered to the plaintiffs by March 25, 1879, on their payment of the duties on the goods as first liquidated or estimated, on the entries of the goods. Subsequently, the invoices were recalled by the Collector, and the local appraiser reported an increased valuation of the goods. There was a reappraisement of them by the general appraiser and a merchant appraiser, and new liquidations, which increased the duties by the sum of $694.05. The plaintiffs paid this amount to the Collector, and duly filed protests, and appealed to the Secretary of the Treasury, who affirmed the action of the Collector, and then this suit was brought.

The error assigned by the plaintiffs is that the circuit court erred in deciding that the payment of the increased duties, after due protest and appeal, and the decision of the Secretary of the Treasury, as to the 25 packages, was a voluntary payment and was a bar to the plaintiffs' right to recover.

It is provided by section 3011 of the Revised Statutes that "Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid." It is apparent that, under this section, although a person may have paid duties under protest, he is not entitled to maintain an action to recover back the duties, unless he also paid them in order to obtain possession of the merchandise.

It is found as a fact in this case that the 25 packages upon which the increased duties of $694.05 were paid were delivered to the plaintiffs by the defendant on the payment of the duties first liquidated or estimated, and before the payment of such increased duties. The language of the agreed statement of facts and of the bill of exceptions, in regard to the 25 packages, is, throughout, that they were "delivered" to the plaintiffs. This necessarily means that they passed into the possession of the plaintiffs; that, until the first liquidated or estimated duties were paid, the merchandise was in the possession of the United States; that the plaintiffs paid such duties in order to obtain possession of the merchandise; that it was in their possession when they paid the $694.05; and therefore, they did not pay the latter amount in order to obtain possession of the goods.

The plaintiffs contend that, under the statute, the lien of the United States on the goods for the amount of the increased duties upon them remained, although the goods had passed into the physical possession of the plaintiffs; and that the payment by the plaintiffs of the increased amount of duties was made in order to free the goods from such lien, and was, therefore, a payment made, within the meaning of section 3011, to obtain possession of the goods. But we are unable to adopt this view.

By section 2869 of the Revised Statutes it is provided that when an entry of goods is made the collector shall estimate the amount of the duties on them, and that when such amount is paid or secured to be paid a permit may be granted to land the goods. Provision is also made that the goods shall be landed under the superintendence of inspectors, and in accordance with the permits. Section 2888 provides that the officer charged with the deliveries shall return to the collector copies of his accounts of entries of deliveries, which shall comprise "all deliveries made pursuant to permits, and all packages or merchandise sent to the public stores." This necessarily implies that deliveries are to be made pursuant to permits, to persons who have paid the first liquidated or estimated duties on entries, as contradistinguished from sending other goods to the public stores. These deliveries are sufficient to put the importer in possession of the merchandise, within the meaning of section 3011, without reference to any lien of the United States upon the goods, or to any right to follow and reclaim them, in case of an insufficient payment of duties, to be liquidated or ascertained afterwards.

The provisions of section 3011 are to be strictly followed, because, as we held in *Arnson* v. *Murphy*, 109 U. S. 238 [27:920], an action to recover duties paid under protest is now based entirely on a statutory liability, which is regulated as to all its incidents by express statutory provisions. Among such regulations is the one that the payment of the duties shall have been made not only under protest but also in order to obtain possession of the imported merchandise, in order to authorize the action to recover back the duties.

In addition, this case seems to us to be governed by the decision in *U. S.* v. *Schlesinger*, 120 U. S. 109 [30: 607]. In that case the circuit court had, under section 3011, held that there could be no suit against a collector to recover back an excess of duties paid upon merchandise imported, unless the payment, in addition to being made under protest, was made "in order to obtain possession" of the merchandise. The importers had paid the estimated amount of duties and had obtained possession of the goods, and the suit was brought by the United States against them to recover the difference between the amount so paid and a

larger amount, at which the collector had subsequently liquidated the duties. The circuit court had held that, under those circumstances, the importers could not, in case they had paid such difference, recover it back, and that, therefore, they could obtain the benefit of the exemption from the duties sued for, which were in fact illegally imposed, only by a defense in the suit brought by the United States to recover them. This court concurred in that view, and its decision was placed expressly on that ground.

The judgment of the Circuit Court is affirmed.

ALANSON W. BEARD, Collector of Customs, *Plff. in Err.*,

v.

THOMAS C. PORTER ET AL., Late Copartners.

(See S. C. Reporter's ed. 437–444.)

Duties on imported goods — protest — declaration — waiver.

1. Under section 21 of the Act of June 22, 1874, 18 Stat. at L. 190, where duties upon imported goods had been liquidated and paid and the goods delivered to the importer, such liquidation and payment is a settlement of duties which, in the absence of fraud or protest, is final and conclusive after the expiration of one year upon all parties.

2. In order that a protest may prevent such settlement being thus conclusive, the protest must be one against prior liquidation or settlement of duties.

3. Although an importer in order to recover back an excess of duties paid under protest must show that he has brought the suit within the time limited by section 2931 of the Revised Statutes, it is not indispensable that the declaration should state the fact.

4. Where plaintiffs in an action to recover back duties had been induced to pay such duties by an agreement and assurance of the Secretary of the Treasury, contained in a letter from him, that the question of voluntary payment should not be raised or set up in any manner as a defense to a suit to recover back the duties paid, held, that the United States had waived the claim that the plaintiffs voluntarily made the payment of the duties sought to be recovered.

[No. 134.]

Argued Jan. 19, 1888. Decided Jan. 30, 1888.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment for plaintiffs in an action to recover duties paid under protest. *Judgment affirmed.*

The facts are fully stated in the opinion.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **Chas. Levi Woodbury,** for defendants in error:

The Collector's decision first had legal effect by the Act of 1857; then a wider effect in the Act of 1864, now R. S. section 2931. By this section he has become a special tribunal on certain subjects; as such, the limits of his jurisdiction are to be found in section 2931 R. S., and section 21 of the Act of 1874.

Such tribunals having rendered their decisions become *functus officii*, and cannot recall or reverse their decision.

U. S. v. *Leng*, 18 Fed. Rep. 16, 24.

The liquidation by the Collector is the decision. Its quality in law as a judgment attached in 1864.

Lawrence v. *Caswell*, 54 U. S. 13 How. 488 (14: 235); *Westray* v. *U. S.* 85 U. S. 18 Wall. 322 (21: 768).

Although this decision under section 2931 was final against the importer, it was not final against the United States; and reliquidations are sanctioned.

Watt v. *U. S.* 15 Blatchf. 30; *U. S.* v. *Phelps*, 17 Blatchf. 312; *U. S.* v. *Leng*, 18 Fed. Rep. 16.

The legal right to make reliquidations, on the discovery that short duties or no duties had been paid, is recognized by the decisions previously cited, and by R. S. section 3012½, and by the Act of 1874, sec. 21, laws of that year, p. 190.

The Act of 1874, section 21, limits the authority of the United States to disturb a liquidation of duties by reliquidation, and establishes a time limit to the collector's power to assess. His control of the judgment is at an end, on the expiration of a year.

U. S. v. *Leng*, and *U. S.* v. *Phelps*, *supra*; *U. S.* v. *Fraser*, 10 Ben. 347; *U. S.* v. *Seidenberg*, 17 Fed. Rep. 229.

Statutes of Limitation are entitled to the same respect as other statutes.

U. S. v. *Wilder*, 80 U. S. 13 Wall. 255 (20: 682); *Bell* v. *Morrison*, 26 U. S. 1 Pet. 360 (7: 178).

Section 2931, R. S., directs such defenses to be made by protest after liquidation.

Watt v. *U. S.* 15 Blatchf. 32.

The appeal to merchant appraisers vacated the second report of the local appraiser, section 2930, and they became the board of appraisement.

Rankin v. *Hoyt*, 45 U. S. 4 How. 327 (11: 996); *Greely* v. *Thompson*, 51 U. S. 10 How. 241 (13: 405).

The Collector had no authority at law to make the liquidation he relies on.

Lawrence v. *Caswell*, 54 U. S. 13 How. 496 (14: 239).

There is no protest which prevents the twenty-first section from running in this case.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action brought in the Circuit Court of the United States for the District of Massachusetts, by the members of the copartnership firm of Cushing, Porter & Cades, against Alanson W. Beard, Collector of Customs, to recover the sum of $3,228.10, with interest, as an excess of duties paid under protest on the importation of certain merchandise into the Port of Boston, in May, June, July, August, and September, 1878.

The question involved arises on the fourth count of the declaration, which is in these words:

"And the plaintiffs further say that, on the several respective dates, and by the vessels named in the account annexed to the first count of said declaration, they imported and entered at the custom house in said Boston, the goods described in the several items of said account annexed, and the defendant duly liquidated the duties on said goods, and the plaintiffs paid the same; and the said defendant then and there delivered to the plaintiffs all of the said goods.

"And the plaintiffs say that, long afterwards, and after the lapse of more than one year from

said respective dates of entry, the defendant made a new liquidation and settlement of duties upon said goods entered as aforesaid, and demanded of plaintiffs the full sum of three thousand thirty dollars and five cents, as additional duties upon said goods so entered as aforesaid. And the plaintiffs say that they protested against such second liquidation and settlement of duties, and protested against the payment of said sum, and alleged in said protest, and now allege, that said second liquidation was made after the payment of the duties as first ascertained, and after the goods had been delivered to the plaintiffs, and more than one year after said several dates of entry, and the same was and is illegal and void. Plaintiffs appealed to the Secretary of the Treasury, who decided thereon, affirming the action of the defendant.

"And the plaintiffs further say that they denied, by said protest and appeal, the right of the government and of this defendant to make such second liquidation and demand; and, doubts having arisen as to the right of the plaintiffs to recover back the same if paid, should the defendant contest the same upon the ground that such payment was voluntary, the plaintiffs, by their attorney, addressed a letter to the Secretary of the Treasury of the United States, a copy of which is hereto annexed, marked A, and received in reply thereto a letter from said secretary, a copy of which is hereto annexed, marked B; and said secretary also addressed a letter to the United States attorney for said district, a copy whereof is hereto annexed, marked C, which was exhibited to the plaintiffs' attorney before the payment by the plaintiffs to defendant of the sum demanded upon said second liquidation. And the plaintiffs say that, relying upon the said agreement and assurance of the Secretary of the Treasury, that the question of voluntary payment should not be raised or set up in any manner as a defense to a suit by the plaintiffs to recover back said sum, the plaintiffs were induced to and did pay the said defendant, under protest and appeal, the said sum of three thousand thirty dollars and five cents ($3,030.05) illegally ascertained and demanded as aforesaid, the same being the full sum demanded by the defendant, and the defendant now owes the plaintiffs the said sum, with interest thereon."

The defendant answered the fourth count as follows:

"And now comes the defendant, and for answer to the fourth count of the plaintiffs' declaration, as amended, says:

"That, after the first liquidation, as set forth in said fourth count, and within one year from the time of the entries therein described, the defendant caused said invoices to be sent to a United States local appraiser for reappraisal; that said appraiser, within a year from the date of said entries, made a new report thereon; that the plaintiffs, upon notice of this report, and within one year from the date of the entries, except by The Parthia of May 6, 1878, and one day after the expiration of the year in case of the entry by said Parthia, appealed from said report, and requested a reappraisment according to law, a copy of which request is hereto annexed; that a merchant appraiser was thereafter appointed by the defendant to act with the general appaiser in the appraisal of the merchandise described in said entries within one year from the date of entry, except in case of the said Parthia, in which it was after the expiration of the year; that said board of appraisal held many meetings at which the plaintiffs were present personally and by counsel, said meetings being after the expiration of one year from the date of said entries; that, as to the goods in controversy, said board reported that they did not reappraise them, for the reason that they could not be found and were not examined by them; that the fees of the merchant appraiser were paid by the plaintiff; that at no time before the final liquidation did the plaintiffs claim that the first liquidation was final and conclusive, or object to the second liquidation or to the reappraisal by the local appraiser, otherwise than by their appeal therefrom as aforesaid, or by the board of reappraisement, or to the power of the defendant to order a reappraisal, though well knowing the facts above set forth; that the second report aforesaid of the local appraiser increased the values of said goods from the invoice values, disallowed a discount of twelve and one half per centum, which appeared on the invoices, and changed the rate of some of the merchandise; that the second liquidation, the subject of this suit, was made by the defendant by the disallowance of said discount and by changing the rate of duty, as suggested by the local appraiser as aforesaid."

The plaintiffs filed a demurrer to the answer to the fourth count of the declaration, setting forth that such answer was not sufficient in law, and that the defendant had set out no sufficient grounds to avoid the final and conclusive effect upon all parties thereto of the first liquidation made by the collector of the several entries in the case. The court sustained the demurrer, and ordered that judgment be entered for the plaintiffs for an amount to be found by an assessor. The assessor reported in favor of the plaintiffs for $3,228.10, and a judgment was entered in their favor, on April 12, 1884, for that amount, with interest from the date of the writ. The defendant has brought a writ of error to review this judgment.

The question involved in this case arises on section 21 of the Act of June 22, 1874, 18 Stat. at L. 190, which provides "That, whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud, and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

The claim on the part of the defendant is that, inasmuch as the collector, within one year from the time of the entries mentioned in the fourth count, caused the invoices to be sent to a local appraiser for a reappraisal, and the appraiser within such year made a new report thereon, such reappraisement was the first step in the continuous legal proceeding which terminated in the decision of the Secretary of the

Treasury mentioned in the fourth count; that the plaintiffs applied for a reappraisement, which application was made within one year from the date of the entries, except as to one entry; that the contest thus begun was continued by the plaintiffs after the expiration of the one year, until the collector made the second liquidation; that the plaintiffs paid the fees of the merchant appraiser, and did not, prior to the making of the final liquidation, claim that the first liquidation was conclusive; and that the plaintiffs, by such proceedings waived the objection now taken by them to the final liquidation. That objection is that the final liquidation was made after the expiration of one year from the time of entry, and that, therefore, under section 21 of the Act of 1874, the first liquidation and the payment of the duties thereunder was a settlement of duties, which was final and conclusive upon all parties.

We are of opinion that the settlement of duties in the present case was conclusive upon the United States. We do not find it necessary to decide whether the taking of steps by the Collector for a reappraisement by a local appraiser, within a year from the time of the entry, in a case where the question of reliquidation depends strictly upon a reappraisement of the value of the merchandise, will have the effect, as contended by the defendant, to make the reliquidation valid, although that is made after the expiration of one year from the time of the entry; because it appears, by the answer to the fourth count in the present case, that although the second report of the local appraiser increased the values of the goods from the invoice values, and also disallowed a discount of 12½ per cent, which appeared upon the invoices, and changed the rate of some of the merchandise, the second liquidation, which is the subject of this suit, was made by the defendant solely by disallowing such discount and by changing the rate of duty. It does not appear that such second liquidation was based at all upon any increase of the values of the goods from the invoice values; or that such disallowance of the discount and such change of the rate of duty were matters which depended upon any increase in the appraised values of the goods, or were matters at all involved in any proper action of the local appraiser in appraising the goods, or were matters which could not have been finally acted upon by the Collector at any time within a year from the date of the original entry as well as at any other time, and without reference to any increase in the appraised values of the goods. There is no allegation that there was any fraud in the case.

It is suggested on the part of the defendant that the settlement of duties spoken of in section 21 of the Act is made final and conclusive upon all parties only in the absence of protest by the owner or importer, and that in this case a protest was filed. But the protest referred to in section 21 is, manifestly, a protest against the prior liquidation or settlement of duties which the section proposes to declare to be final and conclusive after the expiration of one year from the time of entry. No protest against that liquidation had been made.

It is also contended on the part of the defendant that, as this suit was brought on the 21st of April, 1882, and it is not stated in the fourth count of the declaration at what date the decision of the Secretary of the Treasury on the appeal was made, and as section 2931 of the Revised Statutes provides that the decision of the secretary on the appeal shall be final and conclusive, unless suit shall be brought within ninety days after such decision, the plaintiffs should have alleged in the count that they had brought the suit within the time prescribed by the statute; and that this defect in the count can be availed of by the defendant on the demurrer of the plaintiffs to the answer to the count.

It is true that this court decided, in *Arnson* v. *Murphy*, 115 U. S. 579 [29: 491], following the decision in the same case in 109 U. S. 238 [27: 920], that, where an action is brought under section 3011, to recover back an excess of duties paid under protest, the plaintiff must, under section 2931, as a condition precedent to his recovery, show not only due protest and appeal to the Secretary of the Treasury, but also that the action was brought within the time required by the statute. It was also held in the case in 115 U. S. that the conditions imposed by section 2931 were not matters a failure to comply with which must be pleaded by the defendant as a Statute of Limitations, inasmuch as the right of action did not exist independently of the statute, but was conferred by it. This ruling was made on the authority of the case of *Cheatham* v. *United States*, 92 U. S. 85 [28:561]. But, while the plaintiff must, in order to recover in the suit, show, in a proper case, that he has brought the suit within the time limited by section 2931, we do not regard it as indispensable that the declaration should state the fact, inasmuch as it is provided, in section 3012, that no suit shall be "maintained" for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, unless the plaintiff shall, within thirty days after due notice of the appearance of the defendant, serve a bill of particulars of the plaintiff's demand, giving among other items the date of the appeal to the Secretary of the Treasury and the date of his decision, if any, on such appeal. This requirement seems to make it unnecessary to state substantially the same thing in the declaration. Nothing appears in the record in this case from which it can be inferred that the suit was not brought within the prescribed time; and, in view of the fact that the taking of the appeal to the Secretary of the Treasury and the rendering of his decision thereon affirming the action of the Collector are set forth in the fourth count of the declaration, it must be inferred that it was conceded that the suit was brought within the prescribed time.

It is proper to state that the United States waived in this case all claim that the plaintiffs voluntarily made the payment of the duties sought to be recovered.

The judgment of the Circuit Court is affirmed.

ROLAND WORTHINGTON, Collector of Customs, *Plff. in Err.*,

v.

JERE ABBOTT ET AL., Copartners, etc.

(See S. C. Reporter's ed. 484–486.)

Duty on nail rods.

1. Nail rods, consisting of straight, flat pieces about an inch in width and three eighths of an inch in thickness, are not bar iron, within the meaning of section 2504 of the Revised Statutes, but come within the description in said section of rolled iron not otherwise provided for, and are liable to duties of only one and one fourth cents per pound.

2. The commercial understanding as to the description of an article by Congress must prevail.

[No. 135.]

Argued Jan. 19, 1888. Decided Jan. 30, 1888.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment for the plaintiff, in an action to recover an alleged excess of duties. *Judgment affirmed.*

Reported below, 20 Fed. Rep. 495.

The facts are fully stated in the opinion.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error:

Nail rods should be classified under the first of the clauses of section 2504, R. S. Schedule E, pages 464, 465, and so subject to a duty of one cent and one half per pound.

Arthur v. *Morrison*, 96 U. S. 108 (24: 764); *Arthur* v. *Lahey*, 96 U. S. 112 (24: 766).

Mr. **Charles Levi Woodbury,** for defendants in error.

Mr Justice **Blatchford** delivered the opinion of the court:

This is an action brought in the Circuit Court of the United States for the District of Massachusetts, by the members of the copartnership firm of Jere Abbott & Co., against Roland Worthington, Collector of Customs, to recover the sum of $56.11, as an alleged excess of duties on Swedish iron nail rods imported by them into the Port of Boston. After issue joined, a jury trial was duly waived and the case was tried by the court without a jury, and a judgment was entered for the plaintiffs for the above amount of damages and for costs, to review which the defendant has brought a writ of error.

There is a bill of exceptions, which states that the defendant liquidated the duties on the nail rods, under section 2504 of the Revised Statutes, Schedule E, p. 464, 2d ed., as "Bar iron, rolled or hammered, comprising flats less than three eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide:" at "one cent and one half per pound;" that the plaintiffs contended that the duties should have been liquidated under the following clause in Schedule E of section 2504, p. 465: "All other descriptions of rolled or hammered iron not otherwise provided for, one cent and one fourth per pound;" and that the plaintiffs paid the duties as liquidated under protest, took due appeal to the Secretary of the Treasury, and seasonably brought this action to recover the excess claimed to have been illegally exacted. The bill of exceptions then proceeds:

"It further appeared in evidence at the trial, that the merchandise in controversy was rolled iron, in straight flat pieces, about twelve feet long, three eighths of an inch wide, and three sixteenths of an inch thick, slightly curved on their edges, and that they were made for the special purpose of making nails. It further appeared in evidence that, prior to and in 1874, and subsequently, such iron was known in commerce as nail rods, and had not been bought or sold as bar iron, and that in a commercial sense nail rods are not known as bar iron; that, in similitude, the iron in question most resembles scroll iron, in its shapes and sizes, but it was not known commercially as scroll iron. The defendant thereupon requested the court to rule that in the provision of the statutes under which the duties were liquidated, bar iron, comprising certain sizes and descriptions, was used in the sense of 'iron in bars,' comprising those sizes and descriptions, and was not used in a commercial or technical sense; that, as the iron imported came directly within the statute description of 'bar iron, rolled or hammered, comprising flats less than three eighths of an inch or more than two inches thick, or less than one inch or more than six inches wide,' the duties were properly assessed and liquidated; and that, on the evidence in the case, the plaintiffs were not entitled to recover. But the court declined so to rule, and ruled that nail rods, having acquired a specific commercial designation among traders and importers, and having been designated by a specific name in previous legislation, would not properly come under the general term 'bar iron' in the Revised Statutes, but should be classified as a description of rolled or hammered iron not otherwise provided for, and so subject to a duty of one and one fourth cents a pound. To which rulings and refusals to rule the defendant then and there duly excepted and prays that his exceptions may be allowed. The foregoing exceptions presented by the defendant are allowed."

The opinion of the circuit court, which accompanies the record, and is reported in 20 Fed. Rep. 495, proceeds upon the ground that, as the article in question was known commercially as nail rods, and was not bought or sold as bar iron, and was rolled iron, it did not come within the description of "bar iron, rolled or hammered," but came within the description of "rolled or hammered iron not otherwise provided for."

Although the article in the present case was in straight flat pieces less than one inch in width and less than three eighths of an inch in thickness, yet it is distinctly found that it had not been bought or sold as "bar iron," and was not known in a commercial sense as "bar iron." Therefore, although, in one sense, it might properly have been called "iron in bars," it was not "bar iron," although it was rolled iron. It was known in commerce as "nail rods;" and it is found that, in a commercial sense, nail rods were not known as "bar iron." The article, therefore, was a description of rolled iron "not otherwise provided for." The commercial understanding as to the description of the article by Congress must prevail. *Arthur* v. *Morrison*, 96 U. S. 108 [24: 764]; *Arthur* v. *Lahey*, 96 U. S. 112 [24: 766].

The judgment of the Circuit Court is affirmed.

LORENZO D. BROWN ET AL., *Appts.*,

v.

GEORGE T. McCONNELL.

(See S. C. Reporter's ed. 489-493.)

Allowance of appeal—security on appeal—citations, how signed.

1. In ordinary cases, the signing of a citation in time, by the proper justice or judge, is a sufficient allowance of an appeal.
2. The taking of security on appeal is not jurisdictional in its character; its omission is only an irregularity and does not necessarily avoid the citation, and permission to supply such omission may be given.
3. Citations on appeals from the territorial courts may be signed by a judge or justice of the territorial court or by a justice of this court.

[No. 989.]

Submitted Jan. 9, 1888. Decided Jan. 30, 1888.

APPEAL from the Supreme Court of the Territory of Washington.

Motion to dismiss. *Dismissed, unless a bond on appeal is filed.*

The facts are stated by the court.

Mr. **A. H. Garland** for appellees, and *Mr.* **W. W. Upton** for Ranck, in support of motion:

This suit to all intents and purposes was an action of ejectment.

Greer v. *Mezes*, 65 U. S. 24 How. 268 (16:661).

The questions involved cannot come up on appeal, but on writ of error only.

R. S. §§ 691, 692; *Hayes* v. *Fischer*, 102 U. S. 121 (26: 95); *Sarchet* v. *U. S.* 37 U. S. 12 Pet. 143 (9: 1033); *Jones* v. *La Vallette*, 72 U. S. 5 Wall. 579 (18: 550); *Ex parte Brown*, 116 U. S. 401 (29: 676).

There was no trial of the case on issue.

Story v. *Black*, 119 U. S. 235 (30: 341) and cases cited; 2 Bouv. L. Dict. 749.

This proceeding might be considered as an appeal.

Brandies v. *Cochrane*, 105 U. S. 262 (26: 989).

Mr. **Leander Holmes** for appellants, in opposition:

In all of the Territories, in cases tried by jury the case shall be reviewed by writ of error, and all others by appeal.

Act April 7, 1874, chap. 80, § 2, 18 Stat. at L. 27; *Hecht* v. *Boughton*, 105 U. S. 235 (26: 1018); *Wolf* v. *Hamilton*, 108 U. S. 15 (27: 635).

To take an appeal is a right.

Brandies v. *Cochrane*, 105 U. S. 262 (26: 989); *U. S.* v. *Gomez*, 64 U. S. 23 How. 326 (16: 552).

Where the law authorizes the mingling of law and equity in one suit, the same rules are to be applied as if the suit was begun in equity.

Sower v. *Weaver*, 78 Pa. 443; *Williams* v. *Murphy*, 21 Minn. 534; *Ex parte Brown*, 116 U. S. 401 (29: 676).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts on which this motion rests are these:

A judgment was rendered by the Supreme Court of the Territory of Washington July 18, 1885, dismissing an appeal. On the 15th of July, 1886, Lorenzo D. Brown and Leander Holmes presented a bond as security for an appeal from this judgment to one of the justices of that court, and he, on the 21st of that month, indorsed upon it his approval. On the 17th of November, 1886, a citation was signed by the same justice, requiring McConnell, as appellee, to appear in this court to answer the appeal "on the second Monday in October next," which was the first day of the present term. This citation was served on McConnell the day of its date. On the 23d of May, 1887, which was the last Monday in our term of 1886, the appeal was docketed and dismissed under Rule 9, on motion of counsel for the appellee. On the 4th of August, 1887, the case was again docketed by the appellants. This motion is to dismiss upon that docketing.

Even if it should be conceded that an appeal was allowed by the approval of the bond July 21, 1886, that appeal became inoperative by the failure of the appellants to docket the case at our term of 1886, and by the order to dismiss made upon the docketing by the appellee. The rights of the parties depend, therefore, on the legal effect of the signing of the citation on the 17th of November, 1886, returnable to this term without taking any new security.

The statute makes no special provision as to the form of an allowance of an appeal, but this court has said that, "as there can be no appeal without the taking of security, either for costs or costs and damages, and this is to be done by the court, or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is, in legal effect, the allowance of an appeal." *Sage* v. *Iowa Cent. R. R. Co.* 96 U. S. 712, 714 [24: 641, 643]; *Draper* v. *Davis*, 102 U. S. 370, 371 [26: 121, 123]; *Brandies* v. *Cochrane*, 105 U. S. 262 [26: 989].

In the present case there was the signing of a citation returnable to the present term, but no acceptance of security; and the question presented is whether that is enough of itself to constitute an allowance of an appeal such as will give this court jurisdiction, and if it is, whether, before dismissing the case peremptorily, we may permit the appellants to give the requisite security here. *O'Reilly* v. *Edrington*, 96 U. S. 724, 726 [24: 659].

An appeal to this court in a proper case is matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking our jurisdiction. A writ of error is the process of this court, and it is issued, therefore, only upon our authority; but an appeal can be taken without any action by this court. All that need be done to get an appeal is for the appellant to cite his adversary in the proper way to appear before this court, and for him to docket the case here at the proper time. Such a citation as is required may be signed by a judge of the circuit court from which the appeal is taken, or by a justice of this court. Rev. Stat. § 999. As appeals from territorial courts are to be taken in the same manner and under the same regulations as from the circuit courts (Rev. Stat. § 708), it follows that citations on such appeals may be signed by a judge or justice of the territorial court, or by a justice of this court.

If an appeal is taken by the action of the court in session before the end of the term at which the decree is rendered, no formal citation is necessary because, both parties, being constructively in court during the entire term, they are charged by law with notice of all that is done in the case affecting their interests. But if the necessary security is not taken until after the term, a citation is required to bring the appellee before us; although, if the case is docketed here in time, it will not be dismissed at the return term until an opportunity has been afforded the appellant to give the requisite notice. The appeal taken in open court, if dock-

eted here in time, gives this court jurisdiction of the subject matter and invests it with power to make all orders, consistent with proper practice, which are needed in furtherance of justice. This subject was fully considered in *Hewitt* v. *Filbert*, 116 U. S. 142 [29:581].

To get an appeal after the term at which the decree is rendered, a party must apply to the proper justice or judge to sign a citation. If he signs it, he furnishes the appellant the means of getting his case into this court, and in legal effect allows an appeal. All the appellant has to do after that to give this court jurisdiction, both of the subject matter of the appeal and of the parties, is to serve his citation and to docket the case here in time.

By section 1000 of the Revised Statutes the justice or judge is required when he signs a citation to take good and sufficient security that the appellant shall prosecute his appeal to effect, and, if he fail to make his plea good, answer all costs. The failure to take such security is an irregularity, but it does not necessarily avoid the citation. The security is required, however, in the due prosecution of the appeal; and if the case is docketed here in time it will not ordinarily be dismissed because of the neglect or ommission of the justice or judge to require the security until the appellant has been afforded a reasonable opportunity of curing the defect. The taking of security is not jurisdictional in its character, and its omission affects only the regularity of the proceedings. Such being the case, permission to supply it here may properly be given in furtherance of justice.

There is nothing in the case of *Castro* v. *U. S.* 70 U. S. 3 Wall. 46 [18: 163], or in that of *U. S.* v. *Curry*, 47 U. S. 6 How. 106 [12: 363], which is at all inconsistent with our present ruling to the effect that in ordinary cases the signing of a citation in time by the proper justice or judge is a sufficient allowance of an appeal. *Castro's Case* arose under the Act of March 3, 1851, 9 Stat. at L. 631, chap. 41, to ascertain and settle private land claims in California, which required (§ 9) appeals to be granted by the district court on the application of the party against whom the judgment was rendered. Clearly, a citation signed by a judge out of court would not be the allowance of an appeal under that statute, because that appeal must be allowed by the court. *Curry's Case* arose under the Act of May 26, 1824, 4 Stat. at L. 52, chap. 178, which required an appeal to be taken within one year from the time of the rendition of the judgment (§ 2), and the citation was not signed before the end of that time. The jurisdiction of this court depended, therefore, entirely on the first appeal, which had become inoperative by a failure to docket it at the return term.

It is, therefore, ordered that the cause stand dismissed, unless the appellants shall, on or before the 19th day of March next, file with the clerk of this court a bond in the penal sum of five hundred dollars, conditioned according to law for the purposes of the appeal, with sureties to be approved by the Justice of this Court allotted to the Ninth Circuit.

Similar orders may be entered in Nos. 987 [*Brown* v. *Ranck*] and 668 [*Brown* v. *Hazard*], which were submitted on like motions.

UNION INSURANCE COMPANY OF THE CITY OF PHILADELPHIA, *Piff. in Err.*,

v.

PATRICK SMITH.

(See S. C. Reporter's ed. 405–429.)

Expert witnesses—seamen when competent as—on what subjects—secondary evidence—declarations of captain—motion for nonsuit, when waived—general exception—insurance against lake perils—warranty of seaworthiness—loss from other cause—burden of proof.

1. The master, the mate, and fireman of a tug, who were on board of her at the time she was lost on the lake, and her owner, each of whom had been engaged in navigation of the lakes for many years, are competent as expert witnesses in regard to the loss, and in regard to the prudence of the management of the tug, and the weight of the evidence of each in view of the experience of each, is for the jury.

2. In an action to recover insurance on a vessel lost on the lake, the prudence and good seamanship of its management are proper subjects of expert testimony.

3. Secondary evidence of the proofs of loss may be given, where the defendant failed to produce them in evidence on notice.

4. It was not error in the court below to exclude evidence of declarations made by the captain of the tug after she had become disabled, in regard to the occurrence, where it was not stated what was proposed to be proved and it was not shown that such declarations were a part of the *res gestæ*.

5. A motion for peremptory nonsuit, made at the close of plaintiff's testimony, is waived by the introduction by the defendant of testimony in the further progress of the case.

6. A general exception to the refusal to charge the entire series of fourteen propositions, is bad, provided any one of the series is objectionable.

7. Where a vessel was insured against all perils of the lakes, excepting perils from certain specified and excluded causes, if the vessel sustained loss from a peril of the lake which did not arise from, or was not caused by, one of the excluded causes, the insurance company is liable.

8. In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk; and the fact that she subsequently sustained damage, and was not properly refitted at an intermediate port, does not discharge the insurer from subsequent loss, provided such loss be not the consequence of the omission.

9. A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence of the insured or his agents, discharges the insurer from liability for loss which is the consequence of such bad faith or want of prudence or diligence; but does not affect the contract of insurance as to any other risks or loss covered by the policy and not caused or increased by such particular defect.

10. Where defendant sets up, as a special defense, the want of ordinary care at the time of the loss, it is not error for the court to charge the jury that such defense must be shown by defendant; the court having previously stated to the jury that, to entitle the plaintiff to recover, he must show that he had complied with the terms of the policy and that it must appear from the whole proof that the loss was not occasioned by the want of ordinary care.

[No. 787.]

Submitted Jan. 6, 1888. Decided Jan. 30, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio, to review a judgment for the plaintiff in an action to recover for the loss of a vessel insured by a policy of marine insurance. *Judgment affirmed.*

The facts and case are fully stated in the opinion.

Mr. **Harvey D. Goulder,** for plaintiff in error:

There seems to be, in time policies, an implied warranty of seaworthiness where the vessel, at the time of the taking out of insurance, is in a port where repairs can be made.

Hoxie v. *Pacific Mut. Ins. Co.* 7 Allen, 211; *Rouse* v. *Ins. Co.* 3 Wall. Jr. 370; *Hoxie* v. *Home Ins. Co.* 32 Conn. 22; *Lapene* v. *Sun Mut. Ins. Co.* 8 La. Ann. 2; *Copeland* v. *New Eng. Marine Ins. Co.* 2 Met. 432; *Capen* v. *Washington Ins. Co.* 12 Cush. 517; *Paddock* v. *Franklin Ins. Co.* 11 Pick. 233; *Merchants Mut. Ins. Co.* v. *Sweet,* 6 Wis. 670; 1 Pars. Mar. Ins. 380, 381; *Hazard* v. *New Eng. Marine Ins. Co.* 1 Sumn. 218; *Hazard* v. *New Eng. Marine Ins. Co.* 33 U. S. 8 Pet. 557 (8: 1043); *Starbuck* v. *New Eng. Marine Ins. Co.* 19 Pick. 198; *Adderly* v. *American Mut. Ins. Co.* Taney, 126.

The plaintiff was bound to prove a loss by some peril of the sea insured against by defendant.

Cory v. *Boylston F. & M. Ins. Co.* 107 Mass. 140; *Flemming* v. *Marine Ins. Co.* 4 Whart. 58; *Swift* v. *Union Mut. M. Ins. Co.* 122 Mass. 573; *Paddock* v. *Commercial Ins. Co.* 104 Mass. 528; *Jones* v. *Ins. Co.* 2 Wall. Jr. 278; 1 Phill. Ins. §§ 986, 1087–1089; *Baker* v. *Manufacturers Ins. Co.* 12 Gray, 603; *Leftwitch* v. *St. Louis Perpetual Ins. Co.* 5 La. Ann. 706; *Heebner* v. *Eagle Ins. Co.* 10 Gray, 131; 2 Greenl. Ev. § 385; 2 Phill. Ins. § 2079; *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.* 26 Fed. Rep. 596; *Waters* v. *Merchants Louisville Ins. Co.* 36 U. S. 11 Pet. 213 (9: 691).

The vessel was in such a condition of unseaworthiness and danger as to be the proper subject of salvage services.

McConnochie v. *Kerr,* 9 Fed. Rep. 50; *The Plymouth Rock,* 9 Fed. Rep. 413; *The Leipsic,* 10 Fed. Rep. 585; *The New Orleans,* 23 Fed. Rep. 909; *The Saragossa,* 1 Ben. 551.

The interests of commerce, of freighters and insurers all require that no unnecessary risks be taken by a vessel's continuance at sea in a disabled and dangerous condition.

McConnochie v. *Kerr, supra; Snethen* v. *Memphis Ins. Co.* 3 La. Ann. 474; *Marcy* v. *Sun Mut. Ins. Co.* 11 La. Ann. 748; *Talcot* v. *Commercial Ins. Co.* 2 Johns. 124.

Where the policy excepts from the perils insured against those arising from unseaworthiness, the assured, to recover thereon, must show that the vessel was seaworthy when lost.

Berwind v. *Greenwich Ins. Co.* 21 Jones & S. 102.

The evidence was insufficient to support a verdict for the plaintiff.

Schofield v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224).

The witness must be shown to have skill or learning in the matter upon which his opinion is to be asked, sufficient to entitle him to be regarded as an expert. And whether the witness is so qualified is a question for the court to pass upon before the testimony is received. Stephens, Dig. Ev. Art. 49; *Pope* v. *Filley,* 9 Fed. Rep. 66.

If the vessel was unseaworthy and if the loss was occasioned by unseaworthiness, the Insurance Company is not to be held liable.

Richelieu & O. Nav. Co. v. *Boston Marine Ins. Co.* and *Merchants Mut. Ins. Co.* v. *Sweet, supra; Swift* v. *Union Mut. M. Ins. Co.* 122 Mass. 573.

The parties made their contract and by that their rights ought to be fixed and controlled. Testimony of custom is clearly inadmissible.

Orient Mut. Ins. Co. v. *Wright,* 68 U. S. 1 Wall. 456 (17: 505); *Partridge* v. *Phœnix Mut. L. Ins. Co.* 82 U. S. 15 Wall. 579 (21: 230); 1 Pars. Ins. 337; *Work* v. *Leathers,* 97 U. S. 379 (24: 1012).

Captain Bowen was the agent and representative of the owner, in charge of the tug. What he said in regard to the then existing leak, and in regard to what should be done in reference to the pending situation in which they found themselves, is a part of the *res gestæ.*

The Potomac, 75 U. S. 8 Wall. 594 (19: 512); *Travelers Ins. Co.* v. *Mosley,* 75 U. S. 8 Wall. 397 (19: 437); *Waldele* v. *N. Y. Cent. & H. R. R. Co.* 95 N. Y. 274; *Western Ins. Co.* v. *Tobin,* 32 Ohio St. 78.

To charge a corporation upon the act of an officer or agent, it must be shown either that the act was performed while in the discharge of his duty in the usual course of business, and was within the general scope and sphere of such duty, or that it was expressly authorized, or that it was performed with the knowledge and assent of the directors or of the corporation or its authorized officers, or was subsequently ratified by them.

Abb. Trial Ev. p. 32; *First Nat. Bank* v. *Ocean Nat. Bank,* 60 N. Y. 290; *Hoffman* v. *John Hancock Mut. L. Ins. Co.* 92 U. S. 161 (23:539); *Northwestern Union Packet Co.* v. *Clough,* 87 U. S. 20 Wall. 528 (22:406); *American L. Ins. Co.* v. *Mahone,* 88 U. S. 21 Wall. 152 (22:598).

The insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the thing insured.

1 Phill. Ins. § 1089; *Baker* v. *Manufacturers Ins. Co.* 12 Gray, 603; *Leftwitch* v. *St. Louis Perpetual Ins. Co.* 5 La. Ann. 706; *Heebner* v. *Eagle Ins. Co.* 10 Gray 131; *The Glenfruin,* L. R. 10 P. Div. 103; *Marcy* v. *Sun Mut. Ins. Co.* 11 La. Ann. 748; 2 Phill. Ins. § 2079; *Myers* v. *Girard Ins. Co.* 26 Pa. 192; *Swift* v. *Union M. Ins. Co.* 122 Mass. 573.

The charge gives to the jury the impression that the owner of the tug, insured as a tug, is justified in towing her indiscriminately about the lakes, with her machinery broken to such an extent that the tug is unnavigable, without affecting the policy.

McConnochie v. *Kerr,* 9 Fed. Rep. 50; *The Leipsic,* 10 Fed. Rep. 585; *The New Orleans,* 23 Fed. Rep. 909; *The Saragossa,* 1 Ben. 551; *The Glenfruin, supra.*

Where the legal effect of the allegations in an answer is a mere denial of the averments in the petition, such allegations cannot be regarded as new matter which will be taken as true unless controverted by the reply.

Dayton Ins. Co. v. *Kelly,* 24 Ohio St. 345; *Simmons* v. *Green,* 35 Ohio St. 104; Bliss, Code Pl. § 396.

The fourth request that, if the plaintiff failed to put the tug in seaworthy condition at Detroit, and in consequence of that she was lost, the verdict should have been for defendant, is supported by *Richelieu & O. Nav. Co.* v. *Boston*

Marine Ins. Co. 26 Fed. Rep. 595; *Work* v. *Leathers*, 97 U. S. 379 (24:1012); *Capen* v. *Washington Ins. Co.* 12 Cush. 517.

The eleventh request is supported by 2 Phillips, Ins. § 2079, and *Myers* v. *Girard Ins. Co.* 26 Pa. 192.

Mr. J. E. Ingersoll, for defendant in error:

The bill of exceptions should show affirmatively that the objection and the exception to it were taken during the progress of the trial. *Scott* v. *Lloyd*, 34 U. S. 9 Pet. 442 (9:186).

An exception to be of any avail must be taken at the trial. The fact that it was seasonably taken must appear affirmatively in the record. *U. S.* v. *Carey*, 110 U. S. 52 (28:67); *Simpson* v. *Dall*, 3 Wall. 460 (18:265).

Experienced navigators, as well as shipwrights, are competent to express opinion on questions involving nautical skill, as to the nature and ordinary effects of the perils to which the marine loss is attributable.

Abb. Trial Ev. 500; *Eastern Trans. Line* v. *Hope*, 95 U. S. 298 (24:477); *Moore* v. *Westervelt*, 9 Bosw. 558; *Walsh* v. *Washington Marine Ins. Co.* 32 N. Y. 427.

By a series of cases, beginning with *Doe* v. *Grymes*, 26 U. S. 1 Pet. 469 (7: 224); also *De Wolf* v. *Rabaud*, 26 U. S. 1 Pet. 496 (7:236), this court has held that a refusal to grant a nonsuit constitutes no ground for reversal in this court.

Those decisions were followed in *Crane* v. *Morris*, 31 U. S. 6 Pet. 608 (8:518); *Silsby* v. *Foote*, 55 U. S. 14 How. 218 (14:394); *Castle* v. *Bullard*, 64 U. S. 23 How. 188 (16:427); *Schuchardt* v. *Allen*, 68 U. S. 1 Wall. 369 (17: 646); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 121 (22:782); *Fowle* v. *Alexandria*, 24 U. S. 11 Wheat. 320 (6:484).

In *Beaver* v. *Taylor*, 93 U. S. 46 (23:797), the court says: An exception to the entire charge of the court, or in gross to a series of propositions therein contained, cannot be sustained if any portion thus excepted to is sound.

A general exception made to a refusal to charge a series of propositions is bad provided any one of the series is objectionable.

Beaver v. *Taylor, supra; Worthington* v. *Mason*, 101 U. S. 149 (25:848); *U. S.* v. *Hough*, 103 U. S. 71 (26: 305).

A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the owner or his agents, discharges the underwriter from liability for any loss, the consequence of such want of faith, prudence or diligence.

American Ins. Co. v. *Ogden*, 20 Wend 287; *Peters* v. *Phœnix Ins. Co.* 8 Serg. & R. 25; *Paddock* v. *Franklin Ins. Co.* 11 Pick. 227; *Starbuck* v. *New Eng. Marine Ins. Co.* 19 Pick, 198; *Adderly* v. *American Mut. Ins. Co.* Taney, 126; *Capen* v. *Washington Ins. Co.* 12 Cush. 517; *Merchants Mut. Ins. Co.* v. *Sweet*, 6 Wis. 670; *Hazard* v. *New Eng. Marine Ins. Co.* 1 Sumn. 218.

The statement of an agent made after the act concerning it is no part of the *res gestæ*.

Vicksburg & M. R. R. Co. v. *O'Brien*, 119 U. S. 103 (30:300).

There is no presumption of negligence as against either party, except such as arises from the facts proved.

Cleveland, C. & C. R. R. Co. v. *Crawford*, 24 Ohio St. 636.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law brought by Patrick Smith against the Union Insurance Company of the City of Philadelphia, a Pennsylvania corporation, in the Court of Common Pleas of Cuyahoga County, Ohio, and removed by the defendant into the Circuit Court of the United States for the Northern District of Ohio, to recover the sum of $7,000, with interest, for the loss of a vessel insured by a policy of marine insurance issued by the defendant. The policy was dated May 6, 1884, and insured the steam tug N. P. Sprague, from May 6, 1884, to December 10, 1884, in the sum of $7,000, the vessel "to be employed exclusively in the freighting and passenger business, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie and Ontario, and River St. Lawrence to Quebec, usually navigated by vessels of her class, the vessel being valued in the policy at $9,884. The policy contained these provisions: "Touching the adventures and perils which the said Insurance Company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or other legally excluded causes, viz: damage that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel: rottenness, inherent defects, overloading, and all other unseaworthiness." "Boiler clause. Unless caused by stranding, collision, or the vessel being on fire, the insured warrants this policy to be free from any claim for loss or damage to boilers, steam pipes, or machinery caused by the bursting, explosion, collapsing, or breaking of the same, and to be free from any and every general average and salvage expense in consequence thereof, excepting always the expenses of getting the vessel from an exposed position to the nearest place of safety, when further expenses of above nature are not to be a claim on the insurer."

The petition by which the suit was commenced in the state court set forth that the plaintiff was the owner of the tug; that on the 18th of July, 1884, the vessel, in her regular course of business, left Port L'Anse, bound to Cleveland; that she was then stout, staunch, and strong, and in all respects seaworthy for the voyage she was about to undertake; that, while on that voyage, and on the 23d of July, 1884, and without fault or negligence on the part of the plaintiff or those in charge and management of her, but solely by reason of the perils of navigation so insured against by the defendant, she sprung a leak; that although the plaintiff and his agents, and the officers in charge of the vessel, used all reasonable endeavors to prevent said vessel filling with water, they were unable so to do; that, within a short time after the dis-

covery of the leak, the vessel filled with water and sank, and became a total loss; that the plaintiff promptly caused proof of loss to be made to the defendant, as required by the policy, and also, in compliance with its terms, caused to be made to the defendant an assignment and transfer of all interest which he had in the vessel, and made a claim upon the defendant for $7,000, as for a total loss; and that the defendant accepted the abandonment and transfer.

The answer admitted the character and general occupation of the tug, and the issuing of the policy to the plaintiff, and denied every allegation in the petition not expressly admitted in the answer to be true. The second and third defenses contained in the answer were as follows:

"2d defense. And by way of further answer, and for a second defense, defendant says that said tug, while on Lake Huron, was rendered helpless and unseaworthy and in great danger of springing a leak and sinking by the breaking of her shaft, a part of her machinery, which breaking was not caused by stranding, collision, or the vessel being on fire, and was compelled to and did abandon the vessel which she had in tow; and while in such helpless, unseaworthy, and perilous condition, said tug was picked up and towed to Port Huron, a place of safety and a port of repair, where every facility and convenient means of repairing said tug were at hand; yet defendant avers that said tug was not there repaired, but, without the knowledge or consent of defendant, said tug, in the same helpless and unseaworthy and dangerous condition before described, was towed out of and past said Port of Huron, and was afterwards towed in the same condition into and through and past the Port of Detroit, at which last named place every facility and all conveniences existed for repairing said tug, and which also was a place of entire safety; and, without any notice to defendant, and without its knowledge and consent, the said tug being then and at all times hereinbefore mentioned in the possession and control of plaintiff and his agents, said tug was, in such helpless and unseaworthy and dangerous condition, towed out upon Lake Erie, not in any manner navigating as a tug, or by or with the aid of her own machinery and appliances, and, soon after reaching Lake Erie, without any stress of weather, the said tug sprung a leak and was sunk.

"3d defense. And, for a further and third defense, the defendant says that, while said tug N. P. Sprague was on Lake Huron, having in tow several vessels, part of her machinery, to wit, her shaft, broke, the said breaking not being caused by stranding, collision, or the vessel being on fire, whereby said tug was completely disabled, and was compelled to and did give up her said tow, and was rendered unseaworthy and helpless, and was in great and constant peril of springing a leak and sinking by the working of her propeller wheel and broken shaft attached thereto; and in that condition, she was picked up, and, by direction of her master, towed to Port Huron, Michigan, which was a place of safety and at which every facility and convenient means for repairing said tug in all respects were at hand, but the plaintiff negligently failed and neglected to repair, or cause to be repaired, said tug, and negligently, and without the knowledge or consent of the defendant, caused her to be towed out of and away from said port of safety and repair, in the unseaworthy and dangerous condition above described; and afterwards, in the same condition, said tug was towed into and through and past the Port of Detroit, a place of safety, where every means and facility for repairing said tug was at hand and convenient; yet the plaintiff, not regarding his duty in that behalf, negligently failed to repair, or cause to be repaired, the said tug, and permitted her, in the unseaworthy, helpless, disabled, and dangerous condition before described, to be towed out of Detroit River and out upon Lake Erie; that, soon after reaching the lake, and meeting with a slight and ordinary swell, the said tug, by reason of her said broken machinery, and by reason of her said unseaworthiness and helpless and dangerous condition, sprung a serious leak and soon after was sunk."

This plaintiff demurred to the second defense, as not stating facts sufficient in law to constitute a defense to the cause of action alleged in the petition, and replied to the third defense as follows:

"This plaintiff admits that, while the tug N. P. Sprague was on Lake Huron, having in tow several vessels, a part of her machinery, to wit, her shaft, broke, whereby said tug was compelled to and did give up her said tow, and was rendered helpless, and was, in this condition, by the direction of her master, towed to Port Huron, Michigan, which was a place of safety; that said master caused her to be towed away from Port Huron to and past Detroit, which was also a place of safety; and that, soon after reaching Lake Erie, on her way to Cleveland, she sprung a leak and soon after sunk; but this plaintiff denies all and singular the allegations in said third defense contained, except those hereinabove admitted."

The court sustained the demurrer to the second defense, and the issues of fact joined were tried by a jury, which returned a verdict for the plaintiff for $7,569.33. A motion for a new trial was overruled, and a judgment was entered in favor of the plaintiff, for the $7,569.33, and interest, and costs, on the 25th of March, 1886, the verdict having been rendered on the 24th of February, 1886. The defendant has brought a writ of error to review this judgment.

There is a bill of exceptions, filed on the 25th of March, 1886, which sets forth that, at the trial of the case, the plaintiff, to maintain the issue on his part, introduced and offered in evidence certain testimony, which is set forth. At the close of such testimony, it is stated that counsel "moved the court to take the case from the jury on the ground of absence of proof of a loss of plaintiff's vessel within the policy, and because there is not sufficient testimony to justify a recovery;" that "the motion was overruled by the court, to which ruling the defendant duly excepted;" and that "the foregoing was all the testimony offered by the plaintiff to maintain the issues on his part, in chief." It is then stated that the defendant, to maintain the issues on its part, offered in evidence certain testimony which is set forth. It is then stated that "the foregoing was all the testimony

offered upon either side, and upon both sides, in the trial of said case;" that, "the testimony being all in, defendant moved the court here to take the case from the jury and direct a verdict for the defendant;" that the motion was overruled by the court; and that the defendant excepted to such ruling.

"The charge of the court to the jury is then set forth at length. The charge, after a statement of the pleadings, was as follows:

"These pleadings form the issue that you are required to determine, in the light of the proof that you have heard on this trial. To entitle the plaintiff to recover he must show that he has complied with the terms of the policy; that he has made the necessary preliminary proofs; that the vessel was lost by reason of the perils against which it was insured; and it must appear from the whole proof that the loss was not occasioned by the want of ordinary care of the master in charge of the vessel, or on account of being unseaworthy, as hereinafter stated, and not within the exceptions contained in the policy, against which the defendant did not insure the plaintiff.

"The perils of the lake, river, etc., which the defendant took upon itself, by the terms of the policy, were such as should come to the damage of the vessel or any part thereof, excepting the incompetency of the master, or insufficiency of the crew, or want of ordinary care and skill in the navigation of the vessel, rottenness, and defects of the vessel, and all other unseaworthiness.

"The perils of the lake described and referred to by this policy of insurance denote the natural accidents peculiar to that element, which do not happen by the intervention of man nor are to be prevented by human prudence.

"[I direct you that the breaking of the shaft, without any fault of the master or owners, was one of the perils covered by the insurance; and, if the vessel had been lost by reason thereof, the defendant would have been liable under the policy.] So, if such breaking of the shaft in Lake Huron was the cause of The Sprague sinking afterwards in Lake Erie, without the master being guilty of a want of ordinary care in the navigation of the vessel, such loss was covered by the policy of insurance. [If the vessel was lost in Lake Erie from the sudden springing of a leak, occasioned from some unknown cause, and without the fault of the master or the owners, in the exercise of ordinary care in its navigation, and the vessel at the time it started being seaworthy, such loss would be covered by the insurance under the policy. The plaintiff, however, in such case, must show that the master in control of the vessel exercised ordinary care in its management at the time that the loss occurred.]

"Ordinary care is such as a reasonably prudent man would exercise, and must have reference to the circumstances under which the care is required to be exercised. What would be ordinary care under some circumstances may not be at other times and under other circumstances.

"[It was generally the duty of the plaintiff to keep The Sprague in a seaworthy condition for the safe navigation of the waters in which she might be run under the policy; and when that seaworthiness, under the policy of insurance, is made and attaches, it is presumed to exist and continue; and the burden of the proof of unseaworthiness would then be upon the defendant.]

"[There is no claim in the defense in this case that The Sprague was not seaworthy when she started from the Port of L'Anse, with her tows, for the Port of Cleveland], but it is claimed that in Lake Huron her shaft was broken, causing a dangerous leak in the vessel, so that she was disabled and had herself to be taken in tow with the other vessels, and that she then became and was unseaworthy, and that it was the duty of the plaintiff or the master to have repaired her, so as to make her seaworthy, at either Port Huron or the first port at which it could be done, or at the Port of Detroit, before attempting to cross Lake Erie to Cleveland, and which, it is claimed, was not done, by reason of which the vessel was lost, and, therefore, the defendant not liable on this policy.

"The Sprague having been temporarily repaired by calking the leakage occasioned by the breaking of her shaft, and taken in tow by The Wilcox, and in safety having reached Detroit, the question presents itself as to the duty of the master or plaintiff to have the proper repairs made there, before starting on Lake Erie for her home port on Lake Erie; and, failing to do so, how does it affect the plaintiff's right to recover on this policy?

"[On this point I direct you that if, when The Sprague arrived at Detroit, the breaking of the shaft and the consequent leakage therefrom was such that an ordinarily prudent and discreet master, of competent skill and judgment, would have deemed it necessary to repair the vessel, so as to stop the leak, before proceeding on the voyage to Cleveland, and you find that the sinking of the vessel and its loss was occasioned by his omission to do so, and would not otherwise have happened, then the plaintiff is not entitled to recover in this suit.]

"[But if you find, from the character of the injury and the leak, that a master of competent skill and judgment might reasonably have supposed, in the exercise of ordinary care for the safety of the vessel, that she was seaworthy for the voyage in which she was then engaged, in the manner that she was to make the trip to Cleveland in tow of The Wilcox, notwithstanding the leakage occasioned by such breaking of the shaft, and on that account omitted to make such repair at Detroit, then such omission to make such repair at Detroit is no bar to a recovery in this suit.]

"[On the question of the competency of the master, I direct you that the competency of the master is not to be determined by the want of a license to act as master of a vessel, or by the fact that the master had a license under the provisions of the statute; but it is to be determined by the skill, experience, and ability of the master in the line of his duties as master, as shown in the proof.]

"[The seaworthiness of a vessel must have reference to the character of the service to be performed and the nature and character of the voyage to be made in this case. Was The Sprague seaworthy, at the time she left Detroit, to be towed from Detroit to Cleveland, not to propel herself in the navigation of the lakes in the usual business of a tug, but seaworthy so

as to be in a condition to be towed, as the voyage was undertaken to be made, in tow of the tug Wilcox?]

"In view of these general principles of law, it will be important for you to carefully examine all of the evidence in reference to the injury and its extent, and the means used temporarily to stop the leakage and keep the vessel clear of water during the period of her trip from the place of injury to Detroit, and how it appeared to the master at Detroit, and what was its condition when the vessel did arrive at Detroit.

"And, as bearing upon the exercise of every ordinary care by the master, in reference to the continuing of the voyage without repairs, you will carefully consider the opinions of the experts in navigation who have testified to you in relation to the character of the vessel and the injury, and the necessity, for the safety of the vessel, of repairing, and the danger or absence of danger in continuing the voyage, under all the circumstances of the situation. The value of this expert testimony depends very largely upon the skill, the information or knowledge, and the experience, of the party who undertakes to give his opinion on any given subject. We are always required to consider the testimony of experts in different and various branches of business, and more particularly that connected with navigation upon the lakes and rivers in this country. Then the opinions of these experts depend very largely upon the truth of the hypothetical case that counsel on the one side and on the other have seen proper to put to the witnesses during their examination; and you, no doubt, have noticed, in the testimony of these experts, that the same expert witness, in response to the hypothetical case on the one side, will answer affirmatively; and to the hypothetical case put by the other side he will answer affirmatively also.

"The value of that sort of opinion depends very largely upon the question of how the facts in this case have been established in the proof before you; and in giving weight to the testimony of experts you will be careful to ascertain what the evidence establishes as to the truth of the one or the other of these different hypothetical cases put by counsel to the witnesses on the examinations.

"Then it is claimed that in Lake Erie, at the time of the sudden increase of the leakage of the vessel, the master did not exercise ordinary care for the safety of the vessel, in not taking her to a safe port, or safe place on the beach, so as to prevent the loss of the vessel. I direct you that it was the duty of the master at the time to exercise ordinary care, under all the circumstances, to secure the safety of the vessel, and to prevent the loss thereof, or any greater loss than could be prevented by the exercise of such ordinary care by the master.

"You will then carefully consider the evidence, and all the circumstances surrounding the transaction, with the evidence of the experts who have given testimony in the case, and find whether the master was guilty of the want of ordinary care. If you find he did not exercise that care and diligence, and the vessel was lost for the want of such care, then the plaintiff is not entitled to recover in this action.

"[The burden, however, to show the want of ordinary care at the time of the loss in Lake Erie, must be shown by a fair preponderance of the proof on behalf of the defendant, for the reason that the defendant sets it up in its special defense, in the form of a special answer, and in that respect takes upon itself the establishment of the affirmative of that proposition.]

"Under these general directions—and these are about all the questions of law involved in the case—you are to make your finding. [So far as the matter of preliminary proof is concerned, required to be made out by the plaintiff, I do not understand that the defendant makes any great contest in reference to whether that was made or not, but it has denied it in the form of an answer; and you will look into the testimony and see whether that satisfactorily shows the proof of loss was made to this Company before this action was brought, although the paper was not present on the trial before you.] Then carefully examine all the evidence, and if you find that the plaintiff has not made out all that is necessary to entitle him to recover, your verdict will be in favor of the defendant; but if you find, in the application of these general principles, under the evidence before you, that the plaintiff is entitled to recover in this action, the measure of that recovery is the amount of the policy of insurance, the vessel being a total loss, and having been estimated in the policy at $9,300. The measure of recovery would be the $7,000, and the plaintiff would be entitled to recover interest from the time the money became payable by the terms of the policy—sixty days after the presentation of the preliminary proof—until the first day of the present term.

"Now take the case, gentlemen, and make such a finding as will satisfy you of having correctly carried out these general principles and correctly weighed, considered, and decided the questions of fact before you."

The bill of exceptions then states that the defendant took the following exceptions to the charge of the court:

"1. To that portion of the charge which relates to the breaking of the shaft on Lake Huron, without any fault of the master's, being a peril of the sea, and if the loss occurred from that, the defendant would be liable.

"2. To that portion of the charge which says the springing of a leak on Lake Erie from some unknown cause would be a peril of the sea for which the defendant would be liable.

"3. To that portion of the charge which says the burden of the proof of unseaworthiness is on the defendant, and also to the statement of the charge that there is no claim on the part of the defendant that she was not seaworthy when she left L'Anse.

"4. To that portion of the charge in reference to the duty of the plaintiff or master to repair at Detroit, and to that part in which the court says that if an ordinarily prudent and skillful master would have stopped at Detroit and made repairs, then it was plaintiff's duty to so stop in this case.

"5. To that portion of the charge, in the same connection, in which the court directs the jury that if they find, from the character of the leak, etc., in the exercise of ordinary care, the master would not stop, then the defendant would be liable.

"6. To that portion of the charge in reference to the license of the master.

"7. To that part of the charge which says that seaworthiness must have reference to the nature of the voyage.

"8. To that portion of the charge which says that the burden of proof is on the defendant to show the want of ordinary care at the time of the loss, in trying to prevent the loss, because the defendant sets that up in a special plea.

"9. To that portion of the charge in reference to the preliminary proofs having been made in this action.

"10. Also to the refusal of the court to charge the requests presented by the defendant in this case, numbered 1 to 15.

"11. Also to the entire charge as given."

It is then stated in the bill of exceptions that the defendant requested the court to give to the jury the following instructions:

"1. Under all the testimony in this case your verdict should be for the defendant.

"2. The burden of proving a loss of this kind is on the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant.

"3. It was the duty of the master, at Detroit, before leaving or passing for Cleveland with a crippled tug, to ascertain at the signal station what would probably be the weather in the direction of Cleveland during the time necessary to reach that point, if such information could have been obtained at Detroit, and his failure to do so would be, under such circumstances, a want of ordinary care and skill.

"4. It was the duty of the plaintiff to keep the tug Sprague in a seaworthy condition for the safe performance of this trip—that is, her hull must have been so tight, staunch, and strong as to be competent to resist all ordinary action of the winds and waves—and, if he failed to put her in such condition at Detroit, and she was lost in consequence of her failure to be in such condition on Lake Erie after passing Detroit, and you find that sufficient repairs could have been made at Detroit, your verdict must be for defendant.

"5. Under the policy in this case, the Company does not agree to indemnify the plaintiff against all damages that might happen to her in the course of navigation of a vessel, or all the misfortunes that may befall her while upon the lakes, and there are excepted from the provisions of this policy, and from the liability of the defendant, certain risks which the defendant does not take upon itself to bear. The purport of these exceptions, so far as this case is concerned, is that the Company does not undertake to insure any loss to this vessel which may be occasioned by the incompetency of the master, the insufficiency of the crew, or want of ordinary care and skill in navigating, or any unseaworthiness of any description.

"6. In order to find for plaintiff, you must find that the loss of this tug was by a peril of the sea, that is, by some natural perils and operation of the elements which occurred without the intervention of human agency, and which the prudence of man could not foresee nor his strength resist. Imprudence or want of skill in a master may have been unforeseen, but it is not a fortuitous event. The insurer undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed.

"7. It is admitted by the pleadings in this case that, after the breaking of the shaft on Lake Huron, the tug was towed to Port Huron, and also to Detroit, both ports of safety. This being so, if you find that the loss was occasioned by reason of unseaworthiness after leaving Detroit, the defendant is entitled to your verdict.

"8. Under the circumstances of this case, if you find that the vessel was not seaworthy when she sprung a leak on Lake Erie, your verdict must be for the defendant, without reference necessarily to any question of whether the master used good or bad judgment in leaving or passing Detroit, because the plaintiff and defendant agreed in the policy that perils and losses growing out of unseaworthiness were not insured against.

"9. If you find that the loss was incurred or contributed to by the incompetency of the master, or want of ordinary care and skill in navigation, your verdict must be for defendant.

"10. If you find that, after the danger was discovered on Lake Erie, the master did not do what a competent master of ordinary prudence would do, and that, by the use of ordinary skill and care, under such circumstances, by a competent master, the tug could have been got to a place of safety and her loss prevented, your verdict should be for the defendant.

"11. The fact that this tug began leaking so rapidly on Lake Erie, in moderate weather, so soon after leaving Detroit, raises a presumption that, either from the effects of the accident on Lake Huron, or in some other respect, she was unseaworthy for the undertaking to go to Cleveland when she left Detroit, which it devolves upon the plaintiff to explain and overcome.

"12. The burden of proof is on the plaintiff in this case, to show, by a fair preponderance of the testimony, that the sinking and loss of this tug could not have been guarded against or prevented by the ordinary exertion of human skill and prudence.

"13. In this case the words 'ordinary skill' and 'ordinary care' have a relative meaning. What would be ordinary care in relation to a strong, staunch, sound vessel, might fall far short of ordinary care and skill in relation to a wounded vessel. What might be ordinary care and skill if the tug was seaworthy and navigating as a tug, might fall far short of ordinary care when the tug is broken down and a severe and dangerous leak has been temporarily stopped. You must consider the circumstances of the case, the condition of the vessel, whether she could meet and withstand the ordinary wear and tear and strain of the elements, or required fine weather and smooth water; what means there existed of ascertaining the probable weather during the time he would be occupied in crossing Lake Erie; what precaution he took or failed to take in this respect; as well as all other circumstances.

"14. If this tug, after her accident on Lake Huron, was unseaworthy, and in consequence was lost on Lake Erie, her loss is to be attributed to the unseaworthiness and not to the acci-

dent, provided the master had opportunity to repair the damage done on Lake Huron, and in that case your verdict must be for the defendant.

"Which requests to charge were refused by the court, except so far as covered by the charge already given, to which refusal to charge the defendant excepted.

"And the jury, after being charged, retired, and afterwards returned a verdict for said plaintiff against said defendant for the sum of seven thousand dollars; and the defendant having filed its motion for new trial for the reasons and causes set out in said motion, and the said circuit court having overruled said motion and entered judgment on said verdict, the said defendant excepted to the said ruling of said court overruling said motion for new trial, and to said judgment, and prayed the court here to sign and seal this its bill of exceptions, and order the same to be made a part of the record in this case; all of which is done and ordered as said defendant has prayed for." Then follow the signature and seal of the judge.

The defendant alleges that the circuit court erred in overruling objections taken by it to testimony offered by the plaintiff; and in rejecting testimony offered by the defendant; and in overruling the motion made by the defendant to take the case from the jury at the close of the plaintiff's testimony; and in overruling the motion made by the defendant, at the close of its testimony, to take the case from the jury and to direct a verdict for the defendant; and in overruling objections taken by the defendant to the charge to the jury; and in overruling the defendant's requests to instruct the jury.

Assuming that the bill of exceptions sufficiently indicates that the exceptions taken by the defendant to the admissions and exclusions of evidence were taken during the course of the trial, we proceed to consider the objections urged to the admissions of evidence.

John Bowen, the master of the tug, who was on board of her at the time she was lost, was asked this question:

"Q. What do you say as to its being good seamanship and prudent to bring her through to Cleveland at that time?

"(Objected to, objection overruled, and defendant excepted.)

"A. I think it was on my part."

George Ellis, who was a fireman on the tug at the time, was asked the following question:

"Q. What is the fact about whether vessels do sometimes begin to leak in a calm, when you cannot explain how the leak comes?

"(Objected to, objection overruled, and defendant excepted.)

"A. I could not explain that; I have not known of other cases of the kind where you did not know the cause of the leak."

And again:

"Q. State whether it would have been good seamanship and prudent to try to tow The Sprague across the lake to Cleveland, at the time you got ready to leave her.

"(Objected to, objection overruled, and defendant excepted.)

"A. Well, sir, if I was to get Lake Erie for it, I would not take it across—yes; I mean it was not prudent."

Walter S. Rose, the mate of the tug, who was on board of her, was asked this question:

"Q. So that, when you got to Detroit, state what need or occasion there was for your stopping there because of any leakage that you were not able to control; whether there was anything of that kind.

"(Objected to, objection overruled, and defendant excepted.)

"A. There was nothing any more than there was all the time down—just the same."

And again:

"Q. What do you say as to its being a matter of prudence for you to come past Port Huron, or to come past Detroit, and to try and get the tug to the home port, in order to have her repaired there? The question is whether the captain exercised reasonable prudence in bringing her by.

"(Objected to, objection overruled, and defendant excepted.)

"A. I think he did."

The plaintiff himself, as a witness, was asked whether, on the facts of the case, detailed to him in the question, it was the exercise of good seamanship and prudence, when the vessel reached Port Huron, to continue right on, to bring her to her home port of Cleveland. He answered that he would consider it good seamanship.

He was also asked:

"Q. If you could stop the leak, state whether any such boat would be seaworthy.

"A. I would not consider her unseaworthy to tow to Detroit or any other port."

He was also asked, on the facts, as to its being prudent to keep on from Detroit and bring the tug to her home port. He answered that he thought it would be prudent and good seamanship.

The entry in respect to each of these three questions is "(Objected to, objection overruled, and defendant excepted.)"

Similar objections were made to the testimony of Edward Kelly, an expert witness.

In regard to Bowen, the objection is made that he was not qualified as an expert. But he was the master of this vessel and on board of her at the time; had been her master from the time she went out in the spring until she was lost; had made two or three trips in her the fall before; had run another tug from Cleveland for a few weeks in 1884, before taking The Sprague; and had been engaged in the navigation of the lakes and adjacent waters about twenty or twenty-one years, off and on. The witness Ellis had followed the lakes for twenty-seven years, and had been connected with tugs about four years, and was a fireman on this tug. The witness Rose had followed the lakes for thirty-six years, and was mate of the tug, and had been second mate of a steam barge for one season. The plaintiff had been in the tug business for twenty or twenty-five years, and had run a tug all around Lake Erie. The witness Kelly had been a part of two seasons in a tug; had sailed sailing vessels, steamers, and steam barges; and had sailed a few trips in this tug.

In regard to the objection that these witnesses were not qualified as experts, in addition to the fact that three of them were on board of the tug at the time, and in its service, the court

charged the jury that the value of expert testimony depended very largely upon the skill, the information or knowledge, and the experience of the witness; and that, in giving weight to the expert testimony, the jury should be careful to ascertain what the evidence established as to the truth of the hypothetical questions put to the witnesses by the counsel on the one side and on the other.

We think that the witnesses in question were competent to give their testimony to the jury, in response to the questions asked of them, and that the question as to the weight of the evidence of each of them was one for the jury, in view of the testimony of each as to his experience. *Eastern Transportation Line* v. *Hope*, 95 U. S. 297, 298 [24: 477]; *McGowan* v. *American Pressed Tan-Bark Co.* 121 U. S. 575, 609 [30: 1027, 1038.]

It is also objected that the testimony given by the five witnesses above mentioned was not the proper subject of expert testimony; that, under the policy in this case, the proper inquiry was not as to the prudence of the captain in passing Port Huron; and that, if the vessel was, as a matter of fact, unseaworthy, either because of her rottenness or her unnavigability, or the broken and leaky condition of her stern, and if the loss was occasioned by unseaworthiness, the defendant was not liable. But we think that the testimony referred to was competent, in view of the questions the jury were to consider, as properly laid before them by the court in its charge, to be considered hereafter.

We see no objection to the introduction of the secondary evidence as to the proofs of loss, on the failure of the defendant to produce them on notice. This applies to the evidence of the witness W. B. Scott and of the plaintiff on that subject. As to the other objections to the testimony of the witness Scott, and to that of the plaintiff, and the objections to the exclusion of a question asked of the defendant's witness Newton, and to the admission of testimony given by the witness McNillie, and to the admission of some testimony given by Captain Bowen on rebuttal, and of testimony given on the part of the plaintiff as to the value of the tug, it is sufficient to say that we see no objection to the rulings of the court, as the testimony admitted was either competent, or, if not strictly competent, was harmless, and that excluded was incompetent.

One of the objections to the exclusion of evidence was that the defendant was not allowed to ask its witness, the chief engineer of the tug at the time of the occurrence, what, if any, talk he had with the captain of the tug after The Wilcox took her in tow, in regard to the leak or what should be done. It is not stated what it was proposed to prove, and it is not shown that the statement of the captain at the time mentioned ought to be regarded as a part of the *res gestæ*. *Vicksburg & M. R. R. Co.* v. *O'Brien*, 119 U. S. 103 [30: 300]. The evidence was not competent.

As to the overruling of the motion of the defendant to take the case from the jury at the close of the plaintiff's testimony, it was a motion for a peremptory nonsuit against the will of the plaintiff; and it was waived by the introduction by the defendant of testimony in the further progress of the case. *De Wolf* v. *Rabaud*, 26 U. S. 1 Pet. 476 [7: 227]; *Crane* v. *Morris*, 31 U. S. 6 Pet. 598 [8: 514]; *Silsby* v. *Foote*, 55 U. S. 14 How. 218 [14: 394]; *Castle* v. *Bullard*, 64 U. S. 23 How. 172, 183 [16: 424, 427]; *Schuchardt* v. *Allen*, 68 U. S. 1 Wall. 359, 369 [17: 642, 646]; *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700 [27: 266]; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 530 [30: 740, 742].

As to the motion of the defendant, at the close of the testimony on both sides, to take the case from the jury and direct a verdict for the defendant, we are of opinion that the case was, on the evidence, one for the jury.

As to the exceptions to the charge of the court, they may, perhaps, fairly be said to point sufficiently to the portions of the charge which are hereinbefore set forth in brackets.

As to the fourteen requests to charge which were refused by the court, except so far as they were covered by the charge which it had already given, the statement in the bill of exceptions is that the defendant excepted to the "refusal to charge," that is, to the refusal to charge the requests as a whole. The exception is a general one, to the refusal to charge the entire series of the fourteen propositions; and it is well settled that such a general exception is bad, provided any one of the series is objectionable. *Beaver* v. *Taylor*, 93 U. S. 46 [23: 797]; *Worthington* v. *Mason*, 101 U. S. 149 [25: 848]; *U. S.* v. *Hough*, 103 U. S. 71 [26: 305]. The first one of this series of propositions was clearly objectionable, namely, that, under all the testimony in the case, the verdict of the jury should be for the defendant.

As to the parts of the charge which may be considered as having been excepted to, namely, the parts included in brackets, the argument on behalf of the defendant is that, after the tug's shaft had been broken, so that she was unable to navigate herself as a tug, she became unseaworthy for all purposes; and that, if the plaintiff took the tug, while she was in that condition, past a port where he might have had her repaired, such conduct would prevent a recovery upon the policy if she were lost while she continued in such unseaworthy condition, even though the loss did not arise from the breaking of the shaft.

But the circuit court took the view in its charge, and as we think correctly, that while the breaking of the shaft might have rendered the tug unseaworthy for the purpose of propelling herself and towing other vessels, yet it was competent for the plaintiff to prove, as he claimed to the jury the fact was, that the master stopped the leakage occurring around the broken shaft at the stern of the vessel, so far as would make her seaworthy to be towed, and undertook to have her towed to the Port of Cleveland, which was her destination, where he could have her repaired by her owner. The court instructed the jury, in substance, that permitting the tug to be towed in such condition, past Port Huron and Detroit, and through the Detroit River, into Lake Erie, with the design to take her to Cleveland for repairs, would not of itself constitute such a breach of the policy as would deprive the plaintiff of his right to recover thereon; and that, if the master of the tug, in the exercise of reasonable prudence and discretion, took that course, after he had

so far controlled the coming in of water at the place where the break of the shaft had occurred, as to render the vessel reasonably safe to undergo, at that time of the year, the navigation proposed in the form proposed, it would be proper for the jury to consider, on all the evidence, whether such condition of the vessel was the cause of her ultimate loss, and, if so, whether, in taking her past a port where she might have been repaired, the master was guilty of incompetency, or of such lack of ordinary care in navigating the vessel as brought the case within the exceptions contained in the policy, as above set forth.

The contention of the defendant is that if the vessel became unseaworthy from any cause in the course of her voyage, and failed to put in at the first port where such unseaworthiness could be repaired, that unseaworthiness operated to release the insurer from liability, whether the loss resulted from such unseaworthiness or not. But we are of opinion that, by the terms of the policy, the vessel was insured against all perils of the lakes which should damage her, excepting perils and losses consequent upon and arising from, or caused by, the specified and excluded causes applicable to and arising out of the facts of this case, namely, incompetency of the master, or want of ordinary care and skill in navigating the vessel, rottenness, inherent defects, and all other unseaworthiness.

The Company is not released from liability by reason of the existence of any of the excluded conditions, but is released from such losses as are consequent upon and arise from or are caused by any of the specified, excluded causes. If, therefore, the vessel was subjected to a peril of the lake, and sustained loss which did not arise from, or was not caused by, some one of the excluded causes, the Company was not released from liability. Therefore it was contended by the plaintiff that, although the shaft of the tug had been broken, in Lake Huron, about seventy miles from Port Huron, yet, as the master had succeeded at the time in so stopping the leak around the shaft that he had it under such control that he was able to have the tug taken in tow, and, by moderate pumping, to keep her free from water; and as, after reaching Port Huron, and finding that the leak was under control, he continued his course to Detroit; and as he there found that the leak was still under control and proceeded to go across Lake Erie, with a design to reach Cleveland, where the vessel could be repaired by her owner, he acted with ordinary care. This question was submitted to the jury, under all the circumstances of the case, and upon the opinions of experts, approving the course.

The question also arose whether, when the vessel began to fill with water upon Lake Erie, such filling with water was caused by the breaking of the shaft or by some other peril; and upon this point the testimony of the master, who made a particular examination at that time, was distinct, that the leak which had existed at the time the shaft was broken, and had been stopped by him, remained stopped at the time the water was found to be coming in. There was other testimony bearing upon the questions above stated, and which was fairly submitted to the jury, and upon which the verdict they gave was justified.

The principle adopted by the circuit court in laying the case before the jury was the proper one. In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk; and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence, but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect. *American Ins. Co.* v. *Ogden*, 20 Wend. 287; *Peters* v. *Phœnix Ins. Co.* 3 Serg. & R. 25; *Paddock* v. *Franklin Ins. Co.* 11 Pick. 227; *Starbuck* v. *New Eng. Mar. Ins. Co.* 19 Pick. 198; *Adderly* v. *American Mut. Ins. Co.* Taney, 126; *Copeland* v. *New Eng. Marine Ins. Co.* 2 Met. 432; *Capen* v. *Washington Ins. Co.* 12 Cush. 517; *Merchants Mut. Ins. Co.* v. *Sweet*, 6 Wis. 670; *Hoxie* v. *Pacific Mut. Ins. Co.* 7 Allen, 211; *Rouse* v. *Ins. Co.* 3 Wall. Jr. 367.

In view of all the facts in evidence, the court properly put the case on this subject to the jury in these words:

"The Sprague having been temporarily repaired by calking the leakage occasioned by the breaking of her shaft, and taken in tow by The Wilcox, and in safety having reached Detroit, the question presents itself as to the duty of the master or plaintiff to have the proper repairs made there before starting on Lake Erie for her home port on Lake Erie, and, failing to do so, how does it affect the plaintiff's right to recover on this policy? On this point I direct you that if, when The Sprague arrived at Detroit, the breaking of the shaft and the consequent leakage therefrom was such that an ordinarily prudent and discreet master, of competent skill and judgment, would have deemed it necessary to repair the vessel, so as to stop the leak, before proceeding on the voyage to Cleveland, and you find that the sinking of the vessel and its loss was occasioned by his omission to do so, and would not otherwise have happened, then the plaintiff is not entitled to recover in this suit. But if you find, from the character of the injury and the leak, that a master of competent skill and judgment might reasonably have supposed, in the exercise of ordinary care for the safety of the vessel, that she was seaworthy for the voyage in which she was then engaged, in the manner that she was to make the trip to Cleveland in tow of The Wilcox, notwithstanding the leakage occasioned by such breaking of the shaft, and on that account omitted to make such repair at Detroit, then such omission to make such repair at Detroit is no bar to a recovery in this suit."

Special objection is made by the defendant to that portion of the charge which says that

"the want of ordinary care at the time of the loss in Lake Erie must be shown by a fair preponderance of the proof on behalf of the defendant, for the reason that the defendant sets it up in its special defense, in the form of a special answer, and in that respect takes upon itself the establishment of the affirmative of that proposition." The court had previously stated to the jury that, to entitle the plaintiff to recover, he must show that he had complied with the terms of the policy, and that "it must appear from the whole proof that the loss was not occasioned by the want of ordinary care of the master in charge of the vessel, or on account of being unseaworthy, as hereinafter stated, and not within the exceptions contained in the policy, against which the defendant did not insure the plaintiff." The defendant had undertaken, by expert testimony, to prove that the master did not exercise ordinary care, when he discovered the water gaining on his pumps in Lake Erie, because he did not require the tug which was towing him to take him back to the Detroit River; and it was in regard to this claim of the defendant that the court said what is thus specially objected to. We think the instruction was proper in reference to the subject to which it related.

We do not consider it necessary to discuss particularly any of the other positions taken by the defendant. They have all of them been considered; we see no error in the record, and *the judgment of the Circuit Court is affirmed.*

JAMES REID STEWART, *Appt.*,

v.

BRANCH T. MASTERSON.

(See S. C. Reporter's ed. 493, 494.)

Appeal, signing of citation is—time allowed to file bond.

1. Where an appeal to this court became inoperative by reason of the failure to seasonably docket it, the subsequent signing of a citation is, in effect, the allowance of a new appeal.

2. Where the bond, given on the first appeal, became inoperative by failure to docket the appeal in time, the new appeal, if not accompanied by another bond, will be dismissed unless the appellant shall, within the time allowed by this court, file a proper bond.

[No. 571.]

Submitted Jan. 9, 1888. Decided Jan. 30, 1888.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

On motion to dismiss. *Ordered dismissed unless bond be filed.*

The facts are stated in the opinion.

Mr. **S. S. Henkle,** for appellee, in support of motion:

If the appeal is not docketed at the first term of this court after it is taken, it becomes void.

A citation issued and served after the expiration of the appeal is of no avail.

More than two years having elapsed since the decree was rendered, no new appeal can now be taken.

Castro v. *U. S.* 70 U. S. 3 Wall. 46 (18:163); *U. S.* v. *Gomez*, 70 U. S. 3 Wall. 752 (18: 212); *Villabolos* v. *U. S.* 47 U. S. 6 How. 90 (12: 356); *Yeaton* v. *Lenox*, 32 U. S. 7 Pet. 220 (8: 664); *U. S.* v. *Curry*, 47 U. S. 6 How. 106 (12: 363); *Edmonson* v. *Bloomshire*, 74 U. S. 7 Wall. 306 (19:91); *Grigsby* v. *Purcell*, 99 U. S. 505, 506 (25:354) and cases cited; *Hewitt* v. *Filbert*, 116 U. S. 142 (29:581).

Mr. **C. C. Lancaster,** for appellant, in opposition:

A district judge, sitting in the circuit court, may allow appeals from its decisions.

Rodd v. *Heartt*, 84 U. S. 17 Wall. 354 (21: 627).

There was no necessity for the petition to the district judge to grant the appeal. It was a matter of right given by law after final decree, which the court could not refuse.

U. S. v. *Curry*, 47 U. S. 6 How. 112 (12: 365); *The Douro* v. *U. S.* 70 U. S. 3 Wall. 564 (18:168).

The prayer for and allowance of the appeal need not appear of record.

Hudgins Kemp, 59 U. S. 18 How. 587 (15: 513).

The acceptance of the security, followed by the signing of the citation, is, in legal effect, the allowance of an appeal.

Sage v. *Iowa Cent. R. R. Co.* 96 U. S. 712 (24: 641); *First Nat. Bank* v. *Omaha*, 96 U. S. 737 (24:881); *Draper* v. *Davis*, 102 U. S. 370 (26:121); *Brandies* v. *Cochrane*, 105 U. S. 262 (26: 989).

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts on which this motion rests are these: the decree from which the appeal was taken was rendered November 7, 1884, and contained on its face the allowance of an appeal to this court. That appeal was returnable to October Term, 1885, which began October 12 of that year. It does not appear that any bond was approved during the term at which the decree was rendered, but one was approved October 10, 1885, which was before the beginning of the return term. A citation was signed November 2, 1885, after that term began, requiring the appellee to appear in this court on the second Monday in October, 1886. This citation was served February 17, 1886; but the case was not docketed in this court until June 11, 1886, which was after our term of 1885 ended, but before that of 1886 began.

The bond approved October 10, 1885, must be deemed to have been taken under the appeal allowed in open court; and as that appeal became inoperative by reason of the failure to docket it here during the term of 1885, the only question we have now to determine is, whether the signing of the citation November 2, 1885, was in effect the allowance of a new appeal, returnable at the term of 1886. We have just decided in *Brown* v. *McConnell* [*ante*, 495] that it was; but as the bond which was executed October 10, 1885, became inoperative by the failure to docket the first appeal in time, *we now order that this appeal be dismissed, unless the appellant shall, on or before the 19th day of March next, file with the clerk of this court a bond in the penal sum of $500, conditioned according to law, for the purposes of the appeal, with sureties to the satisfaction of the Justice of this Court allotted to the Fifth Circuit.*

JOSEPH J. SMITH, *Plff. in Err.*,
v.
STATE OF ALABAMA.

(See S. C. Reporter's ed. 465–483.)

Alabama Statute requiring locomotive engineers to be licensed—not invalid—effect of—power of Congress—fee for license.

1. The Statute of Alabama requiring locomotive engineers to be examined and licensed is not a regulation of interstate commerce, and does not therefore contravene the Constitution of the United States, and is valid.
2. Such statute is properly an act of legislation, within the power reserved to the State to regulate the relative rights and duties of persons within its territory, intended to secure for the public safety of person and property,
3. Such statute, so far as it affects transactions of commerce among the States, does so indirectly, incidentally and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all it is not in conflict with any enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.
4. Any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.
5. The fee to be paid by an applicant for his examination is not a provision for raising revenue, but is only an equivalent for the service rendered, and is not a tax or burden upon transportation.

[No. 1009.]

Argued Jan. 4, 1888. Decided Jan. 30, 1888.

IN ERROR to the Supreme Court of the State of Alabama, to review a judgment of that court affirming a judgment of the City Court of Mobile, in proceedings upon a writ of *habeas corpus* brought to discharge plaintiff from a commitment. *Judgment affirmed.*

Statement by *Mr. Justice* **Matthews:**

This is a writ of error bringing into review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of the City Court of Mobile. The proceeding in the latter court was upon a writ of *habeas corpus* sued out by the plaintiff in error, seeking his discharge from the custody of the Sheriff of Mobile County, in that State, under a commitment by a justice of the peace upon the charge of handling, engineering, driving and operating an engine pulling a passenger train upon the Mobile and Ohio Railroad used in transporting passengers within the County of Mobile, and State of Alabama, without having obtained a license from the board of examiners appointed by the Governor of said State, in accordance with the provisions of an Act entitled "An Act to Require Locomotive Engineers in this State to be Examined and Licensed by a Board to be Appointed by the Governor for That Purpose," approved February 28, 1887, and after more than three months had elapsed from the date of appointment and qualification of said board. The plaintiff in error, upon complaint, was committed by the examining magistrate to the custody of the sheriff to answer an indictment for that alleged offense. The ground of the application for discharge upon the writ of *habeas corpus* in the City Court of Mobile was that the Act of the General Assembly of the State of Alabama, for the violation of which he was held, was in contravention of that clause of the Constitution of the United States which confers upon Congress power to regulate commerce among the States.

The facts, as they appeared upon the hearing upon the return of the writ, are as follows: the petitioner at the time of his arrest on July 16, 1887, within the County of Mobile, was a locomotive engineer in the service of the Mobile and Ohio Railroad Company, a corporation owning and operating a line of railroad forming a continuous and unbroken line of railway from Mobile, in the State of Alabama, to St. Louis, in the State of Missouri, and as such was then engaged in handling, operating, and driving a locomotive engine, attached to a regular passenger train on the Mobile and Ohio Railroad, within the county and State, consisting of a postal car carrying the United States mail to all parts of the Union, a southern express car containing perishable freight, money packages, and other valuable merchandise destined to Mississippi, Tennessee, Kentucky, and other States, passenger coaches, and a Pullman palace sleeping car occupied by passengers to be transported by said train to the States of Mississippi, Tennessee, and Kentucky. The petitioner's run, as a locomotive engineer in the service of the Mobile and Ohio Railroad Company, was regularly from the City of Mobile, in the State of Alabama to Corinth, in the State of Mississippi, sixty miles of which run was in the State of Alabama, and two hundred and sixty-five miles in the State of Mississippi; and he never handled and operated an engine pulling a train of cars whose destination was a point within the State of Alabama when said engine and train of cars started from a point within that State. His train started at Mobile, and ran through without change of coaches or cars on one continuous trip. His employment as locomotive engineer in the service of said company also required him to take charge of and handle, drive, and operate an engine drawing a passenger train which started from St. Louis, in the State of Missouri, destined to the City of Mobile, in the State of Alabama, said train being loaded with merchandise and occupied by passengers destined to Alabama and other States; this engine and train he took charge of at Corinth, in Mississippi, and handled, drove and operated the same along and over the Mobile and Ohio Railroad through the States of Mississippi and Alabama to the City of Mobile. It frequently happened that he was ordered by the proper officers of the said company to handle, drive and operate an engine drawing a passenger train loaded with merchandise, carrying the United States mail, and occupied by passengers from the City of Mobile, in Alabama, to the City of St. Louis, in Missouri, being allowed two lay-overs; said train passing through the States of Alabama, Mississippi, Tennessee, Illinois, and into the State of Missouri.

It was admitted that the petitioner had not obtained the license required by the Act of the General Assembly of the State of Alabama of February 28, 1887, and had not applied to the board of examiners, or any of its members, for such license, and that more than three months had elapsed since the appointment and qualification of said board of examiners, the same

having been duly appointed by the Governor of the State under the provisions of said Act.

The Statute of Alabama, the validity of which is thus drawn in question, as being contrary to the Constitution of the United States, and the validity of which has been affirmed by the judgment of the Supreme Court of Alabama now in review, is as follows:

"AN ACT to Require Locomotive Engineers in this State to be Examined and Licensed by a Board to be Appointed by the Governor for That Purpose.

"Section 1. *Be it enacted by the General Assembly of Alabama*, That it shall be unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or roadbed of any railroad in this State which is used for the transportation of persons, passengers, or freight, without first undergoing an examination and obtaining a license as hereinafter provided.

"Sec. 2. *Be it further enacted*, That before any locomotive engineer shall operate or drive an engine upon the main line or roadbed of any railroad in this State used for the transportation of persons or freight, he shall apply to the board of examiners hereinafter provided for in this Act, and be examined by said board or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine and his competency as an engineer.

"Sec. 3. *Be it further enacted*, That upon the examination of any engineer as provided in this Act, if the applicant is found competent, he shall, upon payment of five dollars, receive a license, which shall be signed by each member of the board, and which shall set forth the fact that the said engineer has been duly examined as required by law and is authorized to engage as an engineer on any of the railroads in this State.

"Sec. 4. *Be it further enacted*, That in addition to the examination provided for in section two (2), it shall be the duty of said board of examiners, before issuing the license provided for in this Act, to inquire into the character and habits of all engineers applying for license; and in no case shall a license be issued if the applicant is found to be of reckless or intemperate habits.

"Sec. 5. *Be it further enacted*, That any engineer who, after procuring a license as provided in this Act, shall at any time be guilty of any act of recklessness, carelessness, or negligence while running an engine, by which any damage to persons or property is done, or who shall within six hours before, or during the time he is engaged in running an engine, be in a state of intoxication, shall forfeit his license, with all the rights and privileges acquired by it, indefinitely or for a stated period, as the board may determine after notifying such engineer to appear before the board, and inquiring into his act or conduct. It shall be the duty of the board to determine whether the engineer is unfit or incompetent by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it; and if it is made to appear that he is unfit or incompetent from any cause, the board shall revoke or cancel his license, and shall notify every railroad in this State of the action of the board.

"Sec. 6. *Be it further enacted*, That it shall be the duty of the Governor, as soon after the approval of this Act as practicable, to appoint and commission five skilled mechanics, one of whom shall reside in Birmingham, one in Montgomery, one in Mobile, one in Selma, and one in Eufaula, who shall constitute a board of examiners for locomotive engineers. It shall be the duty of said board to examine locomotive engineers, issue licenses, hear causes of complaint, revoke or cancel licenses, and perform such duties as are provided in this Act; *Provided*, That any one of said board shall have authority to examine applicants for licenses, and if the applicant is found competent, to issue license to him; *Provided further*, That for every examination provided in this Act, the board or member thereof making the examination shall be entitled to five dollars, to be paid by the applicant.

"Sec. 7. *Be it further enacted*, That all engineers now employed in running or operating engines upon railroads in this State shall have three months after the appointment of the board herein provided within which to be examined and to obtain a license.

"Sec. 8. *Be it further enacted*, That any engineer violating the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months."

Messrs. **E. L. Russell** and **B. B. Boone**, for plaintiff in error:

The power to regulate commerce with foreign Nations, and among the several States, is exclusively vested in Congress.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Passenger Cases*, 48 U. S. 7 How. 283 (12: 702); *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158); *Fargo* v. *Michigan*, 121 U. S. 231 (30: 890); *W. U. Tel. Co.* v. *Pendleton*, 122 U. S. 347 (30: 1187).

The transportation of passengers and freight from one State to another is interstate commerce.

Gloucester Ferry Co. v. *Pennsylvania*, *supra*.

The nonexercise of the power in respect to the regulation of commerce between the States is equivalent to a declaration that such commerce shall be free and untrammeled.

Welton v. *Missouri*, 91 U. S. 275 (23: 347); *Brown* v. *Houston*, 114 U. S. 622 (29: 257); *Gloucester Ferry Co.* v. *Pennsylvania*, *supra*; *Pickard* v. *Pullman S. Car Co.* 117 U. S. 34 (29: 785); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Corson* v. *Maryland*, 120 U. S. 502 (30: 699); *Hall* v. *DeCuir*, 95 U. S. 485 (24: 547); *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527).

Interstate commerce must be open and free to all persons unless restricted by congressional legislation.

Webber v. *Virginia*, 103 U. S. 344 (26: 565); *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259 (23: 543); *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59 (27: 383).

A State will not be permitted to impose conditions which will amount to a regulation of interstate commerce.

Pensacola Tel. Co. v. *W. U. Tel. Co.* 96 U.S. 1 (24: 708); *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727 (28: 1137); *Case of State Freight Tax*, 82 U. S. 15 Wall. 282 (21: 146); *The Montello*, 78 U. S. 11 Wall. 411 (20: 191); *Passenger Cases*, *supra*; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 (30: 694); *Fargo* v. *Michigan*, 121 U. S. 247 (30: 895).

The Act of the State of Alabama requiring locomotive engineers, engaged solely in interstate transportation, to pay for and take out a license before engaging in the business of interstate commerce is unconstitutional and void.

LaFayette Ins. Co. v. *French*, 59 U. S. 18 How. 404 (15: 451); *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410–415 (19: 972, 973); *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 445–456 (22: 365–369); *St. Clair* v. *Cox*, 106 U. S. 350–356 (27: 222–225); *Philadelphia Fire Asso.* v. *New York*, 119 U.S. 110–120 (30: 342–347); *Barron* v. *Burnside*, 121 U.S. 200 (30: 919); *Welton* v. *Missouri*, *supra*; *Cook* v. *Pennsylvania*, 97 U. S. 566 (24: 1015); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158); *Fargo* v. *Michigan*, 121 U. S. 244 (30: 894); *Robbins* v. *Shelby County Taxing Dist.*, *Pickard* v. *Pullman S. Car Co.* and *Cooper Mfg. Co.* v. *Ferguson*, *supra*; *W. U. Tel. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *W. U. Tel. Co.* v. *Pendleton*, 122 U. S. 347 (30: 1187).

Mr. **T. N. McClellan,** for defendant in error:

The State is entrusted with the duty of creating and maintaining all those internal regulations which are necessary for the preservation of, and the prevention of injury to, the rights of others.

Tiedeman, Lim. Police Powers, § 201; *Mayor of N. Y.* v. *Miln*, 36 U. S. 11 Pet. 102 (9: 648); *Chy Lung* v. *Freeman*, 92 U. S. 280 (23: 552).

A State may exercise its police power even though in doing so it may incidentally operate upon commerce.

Munn v. *Illinois*, 94 U. S. 135 (24: 87); *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 473 (24: 531); *Patterson* v. *Kentucky*, 97 U. S. 504 (24: 1116); *Mobile County* v. *Kimball*, 102 U. S. 698 (26: 240); *Morgan's La. & T. R. R. & S. S. Co.* v. *Louisiana Health Bd.* 118 U. S. 455 (30: 237).

If there is no field for the exercise of police power, the state legislation will be held inoperative and void.

Patterson v. *Kentucky* and *Chy Lung* v. *Freeman*, *supra*; *Hannibal & St. J. R. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527).

The States, in the absence of congressional legislation, may enact laws to prevent the landing in their ports of the pauper and criminal classes.

Mayor of N. Y. v. *Miln*, 36 U. S. 11 Pet. 103 (9: 648); *Henderson* v. *Mayor of N. Y.* 92 U. S. 259 (23: 543); *People* v. *Compagnie Générale Transatlantique*, 107 U. S. 59 (27: 383).

Police regulations of this nature, incidentally affecting commerce, have been sustained by the courts.

McDonald v. *State*, 81 Ala. 283; *Chicago & N. W. R. Co.* v. *Fuller*, 84 U.S. 17 Wall. 560 (21: 710); *Mobile & O. R. R. Co.* v. *State*, 51 Miss. 137; *Commonwealth* v. *Eastern R. R. Co.* 103 Mass. 254; *People* v. *Boston & A. R. R. Co.* 70 N. Y. 569; *R. R. Comrs.* v. *Portland & O. Cent. R. R. Co.* 68 Me. 269; *Davidson* v. *State*, 4 Tex. App. 545; Tiedeman, Lim. Police Powers, § 194; Cooley, Const. Lim. 5th ed. 579, *et seq.*

State quarantine laws do not derive their validity from their adoption by Congress.

Mobile County v. *Kimball*, *supra*; *Cooley* v. *Board of Wardens*, 53 U. S. 12 How. 299 (13: 996); *Morgan's La. & T. R. R. & S. S. Co.* v. *Louisiana Health Bd.* *supra*.

This law is to be tested by its terms as they are, and not by what it might have contained. *Yick Wo.* v. *Hopkins*, 118 U.S. 371 (30: 226).

Mr. Justice **Matthews** delivered the opinion of the court:

The grant of power to Congress in the Constitution to regulate commerce with foreign Nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States.

There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign Nations or among the several States. "But upon an examination of the cases in which they were rendered," as was said in *Sherlock* v. *Alling*, 93 U. S. 99, 102 [23:819, 820], "it will be found that the legislation adjudged invalid im-

posed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on." In that case it was held that a Statute of Indiana, giving a right of action to the personal representatives of the deceased where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio River engaged in interstate commerce, and did not amount to a regulation of commerce in violation of the Constitution of the United States. On this point the court said, p. 103 [820]: "General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In that case it was admitted, in the opinion of the court, that Congress might legislate, under the power to regulate commerce, touching the liability of parties for marine torts resulting in the death of the persons injured, but that, in the absence of such legislation by Congress, the statute of the State, giving such right of action, constituted no encroachment upon the commercial power of Congress, although, as was also said, p. 103 [820], "It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on."

The Statute of Indiana held to be valid in that case was an addition to and an amendment of the general body of the law previously existing, and in force, regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of interstate commerce. This general system of law, subject to be modified by state legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the national government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States; nor can it be implied as existing by force of any other legislative authority than that of the several States in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the Legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication.

It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock* v. *Alling*, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdic-

tion, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employés of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the nonobservance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier, in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?

It is that law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged, which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible.

But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 591 [8:1055]. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the Courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *N. Y. Cent. R. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357 [21:627] where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State.

In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state courts than in other cases. *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 [108: 65]; *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495 [10:1044]; *Oates* v. *First Nat. Bank*, 100 U. S. 239 [25: 580]; *Brooklyn, C. & N. R. R. Co.* v. *National Bank of the Republic*, 102 U. S. 14 [26:61].

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moore* v. *U. S.* 91 U. S. 270 [23:346].

The Statute of Alabama, the validity of which is drawn in question in this case, does not fall within this exception. It would, indeed, be competent for Congress to legislate upon its subject matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States (Rev. Stat. tit. 52, §§ 4399–4500); and such legislation undoubtedly is justified, on the ground that it is incident to the power to regulate interstate commerce.

In *Sinnot* v. *Davenport*, 63 U. S. 22 How. 227 [16:243], this court adjudged a law of the State of Alabama to be unconstitutional—so far as it applied to vessels engaged in interstate commerce—which prohibited any steamboat from navigating any of the waters of the State without complying with certain prescribed conditions, inconsistent with the Act of Congress of February 17, 1793, in reference to the enrollment and licensing of vessels engaged in the coasting trade. In that case it was said, p. 243 [247]: "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the Legislature of a State prescribes a regulation of the

subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the State Legislature derived its enactment."

The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority.

But the provisions on the subject contained in the Statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States.

No objection to the statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant. The fee of $5 to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required, before obtaining his license, to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer; and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.

Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the State or in interstate commerce, to provide and furnish itself with locomotive engineers of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss is caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of congressional legislation.

The statute in question further provides that any engineer licensed under the Act shall forfeit his license if at any time found guilty, by the board of examiners, of an act of recklessness, carelessness or negligence, while running an engine, by which damage to person or property is done, or who shall immediately preceding or during the time he is engaged in running an engine be in a state of intoxication; and the board is authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it. The eighth section of the Act declares that any engineer violating its provisions shall be guilty of a misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than $50 nor more than $500, and also that he may be sentenced to hard labor for the county for not more than six months.

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other States, should, while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offense in such a case to be manslaughter. The power to punish for the offense after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offense.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

In conclusion we find, therefore: first, that the Statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the States to regulate

the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged to contravene the Constitution of the United States, to be a valid law.

The judgment of the Supreme Court of Alabama is therefore affirmed.

Mr. Justice **Bradley** dissented.

KING IRON BRIDGE AND MANUFACTURING COMPANY, *Plff. in Err.*,

v.

COUNTY OF OTOE, STATE OF NEBRASKA.

(See S. C. Reporter's ed. 459–464.)

Statute of Limitations does not apply to county warrant—insufficient answer.

1. In Nebraska the Statute of Limitations of five years does not run against a county warrant.
2. The cause of action upon such warrant did not accrue when the payment was refused.
3. In an action to recover the amount due upon warrants of a county, an answer that the causes of action did not accrue within five years next before the commencement of the suit does not state facts sufficient to constitute a defense.

[No. 1154.]

Submitted Dec. 22, 1887. Decided Jan. 30, 1888.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of the County, in an action against the County of Otoe to recover upon warrants issued by it. *Judgment reversed.*

The facts are stated in the opinion.

Messrs. **N. S. Harwood** and **John H. Ames**, for plaintiff in error:

When commissioners act judicially, their decision is a judgment binding upon the county.

Brewer v. *Otoe County*, 1 Neb. 378.

A county warrant is in no sense a contract, but is, as the court says in *Union Pacific R. R. Co.* v. *Buffalo County*, 9 Neb. 449, a mere certificate of indebtedness.

Chapman v. *Douglas County*, 107 U. S. 348 (27:378).

The interpretation, within the jurisdiction of a State, of a local law becomes a part of that law, as much as if incorporated in the body of it by the Legislature.

Christy v. *Pridgeon*, 71 U. S. 4 Wall. 196 (18:322).

A law of the Confederate Congress if adopted and enforced as a law of one of the States should be deemed a law of that State.

Ford v. *Suryet*, 97 U. S. 594 (24:1018).

The construction put upon the statute of a State by the courts of that State will be followed, although the suit upon the liability created by it be brought in another State.

Flash v. *Conn*, 109 U. S. 371 (27:966).

Mr. **John C. Watson**, for defendant in error:

The Statute of Limitations begins to run against a county warrant when it is presented to the proper authority, and indorsed "Not paid for want of funds."

Carpenter v. *District Twp. of Union*, 58 Iowa, 335.

Where a town clerk has duly paid an order, and is entitled to credit for it at his next settlement, the Statue of Limitations begins to run at the date of such settlement.

Dewey v. *Linn*, 57 Iowa, 235; *Prescott* v. *Gonser*, 34 Iowa, 175.

The Statute of Limitations is well pleaded.

King Iron Bridge & Mfg. Co. v. *Otoe County*, 27 Fed. Rep. 800.

Statutes of Limitation are statutes of repose.

Hurley v. *Cox*, 9 Neb. 230; *Letson* v. *Kenyon*, 31 Kan. 301; *Taylor* v. *Miles*, 5 Kan. 499; *Elder* v. *Dyer*, 26 Kan. 604.

The Statute of Limitations runs for or against counties in the same manner as it does for and against individuals.

Wood, Lim. Actions, § 53, p. 93; *St. Charles County* v. *Powell*, 22 Mo. 525; *Evans* v. *Erie County*, 66 Pa. 222; *Baker* v. *Johnson County*, 33 Iowa, 151; *Armstrong* v. *Dalton*, 4 Dev. L. 568; *Lancaster County* v. *Brinthall*, 29 Pa. 38.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought to recover the amount due upon two warrants of the County of Otoe, one dated October 9, 1878 for $1,605.00, and the other, for the same amount, dated January 9, 1879. The petition contains two counts, one of which, upon the warrant dated October 9, 1878, is as follows:

"For a second cause of action plaintiff says that at Nebraska City, the county seat of Otoe County, Nebraska, on the 8th day of October, 1878, said County being then justly indebted to one Z. King in the sum of $1,605.00, which indebtedness was at that time due and unpaid, the board of county commissioners of said County then being regularly in session, did audit, find, allow, adjudge, and determine that there was due the said Z. King, in the premises, from said County the sum of $1,605.00; to be paid on account of the said sum of $1,605.00 and thereupon the said board of county commissioners did allow, draw, and issue to the said Z. King certain warrants of said County, numbered 622, dated October 9, 1878, signed by Frederick Beyschlay, who was then chairman of the said board of county commissioners, countersigned by C. MacCuaig, County Clerk of said County of Otoe, and attested by the seal of said County, which commanded said treasurer to pay to said Z. King, or order, the sum of $1,605.00 out of the general fund and charge to the account of the 'Special Bridge Fund;' a copy of which warrant, with all the indorsements thereon, is hereto attached, marked Exhibit 'B.'

"Plaintiff further says that on the 23d day of October, 1878, said warrant was by said Z.

King presented to the county treasurer and payment thereon demanded. The same was by said treasurer indorsed 'Not paid for want of funds.' Afterwards the same said warrant was, on the 26th day of December, 1878, registered for payment, numbered on the register 156.

"Plaintiff further says that subsequent thereto, but prior to the commencement of this action, the said warrant was by said Z. King, for a valuable consideration, sold, transferred, and delivered to the plaintiff, who is the lawful holder and owner thereof; that no part of said warrant has been paid by the treasurer of said County or by anyone in its behalf, either to said Z. King or to this plaintiff, or to any person whomsoever.

"Plaintiff further says that Z. King was at the time said warrant was issued and still is a citizen and resident of the State of Ohio, residing at Cleveland, Ohio, and president of the plaintiff's Company.

"That said defendant has at all times neglected and now does neglect and refuse, by levy of the taxes or otherwise, to pay or to provide for the payment of said warrant or any part thereof, and there is now due the said plaintiff thereon the sum of $1,605.00 and ten per cent interest thereon from the 23d day of October, 1878."

The other count was in the same general form upon the other warrant, but alleging its presentment for payment January 15, 1879.

The answer set up as a defense that the causes of action did not accrue within five years next before the commencement of the suit.

To this a demurrer was filed upon the ground that the answer did not state facts sufficient to constitute a defense, and "that by the statutes of Nebraska and the construction given thereunder by the court of Nebraska the statute does not run against a county warrant."

This demurrer was overruled, and judgment given for the County. To reverse that judgment this writ of error was brought, the amount claimed to be due on the warrants being more than $5,000.

The Statute of Limitations relied on is section 10 of the Code of Civil Procedure, Comp. Stat. 1881, p. 532, as follows:

"Within five years an action upon a specialty or any agreement, contract, or promise in writing, or foreign judgment."

In Nebraska at the time these warrants were issued the board of county commissioners was the governing body of the county. Gen. Stat. Neb. 1873, p. 232, chap. 13, § 2. This board had power "to examine and settle all accounts of the receipts and expenditures of the county, and allow all accounts chargeable against the county; and, when so settled, county warrants may be issued therefor as provided by law." *Id.* §14. "The commissioner, whose term of office expires within one year, shall be chairman of the board for that year, and he shall sign all warrants on the treasurer for money to be paid out of the county treasury. Such warrants shall be countersigned by the county clerk, and sealed with the county seal." *Id.* § 23. "Any person who shall be aggrieved by any decision of the board of county commissioners, may appeal from the decision of the board to the district court of the same county." *Id.* § 84. "Such clerk shall not issue any county warrant unless ordered by the board of commissioners authorizing the same; and every such warrant shall be numbered consecutively as allowed from the first day of January to the thirty-first day of December in each year, and the date, amount, and number of the same, and the name of the person to whom it is issued, shall be entered in a book called 'Warrant Book,' to be kept by the clerk in his office for that purpose." *Id.* § 40. "All warrants issued by the board of county commissioners shall, upon being presented for payment, if there is not sufficient funds in the treasury to pay the same, be indorsed by the treasurer, 'Not paid for want of funds,' and the treasurer shall also indorse thereon the date of such presentation and sign his name thereto. Warrants so indorsed shall draw interest from the date of such indorsement, at the rate of ten per cent per annum until paid." *Id.* § 54.

Another statute provided that "All warrants upon the state treasurer, the treasurer of any county, or any municipal corporation therein shall be paid in the order of their presentation therefor." Gen. Stat. Neb. 1873, 891, chap. 65, § 1. "It shall be the duty of any such treasurer, upon the payment of a fee of ten cents by the holder of any warrant, or by any person presenting the same for registration, in the presence of such person, to enter such warrant in his 'warrant register,' for payment in the order of presenting for registration, and upon every warrant so registered, he shall indorse 'registered for payment,' with the date of such registration, and shall sign such indorsement; *Provided*, That nothing in this Act shall be construed to require the holder of any warrant to register the same; but such warrant may be presented for payment and indorsed 'Presented and not paid for want of funds,' and shall draw interest from the date of such presentation, as now provided by law." *Id.* 3.

In a suit upon a county warrant issued under statutes not materially different from these, the Supreme Court of Nebraska, while holding that a Statute of Limitations substantially like that above quoted applied to actions where counties or other municipal corporations were parties as well as to those between private persons, said: "But these warrants do not, nor was it the intention of the Legislature that they should, fall within the operation of this Act. When a demand or claim against a county is presented to the commissioners for settlement, they hear the proofs and determine whether it is one which the county is bound to pay, and the amount due thereon. In this they act judicially, and, within the scope of the authority conferred on them, their decision is a judgment binding upon the county. If they decide in favor of the claimant, an order is drawn on the treasurer for the amount, designating the fund out of which it is to be paid. If there is money in the treasury belonging to the fund against which it is to be drawn, not otherwise appropriated, it is the duty of the treasurer to pay the warrant; but if there be none, he must indorse upon it the fact of its presentation, and nonpayment for want of funds; and the holder must wait for his money until such time as it can be raised through the means which the Legislature provides for the collection of

revenue. Nor can any action rightfully be brought on such warrant until the fund is raised, or at least sufficient time has elapsed to enable the county to levy and collect it in the mode provided in the revenue laws." Then, after referring to certain statutes, which it was thought showed that the limitation Act did not apply to such warrants, the opinion proceeds: "From these as well as numerous other enactments of the Legislature that might be cited, I have reached the conclusion that the plea of the Statute of Limitations cannot be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which it can be paid, or sufficient time has been given to do so in the mode pointed out in the statutes, their payment may be demanded, and, if refused, legally coerced. * * * Whoever deals with a county and takes in payment of his demand a warrant in the character of these, no time of payment being fixed, does so under the implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed." *Brewer* v. *Otoe County*, 1 Neb. 378, 382, 384.

We have not been referred to any case in Nebraska which qualifies this decision, and it stands today, so far as we have been advised, as the settled law of that State. It was recognized and followed by this court in *Chapman* v. *Douglas County*, 107 U. S. 348, 354, 359 [27:378, 380, 382]. The petition in this case appears to have been drawn with express reference to its rulings and with a view of showing that the action could be rightfully brought as the County had neglected for so long a time to levy and collect the necessary taxes to provide a fund for the payment of the warrant. The purpose of the suit was to coerce payment as a sufficient time had already been given to enable the County to do so voluntarily in the mode pointed out in the statutes.

The record as printed does not show when the suit was begun, but it is stated in the brief of the counsel for the County to have been November 10, 1885. This was about seven years after the warrants were indorsed "Not paid for want of funds." According to the rule established in *Brewer* v. *Otoe County*, the cause of action did not accrue when the payment was refused, "but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed." We cannot say, as matter of law, that this was more than five years before the commencement of the action.

It follows that the court erred in overruling the demurrer to the answer, and for that reason the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

UNITED STATES, *Plff.*,
v.
SIGISMUND HESS, Alias SAMUEL HAYES.

(See S. C. Reporter's ed. 488-489.)

Indictment—sufficiency of—language of statute—matters of substance.

1. In an indictment, all material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective.

2. Under section 5480 of the Revised Statutes, in an indictment for devising any scheme or artifice to defraud, the scheme alleged must be stated, with all such particulars as are essential to constitute it; and the absence of all particulars of the alleged scheme renders the indictment defective.

3. The language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

4. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.

[No. 1266.]

Argued Jan. 16, 1888. Decided Jan. 30, 1888.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York in regard to the sufficiency of an indictment under which the defendant was convicted.

Statement by *Mr. Justice* **Field:**

This case comes before us from the Circuit Court for the Southern District of New York on a certificate of division of opinion between the judges. The defendant was indicted in that court for an alleged offense, described in general terms as that of devising "a scheme to defraud divers other persons," to the jurors unknown, and intending to effect it by inciting them to open communication with him through the postoffice establishment.

The indictment contained two counts, but upon the plea of not guilty the case was submitted to the jury upon the second count alone. That count was as follows:

"And the jurors aforesaid, on their oath aforesaid, do further present that Sigismund Hess, otherwise called Samuel Hayes, late of the City and County of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and eighty seven, at the Southern District of New York, and within the jurisdiction of this court, having theretofore devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown, which said scheme he, the said Sigismund Hess, otherwise called Samuel Hayes, then and there intended to effect by inciting such other persons to open communication with him, the said Sigismund Hess, otherwise called Samuel Hayes, by means of the postoffice establishment of the said United States, did unlawfully, in and for attempting to execute said scheme, receive from the postoffice of the United States at the City of New York a certain letter in the words and figures following, that is to say:

'BONILLA, D. T., 2, 25, '87.

'Dr. Sir: If there is any money to be made at it, then count me in. Send on all the confidential terms you have, and you will never be betrayed by

'Yours Truly,

'Return this letter.' J. M. DAVIS.

which said letter was then and there enclosed in a sealed envelope, addressed and directed in words and figures following, that is to say: 'S. Brunk, Esq., 270 West 40th St., New York City, New York, c. o. Boot-Black;' against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The jury found the defendant guilty, and a motion was made for a new trial and in arrest of judgment, when the following questions occurred, upon which the judges holding the court were divided in opinion:

"I. Does the second count of the indictment sufficiently describe an offense under section 5480, Revised Statutes?

"II. If there is any defect or imperfection in the second count of the indictment, is it in matter of form only, not tending to the prejudice of the defendant, and within the provisions of section 1025, Revised Statutes?

"III. If there is a defect or imperfection in the second count of the indictment, is it aided and cured by the verdict?"

Thereupon, on motion of the district attorney, it was ordered that the points upon which the judges disagreed should be certified, with a copy of the indictment and an abstract of the record, to this court for final decision.

The following is section 5480 of the Revised Statutes, upon which the indictment was founded:

"If any person, having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any postoffice of the United States, or take or receive any therefrom, such person so misusing the postoffice establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff:

The second count of the indictment sufficiently describes an offense under section 5480, Revised Statutes.

U. S. v. *Mills*, 32 U. S. 7 Pet. 142 (8:637); *U. S.* v. *Simmons*, 96 U. S. 362 (24:820); 2 Whart. § 1281; *U. S.* v. *Gooding*, 25 U. S. 12 Wheat. 460 (6:693); *U. S.* v. *Noelke*, 17 Blatchf. 555; *U. S.* v. *Pond*, 2 Curt. 265.

The mailing of the letter, and the letter itself, showing its unlawful character, constitute the *corpus delicti*.

U. S. v. *Jones*, 10 Fed. Rep. 469; *U. S.* v. *Henry*, 3 Ben. 29.

If there is any defect or imperfection in the count, it is cured by the verdict.

Heymann v. *Reg.* 12 Cox, Cr. Cas. 383, 389; *Reg.* v *Goldsmith*, 12 Cox, Cr. Cas. 594; *Jackson* v. *Pesked*, 1 Maule & S. 236; *Lincoln* v. *Cambria Iron Co.* 103 U. S. 415 (26:519).

Mr. **George W. Miller,** for defendant:

No offense or crime is stated in the second count.

U. S. v. *Cruikshank*, 92 U. S. 542 (23:588).

When an indictment charges a defendant with an offense, under a statute of the United States, it must show that that offense is one of which Congress has jurisdiction.

U. S. v. *Cruikshank, supra.*

Every indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted.

Lambert v. *People*, 9 Cow. 578.

An indictment charging generally that the defendant conspired to defraud an individual, and not showing the intended means by which the fraud is to be compassed, is bad.

Rex v. *Gill*, 2 Barn. & Ald. 204.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation.

U. S. v. *Mills*, 32 U. S. 7 Pet. 142 (8:637); *U. S.* v. *Cook*, 84 U. S. 17 Wall. 174 (21:539); 1 Arch. Cr. Pr. & Pl. 291.

As all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are, in fact, illegal.

State v. *Parker*, 43 N. H. 83; *State* v. *Keach*, 40 Vt. 118; *Alderman* v. *People*, 4 Mich. 414; *State* v. *Roberts*, 34 Me. 320; *U. S.* v. *Simmons*, 96 U. S. 360 (24:819); 1 Bish. Crim. Proc. § 611; *U. S.* v. *Carll*, 105 U. S. 612 (26:1135); *U. S.* v. *Britton*, 107 U. S. 655 (27:520); *U. S.* v. *Thomas*, 2 Abb. U. S. 114; *Reg.* v. *James*, 12 Cox, Cr. Cas. 127; *Heymann* v. *Reg.* 12 Cox, Cr. Cas. 383; *U. S.* v. *Henry*, 3 Ben. 29; *U. S.* v. *Gooding*, 25 U. S. 12 Wheat. 460 (6:693); Barb. Crim. Law, 276.

Mr. Justice **Field** delivered the opinion of the court:

The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by in-

tendment, or implication, and the charge must be made directly, and not inferentially or by way of recital.

The statute is directed against "devising or intending to devise any scheme or artifice to defraud," to be effected by communication through the postoffice. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial.

The averment here is that the defendant, "having devised a scheme to defraud divers other persons to the jurors unknown," intended to effect the same by inciting such other persons to communicate with him through the postoffice, and received a letter on the subject. Assuming that this averment of "having devised" the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken.

The doctrine invoked by the solicitor-general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. One or two cases will serve as an illustration of the doctrine. In *United States* v. *Cruikshank*, 92 U. S. 542 [23:588], the counts of the indictment in general language charged the defendants with an intent to hinder and prevent citizens of the United States of African descent named therein, in the free exercise and enjoyment of all the rights, privileges, and immunities, and protection granted and secured to them respectively as citizens of the United States and of the State of Louisiana, because they were persons of African descent, but did not specify any particular right, the enjoyment of which the conspirators intended to hinder or prevent; and it was held that the averments of the counts were too vague and general, and lacked the certainty and precision required by the established rules of criminal pleading, and were therefore insufficient in law. In speaking of the necessity of greater particularity of statement, the court said, p. 558 [593]: "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars. 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is: first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances."

In *United States* v. *Simmons*, 96 U. S. 360 [24:819], the indictment was for violations of certain provisions of the Revised Statutes relating to distilled spirits. The second count, pursuing the words of the statute, charged that the defendant "did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain building and on certain premises where vinegar was manufactured and produced." Upon this count this court was asked two questions, one of which was whether it was sufficient in an indictment drawn under the Act which prohibited the use of a still, boiler, or other vessel for the purpose of distilling in any building or on premises where vinegar was manufactured or produced, to charge the offense in the words of the statute. The court answered this question in the negative, observing that "where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter,' but adding that 'to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.'" It accordingly held that, tested by the rules thus laid down, the second count was insufficient. See also *U. S.* v. *Carll*, 105 U. S. 611 [26:1135].

Following this rule, it must he held that the second count of the indictment before us does not sufficiently describe an offense within the statute. The essential requirements, indeed all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict.

It follows that the three questions certified to us must be answered in the negative; and it is so ordered.

SUSAN C. KNIGHT, Formerly SUSAN C. MARSHALL, *Appt.*,

v.

JAMES W. PAXTON.

(See S. C. Reporter's ed. 552-558.)

Illinois law—deed of married woman—acknowledgment—homestead right.

1. Under the Illinois Act of March 27, 1869, the execution of a conveyance of real property by a married woman joining with her husband is suffi-

ciently authenticated by her signature. Her acknowledgment of her execution is only required to render it admissible as evidence without further proof, or to release her homestead right in the property.

2. For its validity as a transfer of the grantor's interest, except as to the homestead rights therein, the acknowledgment is unnecessary.

3. Under the Act of 1871, in the enforcement of a lien upon premises including the homestead, if the value of the premises exceeds the homestead exemption, and they cannot be divided, the court may order the sale of the whole and the payment of the amount of the exemption to the party entitled. In such case if the holder of the lien, who seeks its enforcement by sale of the premises, pays the amount of the homestead exemption into court for the benefit of the person entitled to it, he is entitled to a decree for the possession of the entire property.

[No. 50.]

Submitted Jan. 4, 1888. Decided Feb. 6, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, in favor of plaintiff, for the possession of premises upon payment of the homestead right. *Affirmed.*

The case is fully stated by the court.

Mr. **Geo. L. Paddock,** for appellant:

The discharging deed was never delivered and accepted in fact.

Herbert v. *Herbert*, 1 Ill. 278; *Hulick* v. *Scovil*, 9 Ill. 176; *Stanley* v. *Valentine*, 79 Ill. 544; *Krelaum* v. *Cordell*, 63 Ill. 23; *Union Mut. L. Ins. Co.* v. *Campbell*, 95 Ill. 267; *Kingsbury* v. *Burnside*, 58 Ill. 310.

The trustee had no right to convey to his *cestui que trust*, nor had the *cestui que trust* power to receive such conveyance. Hence the discharging deed was void upon its face.

Swift v. *Castle*, 23 Ill. 209; 2 Perry, Tr. 2d ed. 557, § 921; *Parker* v. *Converse*, 5 Gray, 336; *Breit* v. *Yeaton*, 101 Ill. 242.

The powers of appellant over the property were defined by the antenuptial deed of 1860; all powers not therein included were excluded.

M. E. Church v. *Jaques*, 3 Johns. Ch. 77.

The trust deed was void for misrepresentation and improper influence.

Central Bank v. *Copeland*, 18 Md. 305; *Sterling Bridge Co.* v. *Baker*, 75 Ill. 189.

When the purchaser is affected with notice of the facts which in law constitute the breach of trust, the sale is void as to him.

Wormley v. *Wormley*, 21 U. S. 8 Wheat. 421 (5: 651); *Mechanics Bank* v. *Seton*, 26 U. S. 1 Pet. 299 (7: 152).

In *Barnes* v. *Ehrman*, 74 Ill. 402, the Statute of 1869 is construed to authorize the execution by the wife and husband of a trust deed with power of sale on the land of the wife.

Union Mut. L. Ins. Co. v. *Spaids*, 99 Ill. 249; *Marston* v. *Brittenham*, 76 Ill. 617; *Cookson* v. *Toole*, 59 Ill. 515; *Breit* v. *Yeaton*, 101 Ill. 242.

In *Swift* v. *Castle*, *supra*, it was held that a married woman can only convey her trust property in the manner authorized and for the purposes specified in the deed creating the trust. A married woman cannot alienate her real estate, except by the mode prescribed by statute.

Moulton v. *Hurd*, 20 Ill. 187; *Cookson* v. *Toole*, *supra*; *Bressler* v. *Kent*, 61 Ill. 426; *Elder* v. *Jones*, 85 Ill. 384; *Brooks* v. *Kearns*, 86 Ill. 547; *Lindley* v. *Smith*, 58 Ill. 250; *Hutchings* v. *Huggins*, 59 Ill. 29; *Board of Trustees* v. *Davison*, 65 Ill. 124; *Rogers* v. *Higgins*, 48 Ill. 211.

The trust deed of February 13, 1872, was void as against appellant, by reason of the misrepresentation by which she was induced to execute it.

A party sent to get a thing without a previous communication with the person to whom he is sent is necessarily the agent of the sender.

Sterling Bridge Co. v. *Baker*, 75 Ill. 189.

Mr. **L. H. Boutell,** for appellee:

The present bill is in accordance with the well settled practice in this State.

Hotchkiss v. *Brooks*, 93 Ill. 386; *Cummings* v. *Burleson*, 78 Ill. 231; *Muller* v. *Inderreiden*, 79 Ill. 382.

An acceptance of the deed may fairly be presumed.

Bryan v. *Wash*, 7 Ill. 557; *Rivard* v. *Walker*, 39 Ill. 413; 3 Washb. Real Prop. 5th ed. 315, 582.

The Law of 1869 enabled a married woman, by joining with her husband, not merely to convey her land, but to enter into contracts with regard to it as freely as if she were a *feme sole*.

Hogan v. *Hogan*, 89 Ill. 427; *Bradshaw* v. *Atkins*, 110 Ill. 329.

Her husband should join with her in the deed.

Bradshaw v. *Atkins*, *supra*; *Edwards* v. *Schoeneman*, 104 Ill. 278.

When all the parties in interest unite in the conveyance of trust property, a valid title will pass.

1 Perry, Tr. § 285.

The trust deed to Baird would be valid, without the conveyancing Act of 1869.

3 Pom. Eq. §§ 1107, 1108 and note.

The wife cannot take advantage of her negligence and make it the ground of relief.

2 Bish. Married Women, § 483, and cases cited; *Marston* v. *Brittenham*, 76 Ill. 617; *Spurgin* v. *Traub*, 65 Ill. 170; *McHenry* v. *Day*, 18 Iowa, 445.

Mr. Justice **Field** delivered the opinion of the court:

This suit was brought by James W. Paxton, the complainant below, in the Circuit Court of the United States for the Northern District of Illinois, to obtain a decree that so much of certain described real property, situated in Chicago, as was of the value of $1,000, be set off to the defendants for their homestead, and that the possession of the residue be delivered to him; or, if the premises could not be divided, that the possession of the whole be delivered to him on his paying into court for the use of the defendants the sum of $1,000. The facts, as set forth in the bill, are in substance as follows: on the 13th of February, 1872, James M. Marshall, of Chicago, being indebted to the complainant in the sum of $10,000, executed and delivered to one Francis Bradley his bond of that date, in the penal sum of $20,000, conditioned to pay the amount of that indebtedness on the 13th of February, 1877, with semi-annual interest; and also ten coupon notes, each for $450, payable to the order of the said Francis Bradley. The bond and coupon notes were on the same day assigned to the complainant, and Marshall and his wife at once executed a deed of the real property mentioned to one Lyman Baird, in trust for the security of the principal and interest of the bond and the coupon

notes, and subject to a condition of defeasance on their payment according to their terms, and the performance of the covenants mentioned therein. This deed purported to be acknowledged by Marshall and his wife, and was on the following day recorded in the recorder's office of the county. Default having been made in the payment of the principal sum, the trustee, Baird, at the request of the complainant, and by virtue of the power contained in the trust deed, on the 8th of March, 1879, sold the premises and the title and equity of redemption of the grantors therein, for the sum of $10,000, to the complainant, he being the highest bidder therefor. A deed thereof was executed to him by the trustee. Immediately afterwards he demanded possession of the premises from Marshall and his wife, who were, when the trust deed was executed, in the occupation of the premises as a residence. But they refused to surrender them, and about a year afterwards set up that Susan Marshall, the wife, had never acknowledged the deed of trust, and by reason of this fact her homestead right in the premises had never been released. The bill alleged that this was the first knowledge the complainant ever had of any such claim, and that he always believed the trust deed was properly acknowledged by both Marshall and his wife, and that thereby they had released all their right in the premises under the Homestead Laws of Illinois.

The bill also alleged that the value of the premises was greatly in excess of the value of the homestead rights therein, and that the complainant was entitled to the possession of so much thereof as might not be set off to the defendants for a homestead; or, in case the premises were incapable of division, he was entitled to the whole of them on payment into court of the sum of $1,000, for the use of the defendants, which payment he offered to make. The bill concluded with a prayer for a decree in accordance with these averments, as stated above, and for such other and further relief as the nature of the case might require.

Soon after the bill was filed, James M. Marshall died, and his widow filed a separate answer, setting up four defenses: *first*, that the premises in question were conveyed on the 21st of November, 1860, by James M. Marshall, prior to her marriage with him, and in consideration thereof, to his brother, Thomas E. Marshall, in trust, as an antenuptial settlement, and therefore she was incapable of executing the trust deed of February 18, 1872; *second*, that at the time this latter deed was signed she was confined to her bed by sickness, and by reason thereof, and the effect of narcotics prescribed by her physician to relieve her pain, she had not sufficient mental capacity to read and understand it; *third*, that when she signed it, her husband falsely stated to her that it related to other property which was situated in a different part of the City of Chicago; and *fourth*, that after the bond secured by that deed became due the time for payment was extended by the complainant in consideration of a rate of interest greater than that originally stipulated.

Of these objections, the first is the only one which requires consideration by this court. The other three are not sustained by the evidence in the case. That which bears upon them is vague and conflicting, seldom engendering a doubt, and never producing conviction.

The deed of trust constituting the antenuptial settlement was executed by James M. Marshall to his brother, Thomas E. Marshall, in trust for the appellant, Susan C. Larmon, whom he was about to marry, for her life; and in case of her death, leaving any child or children of the intended marriage, for such child or children; and in case she died without child or children, then for Susan C. Marshall and Ophelia K. Larmon for life, with remainder to James M. Marshall and his heirs.

On the 18th of May, 1867, Thomas E. Marshall, the trustee named in the deed of marriage settlement, and the said Susan C. Marshall and Ophelia K. Larmon, conveyed the premises to the wife, for the purpose, as stated in the deed, of determining the trust, and vesting in her absolutely all rights, legal or equitable, which they might have under the deed of marriage settlement. James M. Marshall, the husband, witnessed this deed, and at the time there were no children born to her. This deed was properly acknowledged by all the grantors, and recorded soon afterwards in the recorder's office of the county. In it all parties then living, interested in the property, or who could by any possibility become interested, united, except James M. Marshall, the husband, who was a witness to its execution. Whether there could afterwards be any restraint upon her alienation of the fee of the property by reason of the subsequent birth of a child or children of the marriage, it is unnecessary to decide. There was none upon the alienation of the life estate when the trust deed in the nature of a mortgage was executed to the complainant in February, 1872. Was she bound by that deed, assuming, as found by the court, that she never acknowledged its execution before the officer whose certificate of acknowledgment it bore? This question, we think, is answered by the Statutes of Illinois. Previous to March 27, 1869, an acknowledgment by a married woman before a qualified officer was essential to the valid execution of her conveyance of real property. But on that date an Act was passed, the first section of which is as follows:

"Any *femme coverte* being above the age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance, or other disposition of lands or real estate as aforesaid, shall be bound and concluded by the same, in respect to her right, title, claim, interest, or dower in such estate, as if she were sole and of full age as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing may be the same as if she were sole."

After the passage of this Act the execution of a conveyance of real property by a married woman joining with her husband was sufficiently authenticated by her signature. It would seem that her acknowledgment of its execution before an officer authorized to take acknowledgments was only required to render it admissible as evidence without further proof, or to release her homestead right in the property.

For its validity as a transfer of the grantor's interest, except as to the homestead rights therein, the acknowledgment was unnecessary.

In *Hogan* v. *Hogan*, 89 Ill. 428, the Supreme Court of Illinois had occasion to speak both of the statute contained in the Revision of 1845 and that of 1869. Of the statute in the Revision of 1845 it said:

"Under said statute it was only in the precise mode prescribed thereby, by the husband joining in the execution of the deed, and by a certificate showing an acknowledgment in substantial compliance with the statutory requirements, that the wife could convey her real estate. It was the acknowledgment of the *femme coverte* which was the operative act to pass the title, and not the delivery of the deed."

And of the Statute of 1869 it said:

"This latter statutory enactment worked a marked change in the laws. Thereafter the acknowledgment ceased to be the effective means to work the transfer of title. The certificate of her acknowledgment might thenceforth have been the same as that required in the case of a *femme sole;* and without any acknowledgment whatever, proof of her execution of a conveyance might have been made as at common law. So also, from that time forth, her contract in writing, made jointly with her husband, for the disposition of her lands, became binding upon her, and might have been enforced in a court of chancery, and she compelled to a specific performance of the same. One only distinction between her condition and that of an unmarried woman, in reference to the alienation or disposition of real property, was still retained. The law still required, before she could convey or make any valid contract for the disposition of her lands, her husband should join with her in the deed or other writing." See, also, *Bradshaw* v. *Atkins*, 110 Ill. 329; *Edwards* v. *Schoeneman*, 104 Ill. 278.

It follows that by the trust deed of 1872 in the nature of a mortgage to the complainant, in which her husband united, her estate in the mortgaged premises passed as completely as if she had been a *feme sole*, subject to any homestead right therein which they possessed under the laws of Illinois. An Act of the State, passed in 1851, provided for exemption from levy and forced sale, under judicial process or order, for debts contracted after its date, of the lot of ground and buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of $1,000. And the amendatory Act of 1857 provided that no release or waiver of such exemption should be valid, unless the same should be in writing, subscribed by the holder and his wife if he had one, "and acknowledged in the same manner as conveyances of real property are required to be acknowledged;" the Act declaring that its object was "to require in all cases the signature and acknowledgment of the wife as conditions to the alienation of the homestead." An Act passed in 1871 provided that in the enforcement of a lien upon premises including the homestead, if the homestead right was not waived or released in the manner required, the court might set off the homestead and decree the sale of the balance of the premises, or, if the value thereof exceeded the exemption, and they could not be divided, might order the sale of the whole and the payment of the amount of the exemption to the party entitled. 1 Starr & Curtis Annotated Statutes of Illinois, chap. 52. The payment by the holder of the lien, seeking its enforcement by sale of the premises, of the amount of the homestead exemption, would of course obviate the necessity of the sale in the case mentioned, where the property was incapable of division, and authorize a decree for the delivery of the entire property to the party otherwise entitled to it. The master, to whom it was referred to ascertain whether the premises could be divided so as to set off to the widow a portion equivalent to the sum of $1,000, having reported that they could not be divided, the complainant was entitled to the possession of the whole premises upon paying the required amount into court for her benefit.

The decree of the Circuit Court is therefore affirmed.

SPENCER TRASK, *Appt.*,

v.

JACKSONVILLE, PENSACOLA AND MOBILE RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 515-519.)

State bonds, when dishonored—lien of agent—bona fide holder.

1. Where the interest upon state bonds had been running unpaid for ten years and no interest had ever been paid upon them, these facts furnished presumptive evidence to a purchaser of them at auction sale that the bonds were dishonored.

2. An agent of a person engaged in perpetrating a fraud upon a railroad company, by appropriating bonds issued by it to his own use, can acquire no lien thereon on account of his services and liabilities as such agent, where his principal had no title as against the company.

3. Where a purchaser of bonds has knowledge of fraud and illegality in their issue, he can acquire no title thereto which he can enforce as a *bona fide* holder.

[No. 90.]

Argued Jan. 5, 6, 1888. Decided Feb. 6, 1888.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Florida, dismissing an action for the collection of bonds of the State issued to a railroad company. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. D. P. Holland and **S. P. Nash,** for appellant:

The complainant is a *bona fide* holder for value. The fact that the bonds bore unpaid coupons was no notice of their invalidity, the principal not being due.

Cromwell v. *Sac Co.* 96 U. S. 51 (24:681); *Ind. & I. C. R. Co.* v. *Sprague*, 103 U. S. 756 (26:554).

At auction sales it is not necessary to follow up notices given by irresponsible bystanders, if the sale goes on and the purchaser acts in good faith. It is a question in all cases of good faith upon the part of the purchaser.

Murray v. *Lardner*, 69 U. S. 2 Wall. 110, 121 (17:857, 859); *Galveston etc. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459, 476-478 (20: 199, 205); *Morgan* v. *U. S.* 113 U. S. 476, 491 (28:

1044, 1049); *Hotchkiss* v. *Nat. Shoe & L. Bank*, 38 U. S. 21 Wall. 354 (22:645); *Seybel* v. *Nat. Currency Bank*, 54 N. Y. 288; *Raphael* v. *Bank of England*, 17 C. B. 161; *Easton* v. *London Joint Stock Bank*, L. R. 34 Ch. Div. 95, 111.

Complainant, as a *bona fide* purchaser for value, was entitled to relief to the extent of the face value of the bonds and interest.

Florida Cent. R. R. Co. v. *Schutte*, 103 U. S. 143–145 (26:336, 337); *Cromwell* v. *Sac County*, *supra*.

But the complainant acquired at the auction sale at least the title of Coddington, who was a *bona fide* holder for value.

Duncomb v. *N. Y. etc. R. Co.* 84 N. Y. 190; *S. S.* 88 N. Y. 1.

The purchaser had the right to bring a new action.

Williams v. *Gibbes*, 58 U. S. 17 How. 239 (15: 135); *Ex parte Howard*, 76 U. S. 9 Wall. 175 (19:634); *Gillespie* v. *Alexander*, 3 Russ. 130.

The sale set up in the answer was made with full notice of the rights claimed in the bill.

Galveston etc. R. Co. v. *Cowdrey*, *supra*; *Wabash & E. Canal Co.* v. *Beers*, 67 U. S. 2 Black, 448, 457 (17:327, 332).

Messrs. A. H. Wintersteen and **Wayne MacVeagh**, for appellees:

There are here all the elements of an estoppel by *res judicata*.

Aspden v. *Nixon*, 45 U. S. 4 How. 467 (11: 1059); *Smith* v. *Smith*, 79 N. Y. 634; *Stowell* v. *Chamberlain*, 60 N. Y. 272.

Coddington was not a *bona fide* purchaser of the bonds for a valuable consideration.

Morse v. *Godfrey*, 3 Story, 364; *Dickerson* v. *Tillinghast*, 4 Paige, 215; *Petrie* v. *Clark*, 11 Serg. & R. 377; *Basset* v. *Nosworthy*, 2 White & T. Lead. Cas. Eq. 4th Am. ed. 33, 83; *Ashton's Appeal*, 73 Pa. 153; *State* v. *Florida Cent. R. R. Co.* 15 Fla. 724.

Constructive notice is evidence of notice, the presumption of which is so violent that the court will not even allow of its being contradicted.

1 Story, Eq. Jur. 402; *Bunting* v. *Ricks*, 2 Dev. & B. Eq. 130; *Le Neve* v. *Le Neve*, 2 White & T. Lead. Cas. Eq. 4th Am. ed. 154.

When the complainant in a bill in equity neither demands nor waives an answer under oath, and the respondent answers under oath, the answer is evidence on behalf of the respondent, conclusive if not contradicted.

Conley v. *Nailor*, 118 U. S. 127 (30:112).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Spencer Trask to collect 192 of the 1000 bonds of the State of Florida, issued to the Florida Central Railroad Company, which were the subject of consideration by this court in *Railroad Companies* v. *Schutte*, 103 U. S. 118 [26:327]. In that case it was decided that, although the bonds were void as against the State, the railroad company that sold them was estopped from setting up their invalidity as a defense to an action brought by a *bona fide* holder to enforce the lien the company had given on its property to secure their payment. Accordingly a decree was rendered establishing the lien of the holders of 197 bonds on the railroad of the company, and ordering a sale to pay the amount due thereon. Trask now claims to be a *bona fide* holder of the 192 bonds he sues for, and seeks the same relief as to them. He concedes the invalidity of the bonds so far as the State is concerned, but as against the Railroad Company and its property claims the benefit of the same estoppel that was adjudged in the other case to exist in favor of those who recovered there.

The general facts as to the issue of the bonds are stated in the case of *Schutte*, beginning at page 127 [330] of the volume (103) in which it is reported. The correctness of our findings then is not denied now. Indeed, Trask relies upon that decision as the basis of his right to recover; and the only disputed question is whether he does in law and in fact occupy the position of a *bona fide* holder. That is substantially a question of fact, only, and it presents itself in a double aspect. Trask got his title from Thomas B. Coddington; and the inquiry is, first, as to his own position separate from that of Coddington, and if that is not sufficient, then next as to that of Coddington, under whom he claims.

We have carefully considered the testimony bearing on these questions, both in the record as it has been printed in the present case, and in that of the *Schutte Case* brought into this also by stipulation. It would serve no useful purpose to refer to this testimony in detail, and it is sufficient to say that we have had no difficulty in reaching the conclusion that Trask, as a purchaser of the bonds, occupies no better position than Coddington, from whom he bought. His purchase was made September 12, 1881, at an auction sale in the City of New York. The bonds had then been running ten years and more, and no interest had ever been paid upon them. As the sale was made under the agreement of August 29, 1872, Trask is chargeable with notice of the contents of that instrument, which showed on its face that the bonds had been the subject of litigation and had not been obtained by Coddington in the ordinary course of business. His debt, for which they were held, was $40,000, and the bonds, without interest, which had been running ten years at 8 per cent per annum, amounted to $192,000. As the bonds were state bonds, the mere fact that no interest had ever been paid furnished the strongest presumptive evidence that they were dishonored. The interest alone, if collected, would much more than pay the debt for which the bonds were held. The circumstances connected with the sale also were entirely inconsistent with the idea of a purchase of commercial paper in good faith for a valuable consideration without notice. No one present at the time could have had any other understanding than that the sale was of bonds which had been commercially dishonored.

We are equally well satisfied that Coddington was never in any commercial sense a *bona fide* holder of the bonds. According to his own testimony he was originally the mere agent of those who were engaged in perpetrating the fraud upon the Railroad Company, and employed by them to get the bonds from Florida to London, so that they might be sold and a large part of the proceeds applied to the payment of the personal debts of one of the guilty parties. He undoubtedly did this because he

had been told that it would enable "the parties in interest" to pay him the cash for $24,465 of coupons of another company for which they were bound. He entered into no contract with the Florida Central Company, and it could never have been supposed by him that any part of the proceeds were to be paid into its treasury or for its use. He could not but have known that the whole purpose of his employment was to get the bonds to London, where they had been contracted to be sold at a price that would yield less than half their face value, and that he was himself to apply more than half of this to the payment of the individual debts of one of the large stockholders of the Company, by whose influence and in whose interest the railroad bonds had been executed to be exchanged for the state bonds, which he was to take away. Under such circumstances, it is certain that he could have acquired no lien on the bonds as security for any services he might render in transferring them to London, or for any liability he had incurred to third parties in order to get the bonds away. His contract for the service, and for the compensation he was to receive, was not with the Railroad Company itself, but with the president of the Jacksonville, Pensacola and Mobile Railroad Company, who was engaged in appropriating the bonds issued to the Florida Central Company to his own use. This disposes of his claim of lien on account of his services and liabilities as agent. He was not the agent of the Florida Central Railroad Company, and as it must be conceded that those for whom he was acting had no title as against this Company, there was nothing in his hands to which any lien could attach in his favor any more than in favor of his principals.

As to the contract made with the Jacksonville, Pensacola and Mobile Company on the 29th of August, 1872, by which the 192 bonds were given to Coddington as security for a debt owing to him by that Company, little need be said. The Jacksonville, Pensacola and Mobile Company had no legal right to the bonds, and it could not, therefore, pledge them as security for its debts. All this Coddington knew or ought to have known. And besides, when this contract was made, the fraud and illegality in the original issue of the bonds, both by the Railroad Company and the State, had become notorious, and it is impossible that Coddington, situated as he was, could have been ignorant of the facts. In order to get the bonds away from Florida he was compelled to arrange with certain stockholders of the Florida Central Company, who had begun a suit to prevent their removal by the president of the Jacksonville, Pensacola and Mobile Company, on the ground that he had no right to use the road of the Florida Central Company "and cover it with liens to raise money to pay private debts, notwithstanding he is the owner of a majority of the stock." It is unnecessary to refer more particularly to the evidence. It is full and conclusive and leaves no doubt on our minds as to the knowledge of Coddington of such facts as would prevent him from acquiring any title to the bonds he took away by purchasing them from any of the parties engaged in the transaction, which he could enforce as a *bona fide* holder against the Florida Central Company.

The decree of the Circuit Court is affirmed.

LAMBERT N. HOPKINS ET AL., *Plffs. in Err.*,

v.

WILLIAM C. ORR ET AL.

(See S. C. Reporter's ed. 510–515.)

Note admissible under common counts—omission in verdict—verdict on all the counts—judgment against sureties on appeal.

1. Where the note sued on varies from the description in the special count in the declaration, it is admissible under the common counts as evidence of money had and received by defendant to plaintiff's use.

2. The omission of the word *dollars* in a verdict is not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury.

3. The technical rule of the common law that where the verdict is general on all the counts of the declaration, and the evidence does not support the special count, no judgment can be rendered on the verdict without first amending it so as to limit it to the common counts, has been abrogated by statute in the Territory of New Mexico; and the supreme court in that Territory in appeals or writs of error may render such a judgment as, upon a consideration of the whole record, justice may appear to require.

4. The provision in the Statute of that Territory, that "in case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond," is valid; and a judgment of the supreme court of the Territory, affirming the judgment of the district court as to the principal sum due and as to the interest to the extent of 6 per cent, upon plaintiffs' remitting the excess of 4 per cent interest, is a judgment affirming that of the district court within the meaning of such statute and of the appeal bond; and in such case the supreme court may render its judgment against the sureties in the bond as well as against the principal defendant.

[No. 140.]

Argued Jan. 20, 23, 1888. Decided Feb. 6, 1888.

IN ERROR to the Supreme Court of the Territory of New Mexico, to review a judgment of that court affirming a judgment of a District Court of the Territory in favor of plaintiff upon his remitting an excess of interest. *Judgment affirmed.*

Statement by *Mr. Justice* **Gray**:

This was an action of assumpsit, brought April 8, 1882, by Orr and Lindsley against Hopkins in a District Court of the Territory of New Mexico. The declaration contained a special count on a promissory note for $1,314.65 made by the defendant on October 1, 1881, and the common counts for the like sum due on that day for goods sold, for money lent, for money paid, and for money had and received. The plaintiffs filed with their declaration the following note:

"$1,314.65. St. Louis, October 1, 1881.

"Four months after date I, the subscriber, of Ft. Wingate, county of ——, State of New Mexico, promise to pay to the order of Orr and Lindsley (a firm composed of William C. Orr

and De Courcey B. Lindsley) thirteen hundred and fourteen $\frac{55}{100}$ dollars, with exchange for value received, with interest at the rate of ten per cent per annum after maturity until paid, without defalcation or discount, negotiable and payable at 1st National Bank, Santa Fé, N. M.

"L. N. HOPKINS, JR."

The description of the note in the special count corresponded with the note filed, except that it did not state that the note was payable with exchange and at a particular place. The defendant pleaded nonassumpsit and payment.

At the trial, the plaintiffs put in evidence the note filed, and were permitted to read it to the jury, notwithstanding the defendant objected that there was a variance between the note and the declaration. The only other evidence introduced was testimony of the plaintiffs' attorney that on March 7, 1882, he presented this note to the defendant, and the defendant admitted the indebtedness, and asked him not to bring suit upon it before April 1, and on that day he would pay it, but he failed to do so. The defendant objected to the evidence as incompetent and immaterial. But the court overruled the objection, and instructed the jury to find for the plaintiffs for $1,399.48, being the amount of the note with interest computed at the rate of 10 per cent.

The jury returned a verdict saying that "they find for the plaintiff in sum of thirteen hundred and ninety-nine and $\frac{48}{100}$." The court overruled motions for a new trial and in arrest of judgment, and gave judgment "that the said plaintiffs do have and recover from the said defendant, Lambert N. Hopkins, the said sum of thirteen hundred and ninety-nine and $\frac{48}{100}$—($1,399.48), and also his costs in their behalf laid out and expended, to be taxed, but that execution shall not issue therefor until further order of the court."

The defendant appealed to the Supreme Court of the Territory, and executed to the plaintiffs a bond, with sureties, the condition of which was that "the said Lambert N. Hopkins shall prosecute his said appeal with due diligence to a decision in the supreme court, and that if the judgment appealed from be affirmed, or the appeal be dismissed, he will perform the judgment of the district court, and that he will also pay the cost and damage that may be adjudged against him upon his said appeal." Thereupon the district court allowed the appeal, ordered execution to be stayed while it was pending, and allowed a bill of exceptions tendered by the defendant to the rulings aforesaid.

The Supreme Court of the Territory held that there was a variance between the special count and the note offered in evidence, but that the note was admissible in evidence under the common counts, and that under those counts and the statutes of the Territory the plaintiffs were entitled to receive the sum of $1,314.65, with interest thereon computed at the rate of 6 instead of 10 per cent; and ordered that, if the plaintiffs should file a remittitur of the excess of 4 per cent interest, the judgment of the district court be affirmed, but, if they should fail to do so, the judgment be reversed and the case remanded for a new trial. Thereupon the plaintiffs filed such a remittitur; and the Supreme Court of the Territory affirmed the judgment of the district court against the defendant and the sureties on his appeal bond, and adjudged that the plaintiffs recover against them the sum of $1,314.65 and interest at the rate of 6 per cent. The defendant and the sureties sued out this writ of error.

***Messrs.* O. D. Barrett** and **Jno. H. Knaebel,** for plaintiffs in error:

There was a fatal variance between the promissory note declared on and the instrument introduced in evidence.

Covington v. *Comstock*, 39 U. S. 14 Pet. 43 (10: 346); *Sheehy* v. *Mandeville*, 11 U. S. 7 Cranch, 208 (3: 317); *Sebree* v. *Dorr*, 22 U. S. 9 Wheat. 558 (6: 160).

The verdict, being general, was bad.

Shaver v. *Ehle*, 16 Johns. 202; *Burford* v. *McCue*, 53 Pa. 431.

While the word *junior* added to a name is a mere *descriptio personæ*, yet it is a significant factor in determining the question of identity.

Kincaid v. *Howe*, 10 Mass. 205; *Com.* v. *Beckley*, 3 Met. 331.

The verdict is bad. The evidence applies as well to the bad counts as to the good.

Bank of U. S. v. *Moss*, 47 U. S. 6 How. 38, 39 (12: 334) and cases there cited; *Hopkins* v. *Beedle*, 1 Caines, 347; *Matheson* v. *Grant*, 43 U. S. 2 How. 282 (11: 268); *Backus* v. *Richardson*, 5 Johns. 476; *Williams* v. *Breedon*, 1 Bos. & P. 329; *Union Turnpike Co.* v. *Jenkins*, 1 Caines, 381; *Livingston* v. *Rogers*, Id. 583; *Holt* v. *Scholefield*, 6 Term Rep. 691; *Eddowes* v. *Hopkins*, 1 Doug. (Eng.) 377.

The contract has an alternative or contingent aspect; the interest provided for is all part of the contract debt.

Gibbs v. *Fremont*, 9 Exch. 25; *Holden* v. *Freedman's Sav. & T. Co.* 100 U. S. 72 (25: 567); *Wilkinson* v. *Daniels*, 1 Greene (Ia.) 179.

Interest is a substantive part of the claim.

Fake v. *Eddy*, 15 Wend. 76; *Tillotson* v. *Preston*, 3 Johns. 229; *Johnston* v. *Brannan*, 5 Johns. 268; *People* v. *N. Y. Co.* 5 Cow. 331.

The law will not imply a promise of any person against his own express declaration.

Clark v. *Smith*, 14 Johns. 326; *Robertson* v. *Lynch*, 18 Johns. 451.

Interest contracted for is part of the debt.

Watkins v. *Morgan*, 6 Car. & P. 661; *Hudson* v. *Fawcett*, 7 Man. & G. 348; *Gibbs* v. *Fremont*, 9 Exch. 25.

The condition of the *supersedeas* bond in this case was never broken.

Drummond v. *Husson*, 14 N. Y. 60.

***Messrs.* W. B. Childers** and **Henry Wise Garnett,** for defendants in error:

The error must appear on the record.

Storm v. *U. S.* 94 U. S. 76 (24: 42).

A question not brought to the attention of either of the courts below cannot be considered here.

Walker v. *Sauvinet*, 92 U. S. 90 (23: 678).

"Junior" is no part of a man's name.

Bouvier, Law Dict. title, *Junior*, and authorities cited.

Kincaid v. *Howe*, 10 Mass. 203; *Headley* v. *Shaw*, 39 Ill. 354; *Johnson* v. *Ellison*, 4 T. B. Mon. 527.

When the judgment is excessive, a remittitur may be entered.

Kentucky Bank v. *Ashley*, 27 U. S. 2 Pet. 327 (7: 440).

The court is authorized to enter the correct judgment.

Chandler v. *Spear*, 22 Vt. 388; *Weed* v. *Weed*, 25 Conn. 494; *Hart* v. *Seixas*, 21 Wend. 40; *Union Cent. L. Ins. Co.* v. *Bernard*, 33 Ohio St. 459.

The court did right in affirming the judgment and rendering it also against the sureties on the appeal bond.

Moore v. *Huntington*, 84 U. S. 17 Wall. 418 (21: 642); *Beall* v. *New Mexico*, 83 U. S. 16 Wall. 535 (21: 292).

The judgment where a remittitur is entered is affirmed wholly as to the right of recovery and partially as to the amount, and the sureties on the appeal bond are responsible for the amount as affirmed.

Butt v. *Stinger*, 4 Cranch, C. C. 252; *Page* v. *Johnson*, 1 D. Chip. 338; *Rush* v. *Halcyon Steamboat Co.* 68 N. C. 72; *Hamlett* v. *Tallman*, 30 Ark. 505; *Union Cent. L. Ins. Co.* v. *Bernard*, 33 Ohio St. 459; *Doolittle* v. *Dininny*, 31 N. Y. 355; Baylies' Sureties & Guarantors, 171.

Plaintiffs in error, having failed to raise any question as to excess in the amount of the judgment in the district court, should not be permitted to raise it in an appellate court.

New Orleans, O. & G. W. R. R. Co. v. *Lindsay*, 71 U. S. 4 Wall. 650 (18: 328); *The Vanderbilt*, 73 U. S. 6 Wall. 225 (18: 823); *Kennedy* v. *Johnson*, 69 N. C. 249; *Campbell* v. *Stokes*, 2 Wend. 137; *Mumford* v. *Memphis & C. R. R. Co.* 2 Lea, 393; *Beekman* v. *Frost*, 18 Johns. 544.

Supplemental Points of Plaintiffs in Error.

This case is within the case of *Maryland* v. *Baldwin*, 112 U. S. 490 (28: 822).

A general verdict and judgment upon several counts in a civil action must be reversed if only one of the counts was bad.

Bond v. *Dustin*, 112 U. S. 604 (28: 835); *Snyder* v. *U. S.* 112 U. S. 216 (28: 697).

Mr. Justice **Gray** delivered the opinion of the court:

It was not contended in either of the courts of the Territory that any question of fact should have been submitted to the jury; but the contest was upon the sufficiency of the evidence and the verdict, in matter of law, to support a judgment for the plaintiffs.

Upon the testimony that the defendant admitted his indebtedness on the note given in evidence, that note, though varying from the description in the special count, was admissible under the common counts as evidence of money had and received by the defendant to the plaintiffs' use. *Grant* v. *Vaughan*, 3 Burr. 1516; *Page* v. *Bank of Alexandria*, 20 U. S. 7 Wheat. 35 [5: 390]; *Goodwin* v. *Morse*, 9 Met. 278. And by the statutes of the Territory the sum so admitted to be due bore interest at the rate of 6 per cent. Prince's Laws, chap. 79, § 4; Comp. Stat. § 1734.

The omission of the word "dollars" in the verdict was not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury, although it might have been more regular to amend the verdict before judgment. *Parks* v. *Turner*, 53 U. S. 12 How. 39 [13: 883]; *Beall* v. *Territory*, 1 New Mex. 507, 519.

It was argued for the defendant that under the rule recognized in *Maryland* v. *Baldwin*, 112 U. S. 490 [28: 822], the verdict being general on all the counts, and the evidence not supporting the special count, no judgment could be rendered on the verdict without first amending it so as to limit it to the common counts. But the technical rule of the common law in this matter has been changed by statute in many parts of the United States. *Bond* v. *Dustin*, 112 U. S. 604 [28: 835]. In New Mexico that rule has been abrogated by the Statute of the Territory, by which "The supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law." Prince's Laws, chap. 16, § 7; Comp. Stat. § 2190. The manifest object of the statute is not merely to restrain the appellate court from going outside of the record, but to enable it to render such a judgment as upon a consideration of the whole record justice may appear to require.

The Supreme Court of the Territory was therefore authorized to affirm the judgment rendered by the district court upon the general verdict for the plaintiffs, if the facts contained in the record supported any count in the declaration, as we have seen that they did. And there can be no doubt of its authority to make its affirmance of the judgment conditional upon the plaintiffs' remitting part of the interest awarded below. *Bank of Kentucky* v. *Ashley*, 27 U. S. 2 Pet. 327 [7: 440].

The statutes of the Territory further enact that, on an appeal from the judgment of a district court, execution shall be stayed upon the appellant's giving bond, with sureties, such as was given in this case, "conditioned that the appellant shall prosecute his appeal with due diligence to a decision in the supreme court, and that if the judgment or decision appealed from be affirmed, or the appeal be dismissed, he will perform the judgment of the district court, and that he will also pay the costs and damages that may be adjudged against him upon his appeal." Prince's Laws, chap. 16, § 4; Comp. Stat. § 2194. They also contain a general provision that "In case of appeal in civil suits, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his securities in the appeal bond;" and this court has adjudged that provision to be valid. Prince's Laws, chap. 45, § 5; Comp. Stat. § 2206; *Beall* v. *New Mexico*, 83 U. S. 16 Wall. 535 [21: 292]; *Moore* v. *Huntington*, 84 U. S. 17 Wall. 417 [21: 642].

By the judgment of the Supreme Court of the Territory, affirming the judgment of the district court as to the principal sum due, and also as to interest to the extent of 6 per cent, upon the plaintiffs' remitting the excess of 4 per cent interest, the judgment of the district court was affirmed, within the meaning of the territorial statutes and of the appeal bond. *Butt* v. *Stinger*, 4 Cranch, C. C. 252; *Page* v. *Johnson*, 1 D. Chip. 338.

The result is that the judgment of the Supreme Court of the Territory was rightly rendered for the plaintiffs against the sureties in

the bond as well as against the principal defendant, and must be *affirmed*.

DISTRICT OF COLUMBIA, *Appt.*,

v.

HUGH L. GALLAHER ET AL., Doing Business as GALLAHER, LOANE & COMPANY.

(See S. C. Reporter's ed. 505-510.)

Construction of contract.

The practical construction which the parties put upon the terms of their own contract, and according to which the work thereunder was done, should prevail over the literal meaning of the contract, where one party thereto seeks to obtain a deduction in the contract price in accordance with such literal meaning.

[No. 141.]

Argued Jan. 23, 1888. Decided Feb. 6, 1888.

APPEAL from a judgment of the Court of Claims, in favor of petitioners in an action for the recovery of a balance due upon a contract for building an arch. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **A. H. Garland,** *Atty-Gen.*, and **Robert A. Howard,** *Asst. Atty-Gen.*, for appellant.

Messrs. **Th. Hughes** and **Woodbury Blair,** for appellees.

Mr. Justice **Matthews** delivered the opinion of the court:

This suit was brought against the District of Columbia for the recovery of the sum of $188,459.55; of this $85,486.49 were alleged to be payable as the balance due upon a contract for building and completing the brick arch upon stone abutments of Tiber Creek sewer, as set out and described in the contract and specifications attached to the petition, at the price of $113 per lineal foot. The additional sum of $98,130.44 was alleged to be due on account of extra work and materials furnished by the contractors beyond the requirements of the contract in and about the same work. This indebtedness was denied, and the defendant also filed a plea of set-off in the sum of $82,176; of this, $7,176 was for the value of stone alleged to have been sold by the defendant to the claimants; $35,000 on account of deficiencies in the construction of the sewer, and $40,000 as the reasonable cost and expense of filling the canal for the whole length of the sewer, which the defendant claimed the petitioners were bound by their contract to do. Upon the facts found by the court, it was held that the claimants were entitled to recover upon their claims the sum of $43,935.74; that the defendant was entitled to recover upon the set-off and counterclaim the sum of $1,479; and judgment was rendered in favor of the petitioners for the difference, being the sum of $42,456.74.

The facts as found by the court, so far as material, are as follows:

The Tiber Creek, prior to the year 1871, was a natural stream of water flowing through the City of Washington and discharging into what was then known as the Washington Canal, on Third Street west, between Maine and Missouri Avenues, and by that in the Eastern Branch.

Among the improvements projected by the Board of Public Works was that of utilizing this stream in connection with the sewerage system of the city, and the general plan adopted was that of constructing a main sewer of masonry and brickwork along its course, through which the stream should flow, receiving and conducting the sewage from lateral connections on either side.

It was constructed for the most part in sections by contract with different parties, and the part here in controversy was the final or outlet section. It was commonly styled the Tiber Creek sewer or arch.

On and before July 14, 1878, a portion of this sewer had been completed, which (so far as is here material) extended from the north side of Pennsylvania Avenue, across the Botanical Garden, into Third Street, and along and under Third Street to a point 3 feet north of the south building line of Maryland Avenue at which terminus the sewer was (so far as here material) of the following construction and size, namely: The side walls were of masonry, about 3 feet high and 5 feet 6 inches thick, supporting an approximate semi-elliptic arch of 80 feet span and 7 feet 10 inches rise. The extrados of the arch, including the skew-back course, was backed up with rubble masonry to the level of its crown.

The timber sleepers for the foundations were forty-one feet in length.

Proposing to continue the sewer to its outlet with the same construction and size, the Board of Public Works, on July 14, 1878, sent to H. L. Gallaher & Co., consisting of Hugh L. Gallaher and Edwin H. Smith, a written proposal for continuing the Tiber Creek sewer from its existing terminus at Maryland Avenue and Third Street southwest, along the line of the Washington Canal to its junction with the James Creek Canal, the size and manner of construction of the sewer to be the same as that of the portion of the same sewer constructed on Third Street southwest, and to be paid for at the rate of $113 per lineal foot; and they were requested by return mail to notify the board of their acceptance or rejection of the proposal. On the same day H. L. Gallaher & Co., by writing accepted it. A written contract bearing date July 19, 1878, was executed between the parties in the same terms as that set forth in the petition. Before work was commenced under it the District engineer was instructed to give the grade of the sewer, to be laid out with the same dimensions as of the existing sewer, which he did in the summer of 1878. It was proposed, however, and consented to by both parties, to deviate from the contract, by which the continuation of the sewer was to follow and be laid in the bed of the canal, so as to take it by a curve from the point of connection on the westerly bank and then proceed parallel with and along said bank to the terminus. About the time of giving the grade Gallaher applied for a plan of the sewer, when by direction of the engineer a plat or working drawing of the structure in transverse section, exhibiting its form and dimensions according to a fixed scale, and representing a structure similar to that of the completed section at the point

of connection, was furnished. Gallaher and Smith then proceeded with the work in accordance with that plan, and completed some part of the excavation, and procured and brought on the ground material, but had not constructed any portion of the arch, when Joseph G. and Henry E. Loane, two of the petitioners, bought out the interest of Smith in the contract, and thereupon the original contract was canceled and one in similar terms executed on December 22, 1873, by the Board of Public Works with the claimants, composing the firm of Gallaher, Loane & Company, a copy of which is set out with the petition. The claimants on entering into said contract received from Gallaher & Smith the working plan furnished to them by the District engineer. It represented the plan and dimensions of the several parts of the structure of the sewer to be built under their contract, and was similar to the completed section with which it was to connect, as provided by the contract, and was the plan under which the work had been commenced and carried on. They proceeded with the work in accordance with the plan, and without calling the attention of the board to any alleged or apparent variation of the same from the contract, and constructing the flooring, masonry and arch according to the dimensions appearing thereon, and had finished about 680 lineal feet thereof when the Board of Public Works was abolished by Act of Congress of June 20, 1874. The work as thus far done was constructed under the direction of the District engineers, but neither they nor the Board of Public Works intimated to the claimants that the work was not progressing to their satisfaction and in accordance with the former sample work, in which the skew-back was constructed of rubble masonry.

Under the new form of government established by that Act for the District, Richard L. Hoxie was detailed as engineer on July 6, 1874, and forthwith made a careful examination of the work being done by the claimants, as to its character and conformity with the specification of the contract, in the presence of one of the claimants.

He found that, generally, it was being built in conformity with the specifications, but there were several departures. The flooring and sleepers were, as he thought, inferior to the quality required; the masonry was not strictly in conformity with the specifications; there were too few bond stone used; the inside walls were not dressed, and the stones generally were small. But what attracted his attention, and was of the most importance, was the manner of constructing the skew-back. It was made of small stones, spalls, and mortar, while it should have been made, as he thought, of large dimension stone. He called the attention of the party present to these alleged variations, and particularly to the skew-back, which he wished constructed of dimension stone. He was informed that to procure the stone would cause considerable delay in the prosecution of the work. Thereupon he directed that the skew-back might be made of brick, and added that he should make a deduction in price, but named no sum. Thereafter claimants proceeded with their work, making the skew-back of brick, under the direction of defendant's engineers, without further complaint.

In August, 1874, the claimants applied for measurement of the work so far as completed and a partial payment. The engineer thereupon transmitted to the board of audit, which, by the Act of June 20, 1874, was charged with the settlement of such accounts, a statement with the measurement requested. In that statement the engineer represented that the contract required the inside sewer face of the stone wall rough dressed, and a skew-back stone not less than a three foot, six inch bed, and in length of not less than four feet; and that these requirements of the contract had not been complied with. He, therefore, on this account, recommended a deduction of $8.94 per lineal foot of the sewer. The board of audit audited the account with that deduction from the contract price, in accordance with the statement of the engineer. The claimants received the partial payment under protest. The amount of this deduction upon the entire work performed by the claimants constitutes the sum of $35,436.49, for which they sue.

The whole controversy between the parties as to this item, and also for a portion of the claimants' demand on account of extra work and material, arises out of the fact that the letter of the contract and specifications does not correspond with the plan of the work as furnished by the District engineer and the sample of the work which had been done previously by other contractors, and with which that of the present claimants was to connect. The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price. The other items allowed by the court of claims, both to the claimants and the defendant, we think well established upon the facts as ascertained by it. The reasons for its judgment, as set forth in the opinion of the court, we think entirely satisfactory. 19 Ct. Cl. 564.

The judgment is affirmed.

GREAT FALLS MANUFACTURING COMPANY, *Appt.*,

v.

AUGUSTUS H. GARLAND, Attorney-General of the UNITED STATES, ET AL.

(See S. C. Reporter's ed. 581-600.)

Dam across Potomac River—land taken for—compensation—waiver of objections—suit in court of claims—effect of.

1. Under the Act of July 15, 1882, the United States is under an obligation to make just compensation for all the land that has been in fact taken and is retained for the dam across the Potomac River,

mentioned in said Act, although some part of the land taken for that purpose is not within the survey and map directed to be made by said Act.

2. Such Act opens the court of claims to every person who, by the construction of the work, has been injured in any property right, provided that within a given time such person file his petition in that court, setting forth his right or title and the amount claimed by him as damages.

3. The Government is under a constitutional obligation to make compensation for any property or right taken, used and held for the purposes indicated in such Act of Congress, whether it is embraced or described in said survey or map, or not.

4. Objections to the map and survey were waived by proceeding in the court of claims by the owner for compensation for lands and water rights taken under the Act.

5. The plaintiff, by suing in the court of claims, has assented to the taking of his property by the Government for public use, and has agreed to submit the determination of the question of compensation to the tribunal named by Congress, and has waived the right that compensation be paid in advance of the taking, and the right to demand that the amount of compensation be determined by a jury.

[No. 605.]

Submitted Dec. 19, 1887. Decided Feb. 6, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Maryland, dismissing a suit brought to restrain defendants from occupying land and for other purposes. *Decree affirmed.*

Statement by *Mr. Justice* **Harlan:**

Congress formed the purpose, many years ago, of supplying the Cities of Washington and Georgetown with water from the Potomac River, at the Great Falls, in the State of Maryland. A controversy having arisen between the Secretary of the Interior—charged with the expenditure of public moneys appropriated for that purpose—and the Great Falls Manufacturing Company, as to the compensation, if any, which the latter was entitled to receive for certain lands and water rights, at or near the Great Falls, which that Company claimed and which the officers of the Government proposed to take for public use, articles of agreement were signed by that Company and the Secretary of the Interior, on the 20th of November, 1862, submitting the matters in dispute to the arbitrament of Benjamin R. Curtis, Joseph R. Swan, and others. The Government exhibited to the arbitrators four alternative plans, with specifications, for what is called the Potomac dam of the Washington Aqueduct. The majority of the arbitrators awarded and determined, February 28, 1863, that "If the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as Dam A, being the first plan of operations mentioned in the said specification, then the Great Falls Manufacturing Company are legally entitled to the sum of sixty-three thousand seven hundred and sixty-six dollars ($63,766), as compensation for the use and occupation by the United States of the land, water rights, and privileges claimed by the said Company, and all consequential damages to the property and rights of the said Company, which they may legally claim by reason of the execution by the United States of the plan of operations last above mentioned. But this assessment is based upon the condition that the said Company, as against the United States, may lawfully build and maintain a canal and bulkhead across and upon the land of the United States, on the Virginia shore of the Potomac, since marked on the same plat numbered 4 as belonging to the United States, so as to use the water of the pool above the Dam A, subject to the superior right of the United States to use the water for the aqueduct in the manner and to the extent shown by the aforesaid specification of the said Dam A and its corresponding plan of operations."

This plan involved the construction of a dam from the feeder of the aqueduct, thence across the Maryland channel and Conn's Island to the Virginia bank, on land belonging to the United States.

The arbitrators concurred in awarding and determining that "If the United States shall adopt and decide to execute the plan of operations designated in the specification and on the plat as 'Plan 4th,' being the fourth plan of operations named in the said specification, then the said Great Falls Manufacturing Company are legally entitled to the sum of fifteen thousand six hundred and ninety-two dollars ($15,692) as compensation for the use and occupation by the United States of the land, water rates, and privileges claimed by the said Company, and all consequential damages to the property and rights of the said Company which they may legally claim by reason of the execution by the United States of the plan of operations last above mentioned."

The latter plan involved the construction of a dam of masonry from the Maryland shore to Conn's Island, and gave the United States the right to deepen the channels on the Maryland side of that island, near its head.

In *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645 [28: 846] this court affirmed a judgment of the court of claims for $15,692, as compensation and damages to that Company by reason of the adoption and execution by the United States of Plan 4.

The present suit by the Great Falls Manufacturing Company relates to the construction of a dam across and from Conn's Island to the Virginia shore, for which provision was made by an Act of Congress approved July 15, 1882, 22 Stat. at L. 168, entitled "An Act to Increase the Water Supply of the City of Washington, and for Other Purposes." The Act provides for a survey and map of the land necessary to extend the Washington Aqueduct to the high ground north of Washington, near Sixth Street extended, and of the land necessary for a reservoir at that point. But it also contains the following provisions:

"The Secretary of War shall cause to be made * * * a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made, the Secretary of War and the Attorney-General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and to the land on which the gate house at Great Falls stands by condemnation: * * * *And provided further*, That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

"When the map and survey are completed, the Attorney-General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this Act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney-General, the Chief Justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the Government, or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney-General a description of any tract or parcel the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney-General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof; and if the offer be accepted, then, upon the execution of a deed to the United States in form satisfactory to the Atttorney-General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this Act.

"In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this Act.

"The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map, who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the Attorney-General as above provided, file a petition in the Court of Claims of the United States, setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein; *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

"Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made, as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney-General as above directed, be forever barred; *Provided*, That owners or claimants laboring under any of the disabilities defined in the Statute of Limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

"Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and, upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States.

"Sec. 2. That the Secretary of War be, and is hereby, authorized and directed to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same at that level across Conn's Island to the Virginia shore; and that he raise the embankment between the Potbmac River and the Chesapeake and Ohio Canal above the dam, so as to protect the canal from the increased flooding which the completion of the dam will cause in times of high water, or pay to the canal company, in full satisfaction for all such flooding, the amount hereinafter appropriated for that purpose.

"Sec. 3. That the following sum or so much thereof as may be necessary is hereby appropriated out of any money in the treasury not otherwise appropriated: * * *

"To pay for water rights and land necessary to extend dam at Great Falls to the Virginia shore, forty-five thousand dollars.

"For work and material to complete the dam at Great Falls to the level of one hundred and forty-eight feet above tide, and extend the same to the Virginia shore, one hundred and forty-five thousand one hundred and fifty-one dollars. * * *

"To protect the Chesapeake and Ohio Canal from increased flooding by reason of completing the dam at Great Falls, twelve thousand three hundred dollars.

"To provide for the erection of suitable fishways at the Great Falls of the Potomac, and at the dam to be constructed under the provisions of this Act, in accordance with plans and specifications to be prescribed by the United States Commissioner of Fish and Fisheries, fifty thousand dollars, or so much thereof as may be necessary."

The defendants are Augustus H. Garland, Attorney-General of the United States; William C. Endicott, Secretary of War; Garrett J. Lydecker, Major of Engineers in the United States Army, having charge, under the Secretary of War, of the construction of the before mentioned dam, from Conn's Island to the Virginia shore; and George B. Chittenden and Samuel H. Chittenden, contractors with the Secretary of War, for said work.

The plaintiff in its bill alleges that it is the

owner in fee of Conn's Island; of other tracts of land in the Potomac River above that island, being the several islands known as the Cyclades; of a tract of about one thousand acres in Virginia, on that river, at the Great Falls, known as the Toulson Tract; and of all the easements, rights of water, use, navigation, privileges, and fisheries appertaining to those several tracts or bodies of land. The value placed by the plaintiff upon said water rights is shown by the allegation that the water at the Great Falls "being of great purity, and 148 feet above the mean tide at Washington City, forms the best, most convenient, and almost the only supply of pure water for the capital of the United States, which will flow by its own weight and without the cost of pumping, into the highest habitations of said District, thus furnishing an unlimited supply of water for domestic use and extinguishment of fires." The bill recites the facts connected with the award of February 28, 1868, and, after stating the circumstances under which it recovered said judgment against the United States in the court of claims, refers to the provisions of the Act of July 15, 1882. It alleges that the secretary caused to be made a survey and map, but that they were not sufficiently accurate to be the foundation of proceedings for the condemnation of plaintiff's land and water rights to the public use. Referring to the notice of such survey and map as published by the Attorney-General, it alleges that the only claim made by that officer as to said land and water rights was the following contained in such notice: "In addition to acquiring to and for the United States any outstanding title to these lands at the Great Falls, it is also proposed to acquire all water rights implied in the possession of the same or needed for purposes contemplated by the Act under which these proceedings are taken. The map of the surveys (in these tracings) required for the uses enumerated in the above named Act of 1882, chap. 294, may be seen at this department by all claimants to any portion of said premises."

The lands above referred to are thus described in the same notice:

"1. For extending the dam to and upon the Virginia shore, it is proposed to take and acquire title to a strip about 918 feet wide, crossing Conn's Island and the Virginia channel, and connecting the U. S. property on Fall's Island and Hard-to-come-at, with the U. S. property on the Virginia shore. This will extend the present limits of the U. S. property on the Virginia shore to the south, by taking in a triangular lot containing about 8-10 acres.

"This tract is colored in yellow on tracing C."

The bill charges that, "although no notice of any taking has been given in the manner prescribed by law, and although no act has been done which would justify him in so doing, the Secretary of War, in the year 1888, by his servants and agents, wrongfully took possession of the lands of your complainant, claiming to have done so in behalf of the United States, in the State of Maryland and in Virginia, which land was not within any description made, surveyed, or traced by the Secretary of War, and has used said land for the purpose of constructing a dam along a portion of said land across Conn's Island and over said river to the Virginia shore, and has built a large portion of said dam by means of his said servants and agents without making any bulkhead in said dam or any provision whatever by which your complainant can use any portion of the water for manufacturing or other valuable purposes, as was awarded by the arbitrators in their award as aforesaid in favor of your complainants, the dam to be constructed after the manner of Plan A. And your complainant is informed and believes, and therefore avers, that the War Department of the United States has occupied said land with a force sufficient to prevent any opposition of your complainant to its acts and doings or the acts and doings of its servants, agents, and employés without a breach of the peace of the State of Maryland."

It is also averred in the bill that the plaintiff waited, after several applications by it, both verbally and in writing, to the Attorney-General and Secretary of War, until the last day before the year limited by said Act in which claims might be filed in the court of claims for damages, expecting that steps would be taken by which its land and water rights might be legally taken by the United States in such form that it could obtain reasonable compensation for such property; and that nothing being done, from great caution and fear lest it might lose all benefit of any provision of said Act by limitation, it then filed a petition in that court, setting forth its claim in order to save its rights, and for no other purpose whatever. But it protests that what the Secretary of War and the Attorney-General did are simply trespasses and wrongs done to the plaintiff, and that for the want of legal steps on their part, for the condemnation of its property, the court of claims is without jurisdiction to ascertain and award compensation to it.

The bill concludes with the averment that, even if the provisions of the Act of Congress had been strictly followed, the steps taken by the Secretary of War and the Attorney-General would not be justified in law, because the Act under which they claimed to proceed is unconstitutional and void. The grounds upon which its validity is assailed will be hereafter indicated.

The relief asked is a decree restraining defendants and each of them from further occupying the plaintiff's lands and premises or from building any structure thereon, or in any way hindering or interfering with the natural flow of the water between Conn's Island and the Virginia shore; that the defendants and each of them be required to remove and cause to be removed every structure, dam, and embankment heretofore erected by them or by any officer of the United States acting in their behalf in the premises; that if it shall appear that its land and water rights have been legally condemned to the use of the United States, an issue be framed, triable by a jury, for the ascertainment of the compensation due the plaintiff, and that it have judgment for the amount so found in its favor; and that all persons, claiming to act for or on behalf of the United States, be restrained from occupying or in any way interfering with said land and water rights until the amount of such judgment be paid or tendered to plaintiff, or paid into court for its use.

In the court below a demurrer to the bill was sustained, and the plaintiff declining to amend, its suit was dismissed with costs. *Great Falls Mfg. Co.* v. *Garland*, 25 Fed. Rep. 521.

Messrs. **B. F. Butler** and **O. D. Barrett**, for appellant:

The Act of 1882 is unconstitutional; it does not take private property for a public use. It seeks to avoid an adjudication for land already taken by the United States and to avoid a compact with a sovereign State.

Act of March 3, 1853; *U. S.* v. *Farragut*, 89 U. S. 22 Wall. 406 (22: 879); Maryland Act of May 3, 1853; *U. S.* v. *Great Falls Mfg. Co.* 21 Md. 119; *Riddall* v. *Bryan*, 14 Md. 444.

It does not provide for a constitutional and impartial tribunal to assess the damages.

Rhine v. *McKinney*, 53 Tex. 362; Cooley, Const. Lim. 656; *Great Laxey Min. Co.* v. *Clagus*, L. R. 4 App. Cas. 115.

When a prospective loss may be the subject of a fresh action when it occurs, it cannot be allowed for beforehand, and *vice versa*.

Nicklin v. *Williams*, 10 Exch. 259; affirmed in this respect per *Lord* Westbury, in *Backhouse* v. *Bonomi*, 9 H. L. Cas. 512; per Willes, J., in *Bonomi* v. *Backhouse*, El. Bl. & El. 658; *Hamer* v. *Knowles*, 6 Hurl. & N. 454; *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389; *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 407 (25: 208).

Assessments of compensation for private property taken by the United States for public use must be by jury.

Osborn v. *U. S. Bank*, 22 U. S. 9 Wheat. 788 (6:204); *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264 (5:257); *Ex parte Milligan*, 71 U. S. 4 Wall. 131 (18:299); *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 420 (9:773); *Clark* v. *Utica*, 18 Barb. 451; *Day* v. *Stetson*, 8 Me. 365; *Isom* v. *Mississippi Cent. R. R. Co.* 36 Miss. 300; *Mitchell* v. *Illinois & St. L. R. R. & Coal Co.* 68 Ill. 286; *Chicago & M. L. S. R. R. Co.* v. *Sanford*, 23 Mich. 418; *Whitehead* v. *Arkansas Cent. R. R. Co.* 28 Ark. 460; *Burt* v. *Merchants Ins. Co.* 106 Mass. 356; *U. S.* v. *Jones*, 109 U. S. 518 (27:1015).

The common-law writ of *ad quod damnum* always lies upon a grant of liberties made by the King.

2 Viner's Abr. 126; Fitzherbert's Natura Brevium, 221–225; *Rex* v. *Flecknow*, 1 Burr. 465; *Ex parte Vennor*, 3 Atk. 766.

The Act does not provide, nor is there any other provision of law by which the compensation for the property taken shall be paid, or any fund from which it shall be paid, save such as may hereafter be voted by the Legislature and approved by the accounting officers of the treasury.

2 Kent, Com. 12th ed. 339, note *f*; *Bloodgood* v. *Mohawk & H. R. R. R. Co.* 18 Wend. 9; *Callison* v. *Hedrick*, 15 Gratt. 244; *People* v. *Mich. Southern R. Co.* 3 Mich. 496; *Jackson* v. *Winn*, 4 Litt. (Ky.) 328; *Charlestown Branch R. Co.* v. *Middlesex Co.* 7 Met. 78; *Ash* v. *Cummings*, 50 N. H. 591; *White* v. *Nashville & N. W. R. Co.* 7 Heisk. 518; *Simms* v. *Memphis, C. & L. R. Co.* 12 Heisk. 621; *Brock* v. *Hishen*, 40 Wis. 674; *State* v. *Messenger*, 27 Minn. 119; *Lowerre* v. *Newark*, 38 N. J. L. 151; *Long* v. *Fuller*, 68 Pa. 170; *People* v. *Hayden*, 6 Hill, 359; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162–168; *Southwestern R. Co.* v. *Southern & A. Tel. Co.* 46 Ga. 43; *Ligat* v. *Com.* 19 Pa. 460; *Penrice* v. *Wallis*, 37 Miss. 183; *Brown* v. *Beatty*, 34 Miss. 227: *Isom* v. *Miss. Cent. R. R. Co.* 36 Miss. 300; *Talbot* v. *Hudson*, 16 Gray, 417; *Orr* v. *Quimby*, 54 N. H. 590; 6 Works of John Adams, 9; *Conn. River R. Co.* v. *Franklin Co.* 127 Mass. 52.

Payment need not precede the seizure; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay.

Haverhill Bridge v. *Essex Co.* 103 Mass. 120–124.

When the Government exercises the power of eminent domain, every step by which the taking is to be done must be strictly followed.

Kelley v. *Horton*, 2 Cow. 424; *Carpenter* v. *Grisham*, 59 Mo. 247; *McCord* v. *High*, 24 Iowa, 336; *Beckwith* v. *Beckwith*, 22 Ohio St. 180; *Newell* v. *Wheeler*, 48 N. Y. 486; *Stockett* v. *Nicholson*, Walk. (Miss.) 75; *Jefferson City* v. *Delachaise*, 22 La. Ann. 26; *N. O.* v. *Sohr*, 16 La. Ann. 393; *Dyckman* v. *N. Y.* 5 N. Y. 434; *Burt* v. *Brigham*, 117 Mass. 307; *Reitenbaugh* v. *Chester Valley R. Co.* 21 Pa. 100; *U. S.* v. *Reed*, 56 Mo. 565; *Currier* v. *Marietta & C. R. Co.* 11 Ohio St. 228.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for appellees:

Where the complainant has a plain, adequate and complete remedy at law, there is no jurisdiction in equity.

Rev. Stat. § 723; *Thompson* v. *Central Ohio R. R. Co.* 73 U. S. 6 Wall. 137 (18:767); *Dade* v. *Irwin*, 43 U. S. 2 How. 383 (11:308); *Parker* v. *Winnipiseogee Lake Cotton & W. Mfg. Co.* 67 U. S. 2 Black, 545 (17:333).

Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive.

Arnson v. *Murphy*, 109 U. S. 243 (27:922).

When the Government consents to be sued, the power may be subject, as a condition of the grant, to limitation as to the tribunal and the terms and manner in which it shall be conducted.

McElrath v. *U. S.* 102 U. S. 440 (26:192).

When the property is taken directly by the State, or by any municipal corporation by state authority, it is not essential to the validity of the law for the exercise of the right of eminent domain that it should provide for making compensation before the actual appropriation.

Cooley, Const. Lim. § 560; Mills, Eminent Domain, § 126; Potter's Dwarris, Stat. 391; *Secombe* v. *Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 118 (23:69).

The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government.

U. S. v. *Jones*, 109 U. S. 518 (27:1017); *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403 (25:206); *Kohl* v. *U. S.* 91 U. S. 375 (23:452).

Mr. Justice **Harlan** delivered the opinion of the court:

The bill alleges that the land and water rights described in the published notice of the Attorney-General are substantially those which would have been taken if the United States had adopted and executed Plan A, as described in

the report of the arbitrators in 1868. In respect to that plan, the arbitrators decided that if it were adopted and executed the plaintiff would be entitled to receive $68,766, and, in addition, to retain the right of using the remainder of the water, by means of proper canal and bulkhead appliances on the Virginia shore of the river. While the Company contends that its enjoyment of the right so reserved cannot lawfully be interfered with, it is not clear that it means to insist upon the award of 1868, in respect to said amount, as absolutely binding upon the United States in proceedings had under the Act of 1882. It will be remembered that the award of 1868 covered four alternative plans for the Potomac dam of the Washington Aqueduct. The United States adopted and executed only Plan 4, and thereby manifested its purpose not to adopt and execute Plan A. Neither the Government nor the Company is bound by that award, so far as it relates to plans which the United States did not adopt and execute. The present inquiry in respect to lands or water rights taken from the plaintiff must therefore be conducted with reference to their value,—not in 1868, when the Government declined to take them, but in 1883, at the time of their being condemned for public use under the Act of 1882. It is, consequently, an immaterial circumstance that the award of 1868 reserved to the Company, as against the United States, the right to maintain a canal and bulkhead across and upon the land of the United States, on the Virginia shore of the Potomac. No such reservation is made by the Act of 1882, and the officers charged with its execution were not required to concede any such right, though, of course, the United States are bound to make just compensation to the Company for property rights of whatever description taken from it for, and appropriated to, public use.

Much stress seems to be laid upon the allegation in the bill—which the appellant insists must be taken as true—that the Secretary of War, by his servants and agents, took possession of lands of the plaintiff, which are "not within any description made, surveyed, or traced" by him, and has used the same for the purpose of constructing the proposed dam across Conn's Island and to the Virginia shore. As the Act of Congress provided that the Secretary of War, upon the publication by the Attorney-General of the required notice, "may take possession of the premises embraced in the survey and map," it is contended that his possession of the Company's land and water rights is without authority of law, and constitutes a mere trespass; in which case, it is argued, the United States are not legally bound to make compensation to the plaintiff. It is clear that the allegation that the lands taken for the purposes of the dam in question are not embraced by the survey, is not to be literally construed. The plaintiff surely does not mean that all the lands taken by the secretary are outside of the survey made under his order; but, only that such lands are not entirely within its limits, and that the survey was not sufficiently accurate "to be the foundation of passing the title to the land and water rights" of the complainant "necessary to be taken for the purposes of said Act." The plaintiff admits that a survey was in fact made, and that the Attorney-General published a notice based upon it. And there is no suggestion that the Secretary has taken any land other than that intended to be embraced within the survey, of which the Attorney-General gave notice by publication. Taking all the allegations of the bill together, we understand the complaint only to be that the survey and notice were not such as in law justified the Secretary of War in taking possession of the lands upon which the proposed dam was being constructed when the suit was brought. But even if it be true that some part of the land actually occupied by the Government is not within the survey and map, still the United States are under an obligation imposed by the Constitution to make just compensation for all that has been in fact taken and is retained for the proposed dam. While Congress supposed that a survey and map could be made with such accuracy as to embrace all the land necessary, under any circumstances, for the purposes indicated in the Act of 1882, and while provision is made whereby the owners of lands, covered by such survey and map, can obtain just compensation, the Act also opens the court of claims to every person who, by the construction of the works in question, has been injured in any property right, provided that, within a given time, such person file his petition in that court, setting forth his right or title and the amount claimed by him as damages. So that if the Secretary of War, who was invested with large discretion in determining what land was actually required to accomplish in the best manner the object Congress had in view, found it necessary to take, and has taken and used, and still holds lands of the plaintiff for the proposed dam, which happen not to be covered by the survey and map, the United States are as much bound to make just compensation therefor as if such lands had been actually embraced in that survey and map. Of course, we are not to be understood as saying that the Secretary of War could, by any act of his, bind the United States to pay for lands taken by him which, manifestly, had no substantial connection with the construction of the dam across Conn's Island to the Virginia shore. It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the Act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the Act of Congress, whether it is embraced or described in said survey or map, or not. *U. S.* v. *Great Falls Mfg. Co.* 112 U. S. 645, 656 [28: 846, 850].

In reference to the allegation that the survey and map made by the secretary were not sufficiently accurate, and that the notice published by the Attorney-General was materially defective, it may be further said that all such objections were waived by the Company when, proceeding under the Act of 1882, it invoked the jurisdiction of the court of claims to give judgment against the United States for such compensation as it was entitled to receive for its

land and water rights. Even if the secretary's survey and map, and the publication of the Attorney-General's notice, did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the Company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes indicated in the Act under which its officers have proceeded.

It is, however, contended that the Act is, in all of its parts, unconstitutional and void. The grounds upon which the plaintiff rests this contention are: that the Act makes no provision by which compensation for property taken under it can be constitutionally adjusted and determined; that it does not provide for the ascertainment of such compensation by the verdict of a jury; that it compels the plaintiff to have recourse to the court of claims, which is a court unknown to the Constitution, being neither a court of equity, such as was known at the adoption of that instrument, nor a court of law proceeding according to the rules of the common law, but only a board of referees, constituted by one party to hear such cases as another party will consent to submit to its determination, and without power to enforce its judgment against the party by whom it is created; and that it directs property to be taken and the owner thereof dispossessed, without making provision for just compensation.

These are questions of much interest, and their examination, in the light of the authorities, might not be altogether unprofitable. But this opinion need not be extended for the purpose of such an examination; for the questions propounded are not material in the determination of the present case. They have become immaterial by the act of the plaintiff in instituting suit against the United States in the court of claims. In that suit compensation was sought for its property taken for public use, while the present suit proceeds upon the ground that it has not been lawfully taken, and that it is entitled to be placed in possession thereof. Congress prescribed a particular mode for ascertaining the compensation which claimants of property, taken for the purposes indicated in the Act of 1882, were entitled to receive. It gave them liberty to proceed by suit against the United States before a designated tribunal, which, since the passage of the Act of March 17, 1866, 14 Stat. at L. 9, has exercised "all the functions of a court," from whose judgment appeals regularly lie to this court. *U. S.* v. *Klein*, 80 U. S. 13 Wall. 145 [20:525]; *U. S.* v. *Jones*, 119 U. S. 477 [30:440]; *Gordon* v. *U. S.* 69 U. S. 2 Wall. 561 [17:921]. The plaintiff, by adopting that mode, has assented to the taking of its property by the Government for public use, and has agreed to submit the determination of the question of compensation to the tribunal named by Congress. By the very act of suing in the court of claims, under the Statute of 1882, it has not only waived the right, if such right it had, to compensation in advance of the taking of its property, but the right, if such it had, to demand that the amount of compensation be determined by a jury. By the same act it has estopped itself from suggesting that no judgment obtained in the court of claims can be enforced against the United States, but must wait an appropriation for its payment. When it resorted to that court, it knew that its judgments against the United States could only be paid out of money appropriated for that purpose by Congress. In short, the plaintiff has voluntarily accepted the provisions of the Act of Congress in respect to the mode of ascertaining the compensation to be made to it. This view cannot work any permanent injury to the plaintiff; for that Act expressly declares that the absolute title to the premises in question shall not vest in the United States until the owner receives payment therefor; that is, the Government holds the premises for public use, subject to the condition imposed by the Constitution and by the Act of Congress, that it will, without unreasonable delay, make such compensation therefor as may be awarded by the tribunal to which the whole subject has been submitted. It is to be assumed that the United States is incapable of bad faith, and that Congress will promptly make the necessary appropriation, whenever the amount of compensation has been ascertained in the mode prescribed by the Act of 1882.

It is scarcely necessary to say that it is immaterial that the plaintiff invoked the jurisdiction of the court of claims from fear that, if it did not file its petition in that court within the time limited, it might lose the right to demand compensation for its property. If the act of the Secretary of War in taking possession of the property was in violation of law, neither he nor his agents could rightfully hold possession against the plaintiff; in which case the plaintiff might have stood upon its rights, under the Constitution, and invoked judicial authority for such protection as the law would afford against the unauthorized acts of public officers. But the plaintiff chose to acquiesce in the taking of its property for public use, and to accept the offer of the Government to have the amount of compensation fixed by the court of claims, according to its peculiar modes of procedure. The reasons inducing the plaintiff to adopt such a course can have no influence upon the action of that court, nor affect its power to ascertain and award just compensation for the loss of the property.

Upon the case as presented to us, and without intending to express doubt as to the constitutionality of the Act of July 15, 1882, we are of the opinion that there is no obstacle in the way of the plaintiff's securing by means of its suit in the court of claims, and without unreasonable delay, just compensation for all of its property taken for the public use indicated in the Act of Congress; and, consequently, the decree dismissing its bill is *affirmed*.

PIERRE FAYOLLE ET AL., *Appts.*,
v.
TEXAS PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 519-523.)

Practice on failure to docket case.

Where the appellant failed to docket the case at the return term, and the excuse for such failure is not sufficient, and the transcript of the record was

not lodged in the office of the clerk of this court until after the return term of the appeal, and no attempt was made to get it upon the docket until another term had passed and still another had begun, *held*, that the appeal be dismissed.

[No. 890.]

Submitted Jan. 30, 1888. Decided Feb. 6, 1888.

APPEAL from the Supreme Court of the District of Columbia. On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

Messrs. **W. D. Davidge** and **William H. Trescott**, for appellee, in support of motion:

The record was filed and the cause docketed in this court more than three years after the appeal was allowed. The appeal then became *functus officio* and of no avail.

Caillot v. *Deetken*, 118 U. S. 215 (28:983); *Edmonson* v. *Bloomshire*, 74 U. S. 7 Wall. 306 (19: 91); *The Virginia* v. *West*, 60 U. S. 19 How. 182 (15: 594); *Mesa* v. *U. S.* 67 U. S. 2 Black, 721 (17: 350); *Castro* v. *U. S.* 70 U. S. 3 Wall. 46 (18: 163).

Except in cases of appeals allowed in open court, a citation, returnable at the same term with the appeal or writ of error, is necessary to perfect jurisdiction.

Hewitt v. *Filbert*, 116 U. S. 142 (29: 582); *Chicago & P. R. Co.* v. *Blair*, 100 U. S. 662 (25: 587); *Dodge* v. *Knowles*, 114 U. S. 486 (29: 296).

If this court did not acquire jurisdiction of the cause, at its next term, a citation was necessary as matter of jurisdiction.

Hewitt v. *Filbert*, 116 U. S. 142 (29: 581); *Dodge* v. *Knowles*, 114 U. S. 438 (29: 297); *Grigsby* v. *Purcell*, 99 U. S. 505 (25: 354).

Mr. **Wm. D. Shipman**, for appellants, in opposition:

As the appeal was prayed out in open court, and allowed, bond filed, the transcript of the record completed and left with the clerk below, in time to send it up, his omission to do so ought not to be charged to the appellants as laches. This is not a mere question of jurisdiction.

Grigsby v. *Purcell*, 99 U. S. 505 (25: 354).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is granted. The decree was rendered November 12, 1883. An appeal was taken at the same time in open court returnable to our October Term, 1884, which ended May 4, 1885, but it was not docketed here until January 17, 1886. That was too late, as the appeal had become inoperative through the failure of the appellants to docket the case here at the return term. *Grigsby* v. *Purcell*, 99 U. S. 505 [25: 354], and cases there cited; *Killian* v. *Clark*, 111 U. S. 784 [28: 599]; *Caillot* v. *Deetken*, 118 U. S. 215 [28: 983]. The excuse presented for the failure to docket in time is not sufficient to give the appellants the benefit of any exception to this rule which was recognized in *Grigsby* v. *Purcell*, p. 507 [355]. Neither does the case come within that of *Edwards* v. *United States*, 102 U. S. 575 [26: 293], because the transcript of the record was not lodged in the office of the clerk of this court until after the return term of the appeal, and no attempt was made to get it upon the docket until another term had passed and still another had begun.

Dismissed.

UNITED STATES, *Plf.*,
v.
DOUGLAS SMITH.

(See S. C. Reporter's ed. 525–533.)

Collector's clerk, not an officer of the United States.

1. A clerk of a collector of customs is not an officer of the United States within section 3639 of the Revised Statutes; and that section does not apply to such a clerk.

2. Such clerks are not appointed by the head of a department, within the meaning of the constitutional provision in regard to appointing officers of the United States.

[No. 927.]

Argued, Jan. 16, 1888. Decided, Feb. 6, 1888.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York, in regard to the sufficiency of an indictment under section 5490 of the Revised Statutes for an unlawful conversion of public money.

Statement by *Mr. Justice* **Field**:

This case comes from the Circuit Court for the Southern District of New York, on a certificate of division of opinion between its judges. The defendant was a clerk in the office of the collector of customs for the collection district of the City of New York, and in 1886 was indicted for the unlawful conversion to his own use of public money, an offense designated in the Revised Statutes as embezzlement of such money. The indictment contains seventy-five counts, each charging the defendant with a separate act of embezzlement. The counts were all in the same form, and the objections to one are equally applicable to the whole of them. The first one is as follows:

"The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present that Douglas Smith, late of the City and County of New York, in the district and circuit aforesaid, heretofore, to wit, on the eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-three, at the Southern District of New York, and within the jurisdiction of this court, he, the said Douglas Smith, being then and there a person charged by an Act of Congress with the safe keeping of the public moneys, to wit, a clerk in the office of the collector of customs for the collection district of the City of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury, and having then and there in his custody a large sum of public money, to wit, the sum of ten and $\frac{12}{100}$ dollars, did unlawfully fail to keep the same, but the same did unlawfully convert to his own use, against the peace of the United States, and their dignity, and contrary to the statute of the United States in such cases made and provided."

The indictment is founded on section 5490 of the Revised Statutes, which is as follows:

"Every officer or other person charged by any Act of Congress with the safe keeping of the public moneys, who fails to safely keep the same, without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed

by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged; and shall be imprisoned not less than six months nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

The law providing for the safe keeping of the public moneys is found in section 3639 of the Revised Statutes, which is as follows:

"The Treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurer, all collectors of the customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land offices, all postmasters, and all public officers of whatsoever character, are required to keep safely without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the Government, to be transferred or paid out; and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the Government which may be imposed by any law, or by any regulation of the Treasury Department made in conformity to law. The President is authorized, if in his opinion the interest of the United States requires the same, to regulate and increase the sums for which bonds are, or may be, required by law, of all district attorneys, collectors of customs, naval officers, and surveyors of customs, navy agents, receivers and registers of public lands, paymasters in the army, commissary-general and by all other officers employed in the disbursement of the public moneys, under the direction of the War or Navy Departments."

The law providing for the employment of clerks by collectors of customs is found in section 2634 of the Revised Statutes, which is as follows:

"The Secretary of the Treasury may, from time to time, except in cases otherwise provided, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy of any such collector, naval officer, or surveyor."

To the indictment the defendant filed a demurrer, and upon its hearing the following questions occurred, upon which the judges were divided in opinion:

"1. Does the indictment sufficiently charge an offense under section 5490, Revised Statutes?

"2. Is a clerk in the office of the collector of customs for the collection district of the City of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury, by virtue of section 2634 of the Revised Statutes, a person charged by any Act of Congress with the safe keeping of public moneys?

"3. Was the defendant appointed by the head of a department, within the meaning of the constitutional provisions (art. II, § 2) upon the subject of the appointing power?"

Thereupon, on the request of the district attorney, the questions were certified to this court, with a copy of the indictment and an abstract of the record, for final decision.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff:

The first question, "Does the indictment sufficiently charge an offense under section 5490, Revised Statutes," submits the whole case to this court on the demurrer, and is too vague and general within the Act of Congress authorizing certificates of this character.

U. S. v. *Northway*, 120 U. S. 329 (30: 664); *U. S.* v. *Bailey*, 34 U. S. 9 Pet. 269 (9: 125); *U. S.* v. *Briggs*, 46 U. S. 5 How. 208 (12: 119).

A clerk of the collector of customs is a person charged by Act of Congress with the safe keeping of public moneys.

U. S. v. *Hartwell*, 73 U. S. 6 Wall. 385 (18: 880).

The defendant was appointed by the head of a department.

U. S. v. *Hartwell*, *supra*; *U. S.* v. *Germaine*, 99 U. S. 511 (25: 483); *U. S.* v. *Barton*, Gilpin, 446; *U. S.* v. *Sears*, 1 Gall. 222; *U. S.* v. *Bloomgart*, 2 Ben. 356; *Platt* v. *Beach*, 2 Ben. 316; 13 Ops. Attys-Gen. 521.

Mr. **Elihu Root,** for defendant:

The defendant is not an officer.

Clause 2, § 2, art. II of the Constitution; *U. S.* v. *Maurice*, 2 Brock. 100; *U. S.* v. *Germaine*, 99 U. S. 508 (25: 482).

The fact averred in the indictment, that the Secretary of the Treasury approved the employment of this defendant, is immaterial.

Browne v. *U. S.* 1 Curt. 20; *Wright's Case*, 13 Ops. Attys-Gen. 588.

The decision in *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385 (18: 880) does not control this case.

U. S. v. *Hutchinson*, 7 Pa. L. J. 365.

Mr. Justice **Field** delivered the opinion of the court:

The indictment in this case is in form sufficiently full and specific in its averments to embrace the offense prescribed by the statute, and yet the defendant charged is not within its provisions. He is designated as a clerk in the office of the collector of customs, and is thus shown not to be charged by an Act of Congress with the safe keeping of the public moneys, contrary to the averments of the indictment. The Courts of the United States are presumed to know the general statutes of Congress; and any averment in an indictment inconsistent with a provision of a statute of that character must necessarily fail, the statute negativing the averment. No clerk of a collector of customs is, by section 3639 of the Revised Statutes, charged with the safe keeping of the public moneys. That section requires the Treasurer of the United States, assistant treasurers, and those performing the duties of assistant treasurer, collectors of customs, surveyors of customs, acting also as collectors, receivers of public moneys at the several land offices, postmasters, and all public officers of whatsoever character, to keep safely all public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered by the proper department or officer of the Government to be transferred or paid out.

They are also required to perform all other duties as fiscal agents of the Government which may be imposed by law, or by any regulation of the Treasury Department made in conformity to law. A clerk of the collector is not an officer of the United States within the provisions of this section; and it is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States* v. *Germaine*, 99 U. S. 508 [25: 482], and in the recent case of *United States* v. *Mouat*, 124 U. S. 303 [*ante*, 468]. What we have here said is but a repetition of what was there authoritatively declared.

The number of clerks the collector may employ may be limited by the Secretary of the Treasury; but their appointment is not made by the Secretary, nor is his approval thereof required. The duties they perform are as varied as the infinite details of the business of the collector's office, each taking upon himself such as are assigned to him by the collector. The officers specifically designated in section 3639 are all charged by some Act of Congress with duties connected with the collection, disbursement or keeping of the public moneys, or to perform other duties as fiscal agents of the Government. A clerk of a collector, holding his position at the will of the latter, discharging only such duties as may be assigned to him by that officer, comes neither within the letter nor the purview of the statute; and we are referred to no other Act of Congress bearing on the subject, making a clerk of a collector a fiscal agent of the Government or bringing him within the class of persons charged with the safe keeping of any public moneys.

The case of *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385 [18: 830], does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston; but his appointment by that officer under the Act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department within the constitutional provision upon the subject of the appointing power. The necessity of the Secretary's approbation to the appointment distinguishes that case essentially from the one at the bar. The secretary, as already said, is not invested with the selection of the clerks of the collector; nor is their selection in any way dependent upon his approbation. It is true the indictment alleges that the appointment of the defendant as clerk was made with such approbation, but as no law required this approbation the averment cannot exert any influence on the mind of the court in the disposition of the questions presented. The fact averred, if it existed, could not add to the character, or powers, or dignity of the clerk. The Constitution, after providing that the President shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not otherwise provided for, which should be established by law, declares that "The Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." There must be, therefore, a law authorizing the head of a department to appoint clerks of the collector before his approbation of their appointment can be required. No such law is in existence.

Our conclusion, therefore, is that section 3639 of the Revised Statutes does not apply to clerks of the collector, and that such clerks are not appointed by the head of any department within the meaning of the constitutional provision.

It follows that our answers to the second and third questions certified to us must be in the negative. An answer to the first question is therefore immaterial.

LAURA E. FRENCH, *Plf. in Err.*,
v.
MOSES HOPKINS ET AL.

(See S. C. Reporter's ed. 524, 525.)

Jurisdiction over state decision—federal question—citizenship of parties.

1. Where the record fails to show that any right, title, privilege or immunity, under the Constitution or laws of the United States, was set up or claimed in the state court, this court has no jurisdiction.
2. A decision of the state court affirming a sale of mortgaged property as a whole and in one parcel, under a decree of foreclosure, when it was capable of division into parts, involves no question of federal law.
3. The jurisdiction of this court, under section 709 of the Revised Statutes, for the review of a decision of a state court, is not dependent on the citizenship of the parties, but on the questions involved.

[No. 1106.]

Submitted Jan. 30, 1888. Decided Feb. 6, 1888.

IN ERROR to the Supreme Court of the State of California. On motion to dismiss. *Dismissed.*

The facts are stated by the court.

Mr. **Wm. M. Stewart**, for defendants in error, in support of motion:

The error complained of consists in the provision in the judgment of foreclosure directing the mortgaged premises to be sold in one parcel. The plaintiff in error does not claim any right, title, privilege or immunity under the Constitution of the United States.

Miss. & M. R. Co. v. *Rock*, 71 U. S. 4 Wall. 177 (18:881).

Messrs. **J. W. Douglass** and **C. M. Jennings**, for plaintiff in error, in opposition:

It is not necessary to confer jurisdiction here that the record show *in ipissimis verbis* that a federal question was presented, or that the particular clause in the National Constitution alleged to be violated should be set out or referred to in the pleadings.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 590

(22:429); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 (19:370); *Murray* v. *Charleston*, 96 U. S. 432 (24:760).

It is enough if the record involves a substantial controversy on this point.

Arrowsmith v. *Harmoning*, 118 U. S. 194 (30: 248); *Northwestern University* v. *People*, 99 U. S. 309 (25:387); *Chenango Bridge Co.* v. *Binghamton Bridge Co.* 70 U. S. 3 Wall. 51 (18:137); *Starin* v. *Mayor of N. Y.* 115 U. S. 257 (29:390); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 (28: 1084); *Southern Pac. R. R. Co.* v. *California*, 118 U. S. 109 (30:103).

Under section 580 of the Code of Civil Procedure of the State of California the court may grant any relief consistent with the case made by the complaint and embraced within the issue.

Raun v. *Reynolds*, 11 Cal. 19; *Reynolds* v. *Harris*, 14 Cal. 678, 679; *Gage* v. *Rogers*, 20 Cal. 91; *Lamping* v. *Hyatt*, 27 Cal. 102; *Gautier* v. *English*, 29 Cal. 165; *Parrott* v. *Den*, 34 Cal. 79; *Lothian* v. *Wood*, 55 Cal. 159; *Simonson* v. *Blake*, 12 Abb. Pr. 331; *Ames* v. *Lockwood*, 18 How. Pr. 555; *Mevey's Appeal*, 4 Pa. 83; *Wolcott* v. *Schenck*, 28 How. Pr. 385.

A motion to set aside was proper process to cure any irregularities of sale.

San Francisco v. *Pixley*, 21 Cal. 57; *Boles* v. *Johnston*, 28 Cal. 226; *Vigoureux* v. *Murphy*, 54 Cal. 346; *Browne* v. *Ferrea*, 51 Cal. 552.

Held to apply to sales under decree of foreclosure.

Kent v. *Laffan*, 2 Cal. 596, 597; *Harlan* v. *Smith*, 6 Cal. 173; *Gross* v. *Fowler*, 21 Cal. 396; *Stout* v. *Macy*, 22 Cal. 647.

The affirmance of sale, as made *en masse*, was a denial of the due process of law, and equal protection of the law, secured by section 1, art. 14, Amendments to Federal Constitution.

San Bernardino Co. v. *Southern Pac. R. Co.* 118 U. S. 422 (30:127); *Barbier* v. *Connolly*, 113 U. S. 27 (28:923).

The judicial interpretation of a law is as much a part of a law as if written therein.

Lehigh Water Co. v. *Easton*, 121 U. S. 388 (30:1059); *Walker* v. *Whitehead*, 83 U. S. 16 Wall. 314–317 (21:357); *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311–317 (11:143–145); *McCracken* v. *Hayward*, 43 U. S. 2 How. 608–612 (11:397–399); *Antoni* v. *Greenhow*, 107 U. S. 769–774 (27:468–471).

The sale was not in strict pursuance of the judgment.

Section 694, Code of Civil Procedure; *Onesti* v. *Freelon*, 61 Cal. 625; *Altschul* v. *Doyle*, 48 Cal. 585; *Hubbard* v. *Sullivan*, 18 Cal. 525; *Clarke* v. *Huber*, 25 Cal. 593.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is granted. The record fails to show, either expressly or by implication, that any right, title, privilege, or immunity, under the Constitution or laws of the United States, was specially set up or claimed in either of the courts below. This is fatal to our jurisdiction. *Spies* v. *Illinois*, 123 U. S. 131, 181 [*ante*, 80, 90]. The only question below was whether a sale of mortgaged property under a decree of foreclosure should be set aside because the property had been sold as a whole and in one parcel, when it was capable of division into parts. The court of original jurisdiction set aside the sale, but the supreme court, on appeal, confirmed it, and gave judgment accordingly. In doing this, it was held to be "within the jurisdiction of the court by its judgment to direct that the property should be sold in one or several parcels," and that there was nothing in the statutes of the State to the contrary of this. That was the only decision in the case, and it certainly involved no question of federal law.

Counsel are in error in supposing that our jurisdiction, under section 709 of the Revised Statutes, for the review of a decision of the highest court of a State, is dependent at all on the citizenship of the parties. In such cases we look only to the questions involved.

Dismissed.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Appt.*,

v.

TOWN OF MIDDLEPORT.

(See S. C. Reporter's ed. 534–551.)

Town bonds—when payment of appropriation—subrogation.

The Town of Middleport having, in pursuance of a Statute of Illinois, voted an appropriation to the Chicago, Danville and Vincennes Railroad Company, to be raised by a tax on the property of the inhabitants of the Town, issued bonds, payable with interest to bearer, for a sum large enough to include interest and the discount for which they could be sold, and delivered them to the railroad company, and they were accepted by that company, and sold and delivered to plaintiff. *Held:*

1. That the purchase of these bonds by plaintiff was no payment of the appropriation voted by the Town to the railroad company;

2. That, the bonds having been held to be void in a suit between the plaintiff and the Town, this did not operate as a subrogation of the plaintiff to the right of the company, if any such existed, to enforce the collection of the appropriation voted by the Town;

3. The doctrine of subrogation in equity requires (1) that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another.

[No. 1184.]

Submitted Jan. 4, 1888. Decided Feb. 6, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing on demurrer the bill of the Ætna Life Insurance Company, to enforce the collection of a demand against the Town of Middleport. *Affirmed.*

The facts are stated in the opinion.

***Messrs.* Francis Fellowes, J. H. Sedgwick and O. J. Bailey,** for appellant:

These contracts granting aid were completed, as binding obligations on the towns in favor of the railroad company, at the polls.

Chiniquy v. *People*, 78 Ill. 576; *Chicago & I. R. Co.* v. *Pinckney*, 74 Ill. 277; *Fairfield* v. *Gallatin Co.* 140 U. S. 47 (25:544).

The last case overrules *Concord* v. *Portsmouth*

Savings Bank, 92 U. S. 625 (23:628); *Concord* v. *Robinson*, 121 U. S. 171 (30:888).

The issuing of void bonds by the officers of the Town to represent or fund these contracts, and the acceptance of such bonds by the railroad company, and its negotiation of them to holders for value, did not extinguish these valid obligations of the towns.

Marsh v. *Fulton Co.* 77 U. S. 10 Wall. 676 (19:1040); *Louisiana City* v. *Wood*, 102 U. S. 293 (26:155); *Paul* v. *Kenosha*, 22 Wis. 256; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Nelson* v. *Mayor of N. Y.* 63 N. Y. 544; *Mayor* v. *Mayor of N. Y.* 63 N. Y. 455; *Anthony* v. *Jasper Co.* 101 U. S. 693 (25:1005).

The railroad company holds them as trustee for our benefit.

Wood v. *Louisiana City*, 5 Dill. 124; *Louisiana City* v. *Wood*, *supra*.

A purchaser will be subrogated to all the rights of his vendor.

Sheldon, Subrogation, § 34.

The equitable assignee of a chose in action has the right to decree of specific performance of the contract.

Mechanics Bank of Alexandria v. *Seton*, 26 U. S. 1 Pet. 299 (7:152); Adams, Eq. 80, 5th Am. ed. 189; *Fortescue* v. *Barnett*, 3 Myl. & K. 36; *Ex parte Pye*, 18 Ves. Jr. 140; 3 Pars. Cont. 5th ed. 876; 2 Story, Eq. Jur. § 724; *Meyer* v. *Mintonye*, 106 Ill. 414; 1 Story, Eq. Pl. §§ 635–637; *Springer* v. *Springer*, 43 Pa. 518; *Mosier's Appeal*, 56 Pa. 76; *Eaton* v. *Hasty*, 6 Neb. 419; 3 Pomeroy, Eq. § 1419; note 1; *Payne* v. *Hook*, 74 U. S. 7 Wall. 425 (19:260).

The equity of subrogation arises where plaintiff's right rests not upon contract, but upon a state of facts which give it. In such cases the proper remedy is not at law but in equity.

Mosier's Appeal, and *Eaton* v. *Hasty*, *supra*; *Goldmith* v. *Stewart*, 45 Ark. 154; *McHany* v. *Schenk*, 88 Ill. 357; *Morgan* v. *Hammett*, 28 Wis. 30; *Talbott* v. *Wilkins*, 31 Ark. 421.

That we are chargeable with notice of the invalidity of the bonds does not affect our rights to subrogation.

Anthony v. *Jasper Co.* 101 U. S. 697 (25:1008); *Gause* v. *Clarksville*, 5 Dill. 180; *Wood* v. *Louisiana City*, 5 Dill. 124; *Shirk* v. *Pulaski Co.* 4 Dill. 214; *Newton School Dist.* v. *Lombard*, 2 Dill. 493.

We had the right to assume that all facts necessary to give the supervisors authority to issue the bond had been complied with.

Pompton v. *Cooper Union*, 101 U. S. 196 (25:803).

We are not barred from our equity because we did not set it up in the former case.

Anthony v. *Jasper Co.* *supra*; *Block* v. *Bourbon Co.* 99 U. S. 693 (25:493); *Cromwell* v. *Sac Co.* 94 U. S. 353 (24:198); *Davis* v. *Brown*, 94 U. S. 428 (24:206).

Mere delay alone, short of the period fixed as a bar by the Statute of Limitations, will not preclude the assertion of an equitable right.

Gibbons v. *Hoag*, 95 Ill. 69; *Thompson* v. *Scott*, 1 Bradw. 641; *Hubbard* v. *U. S. Mortgage Co.* 14 Bradw. 40; *U. S.* v. *Alexandria*, 19 Fed. Rep. 609; *S. C.* 4 Hughes, 545.

The question of limitation must be decided upon the law in force at the time when the contract was made.

Means v. *Harrison*, 114 Ill. 248; *McMillan* v. *McCormick*, 4 West. Rep. 210, 117 Ill. 79.

The vote of the town makes the binding contract.

Chiniquy v. *People*, 78 Ill. 576; *Chicago & I. R. R. Co.* v. *Pinckney*, 74 Ill. 277; *Concord* v. *Robinson*, 121 U. S. 171 (30:888); *Fairfield* v. *Gallatin Co.* 100 U. S. 47 (25:544.)

The records of a town, required to be kept by its clerk, are evidence.

1 Greenl. Ev. §§ 483, 484; 1 Dill. Mun. Corp. 3d ed. § 305.

The fact that the contract is on its face conditional does not bring it within the five years' section.

Dunning v. *Price*, 56 Ill. 339; *Bullard* v. *Bell*, 1 Mason, 243; Ang. Lim. chap. 10, § 80.

The appropriation of money to encourage a railroad is a town purpose.

Chicago, D. & V. R. Co. v. *Smith*, 62 Ill. 268.

The records constitute a specialty not within the Statute of Limitations.

Pease v. *Howard*, 14 Johns. 479; Ang. Lim. 4th ed. §§ 86, 87; *Bourland* v. *Peoria Co.* 16 Ill. 538.

Mr. **Robert Doyle**, for appellee:

A party buying property, at an execution sale, the title to which fails, is not subrogated to the rights of the judgment creditor.

Childress v. *Allen*, 3 La. 477.

It is only in cases where a party paying stands in the relation of surety, or is compelled to pay in order to protect his own interests, or in virtue of legal process, that equity substitutes him in place of creditor.

Nolte v. *Creditors*, 7 Mart. N. S. 602; *Curtis* v. *Kitchen*, 8 Mart. O. S. 706; *Cox* v. *Baldwin*, 1 La. 401.

In case of an ordinary vendee at a sheriff's sale, there can be no substitution.

Richmond v. *Marston*, 15 Ind. 134; *Peet* v. *Beers*, 4 Ind. 48; *Bardin* v. *Walpole*, 88 Ind. 146; *McClure* v. *Andrews*, 68 Ind. 100; *Bishop* v. *O'Conner*, 69 Ill. 433.

Anyone being under no legal obligation or liability to pay the debt is a stranger and, if he pays the debt, a mere volunteer.

Young v. *Morgan*, 89 Ill. 199; *Beaver* v. *Slanker*, 94 Ill. 175; *Bishop* v. *O'Conner*, 69 Ill. 431; *Shinn* v. *Budd*, 14 N. J. Eq. 236; *Sanford* v. *McLean*, 3 Paige, 122; *Kitchell* v. *Mudgett*, 37 Mich. 85; *Gadsden* v. *Brown*, Speers, Eq. 41; Story, Eq. 477–8, 589 *et seq.*; Sheldon, Subrogation, § 241 and authorities cited; *Otis* v. *Cullum*, 92 U. S. 448 (23:496).

The party attempting to recover being *in pari delicto*, no recovery could be had.

Oneida Bank v. *Ontario Bank*, 21 N. Y. 496; *Tracy* v. *Talmage*, 14 N. Y. 162; *Curtis* v. *Leavitt*, 15 N. Y. 99; *Sacketts Harbor Bank* v. *Codd*, 18 N. Y. 240.

The Statute of Limitations is a good defense.

Votes were mere propositions by the people to railroad companies, to be accepted or not as they saw fit, and not in any sense of the term contracts in writing.

Concord v. *Portsmouth Savings Bank*, 92 U. S. 629 (23:630); *Marsh* v. *Fulton Co.* 77 U. S. 10 Wall. 682 (19:1042); *Concord* v. *Robinson*, 121 U. S. 166 (30:886); *Anthony* v. *Jasper Co.* 101 U. S. 696 (25:1007).

The five years' limitation was applied in:

Oran v. *People*, 19 Bradw. 176; *Eaton* v. *Hennagan*, 17 Bradw. 156; *School Directors Dist. No. 5* v. *School Directors Dist. No. 1*, 105 Ill. 655; *Hancock* v. *Harper*, 86 Ill. 445; *Ramsay* v. *Clinton Co.* 92 Ill. 228.

Appellant has no standing in a court of equity.

Otis v. *Cullum*, *supra*; *Lambert* v. *Heath*, 15 Mees. & W. 486; *Meyer* v. *Mintonye*, 106 Ill. 424; *Holder* v. *Galena*, 19 Bradw. 411; *Sumner* v. *Sleeth*, 87 Ill. 500; *Hayward* v. *Andrews*, 106 U. S. 675, 677 (27:272) and authorities cited; *School Directors Dist. No. 2* v. *School Directors Dist. No. 4*, 16 Bradw. 654.

If there were any facts that show that complainant is not within the statute, they should be set forth particularly in the bill, to show that it is not barred.

Henry Co. v. *Winnebago Swamp Drainage Co.* 52 Ill. 301; *Bell* v. *Johnson*, 111 Ill. 379; *Walker* v. *Ray*, 111 Ill. 320.

Equity is governed by a Statute of Limitations, the same as a court of law.

Godden v. *Kimmell*, 99 U. S. 201 (25:487); *Walker* v. *Ray*, 111 Ill. 322; Story, Eq. Pl. § 756.

The claim is *res judicata*.

Kinney v. *Knoebel*, 51 Ill. 126; *Paul* v. *Kenosha*, 22 Wis. 272; *Newton School Dist.* v. *Lombard*, 2 Dill. 493; *Shirk* v. *Pulaski Co.* 4 Dill. 214; *Gause* v. *Clarksville*, 5 Dill. 180; *Dyer* v. *Hopkins*, 112 Ill. 174; *Kendall* v. *Stokes*, 44 U. S. 8 How. 97 (11:511); *Dunn* v. *Murray*, 9 Barn. & C. 780; *Stockton* v. *Ford*, 59 U. S. 18 How. 420 (15:396); *Cromwell* v. *Sac County*, 94 U. S. 352 (24:197).

The judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.

Davis v. *Brown*, 94 U. S. 428 (24:206); *Campbell* v. *Rankin*, 99 U. S. 263 (25:436); *Stout* v. *Lye*, 103 U. S. 71 (26:430); *Scotland County* v. *Hill*, 112 U. S. 185 (28:693); *Bryan* v. *Kennett*, 113 U. S. 198 (28:914); *Case* v. *Beauregard*, 101 U. S. 692 (25:1005).

Mr. Justice **Miller** delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing on demurrer the bill of the Ætna Life Insurance Company, the present appellant.

The substance of the bill is that the complainant is the owner of fifteen bonds, of $1,000 each, issued by the Township of Middleport, in the State of Illinois, dated February 20, 1871, and delivered to the Chicago, Danville and Vincennes Railroad Company. These bonds were payable to bearer, and were bought of the railroad company by the complainant, who paid value for them.

The bill recites that this railroad company was incorporated in 1865 under the laws of the State of Illinois, with power to construct a railroad from a point in Lawrence County, by way of Danville, to the City of Chicago; that an Act of the Legislature of that State, passed March 7, 1867, authorized cities, towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of said road; and "That said Act authorized all incorporated towns and cities and towns acting under township organization, lying wholly or in part within twenty miles of the east line of the State of Illinois, and also between the City of Chicago and the southern boundary of Lawrence County, in said State, to appropriate such sums of money as they should deem proper to the said Chicago, Danville & Vincennes Railroad Company, to aid it in the construction of its road, to be paid as soon as the track of said road should be laid and constructed through such cities, towns, or townships; *Provided, however*, That a proposition to make such appropriation should first be submitted to a vote of the legal voters of such cities, towns, or townships at a regular, annual or special meeting, of which at least ten days' previous notice should be given; and also provided, that a vote should be taken on such proposition, by ballot, at the usual place of election, and that a majority of the votes cast should be in favor of the proposition; and your orator further avers that said Act authorized and required the authorities of such cities, towns, and townships to levy and collect such taxes and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations so made."

It is then alleged that on the 8th day of June, 1867, after due publication of notice according to law, a meeting of the legal voters of said Town of Middleport was held, at which they cast their votes by ballot upon the proposition to levy and collect a tax of $15,000 upon the taxable property of the inhabitants of the Town to aid in the construction of said railroad, provided Watseka, a city in the County of Iroquois, situated in or near the south line of said Town, should be made a point in said road; that it appeared, on counting the votes, that 338 were in favor of and 68 were against such tax, and that thereupon the proposition was duly declared carried, the proceedings relating to the meeting and vote duly attested by the town clerk and the moderator of the meeting, and by said clerk duly recorded in the town records.

The bill further avers that the railroad company accepted this vote and appropriation of the Township, and, relying upon such vote and the good faith of said Town, accepted the condition of the appropriation, and constructed and completed its track through said Town; that on the 10th day of February, 1871, the board of town auditors adopted a resolution, of which the following is a copy:

"Whereas the Township of Middleport did, on the 8th day of June, 1867, vote aid to the Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, and it appearing that said Township is unable to pay such amount in money:

"Therefore resolved by the board of auditors of said Township that bonds issue to said Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, together with a sufficient amount to cover the discount necessary on said bonds in negotiating the same, to wit, one thousand five hundred dollars, said bonds to be dated February 20, A. D. 1871, and to bear interest at the rate of 10 per cent from date per annum."

In pursuance of this resolution it is alleged that, on the 24th day of March, 1871, the supervisor and town clerk of Middleport executed

the fifteen bonds which are the subject of this suit; that "the said bonds were numbered one to fifteen, inclusive, and were delivered to the said railroad company, upon the fulfillment of the conditions of said vote, in payment of ninety cents on the dollar of the appropriation made to said company by said vote, both parties believing that said bonds were fully authorized by law and were legal, valid, and binding on said Town, and also believing them to be legal evidences of the debt in favor of said company incurred by said Town in voting said appropriation."

It is then alleged that, on or about the 26th day of June, 1876, the Town of Middleport, which up to that time had paid the interest upon the bonds, filed a bill in equity in the Circuit Court for the County of Iroquois against the complainant corporation as the holder of said bonds, and certain other persons, "alleging, in substance, the making and issuing of said bonds, as herein stated, that the same were delivered to your orator, that your orator was the holder thereof, and that the same were made and issued without authority of law and were invalid, and praying the court so to decree and to enjoin your orator from collecting the same, and for other relief, as by the record in the cause, upon reference thereto, will fully appear."

It is averred that the circuit court dismissed the bill, but that upon appeal to the Supreme Court of Illinois the decree dismissing it was reversed, that court holding that these bonds were void as issued without authority of law; and the case was remanded to said circuit court for further proceedings; whereupon, it passed a decree in conformity with the opinion of said supreme court, adjudging the bonds void, and enjoined their collection.

The bill then charges that said supreme court, while holding the bonds to be void, did not deny, but impliedly admitted, the validity of the appropriation by the Town, and insists that by the issue and delivery of said bonds to the railroad company, and their sale by that company to the present complainant, it is thereby subrogated to the rights of action which that company would have on the contract evidenced by the vote of the Town, and the acceptance and fulfillment of the contract by the railroad company. It is also alleged that no part of the principal sum named in the bonds, or any part of said appropriation, has ever been paid, but that, on the contrary, the Town of Middleport denies all liability therefor; that ever since the purchase of said bonds the complainant has continued to hold, and now holds, the same, and has been and now is the holder of all rights which the railroad company or its assigns had against said Town by reason of the premises.

A decree is then prayed for that the Town of Middleport shall pay to complainant the amount found due, and shall without delay levy and collect all taxes necessary for such payment; also, that the court will enforce the rights of complainant by writs of *mandamus*, and such other and further orders and decrees according to the course of equity as shall be necessary and proper; and also prays that W. H. Leyford, in whose hands as receiver the Chicago, Danville & Vincennes Railroad Company has been placed by the court, it being insolvent, may be made a party defendant thereto.

In the argument of the demurrer before the circuit court several objections to the bill were taken. The defendant in error, however, relies here upon three principal grounds of defense: *first*, it denies the right of subrogation, upon which rests the whole case of the complainant; *second*, it relies upon the Statute of Limitations of five years; and *third*, it asserts that the former decree in the state court is a bar to the action here.

The circuit court held that the Statute of Limitations was a bar to the present suit, and dismissed the bill on that ground.

But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the Township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation.

The bonds in question in this suit were delivered by the agents of the Town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the Town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity subrogated to said rights, and entitled to enforce the same against the Town of Middleport.

The argument of the learned counsel in the case is based entirely upon the right of the complainant to be subrogated to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. He says:

"The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists, and to the principles on which it rests."

He founds his argument entirely upon the proposition that when the complainant purchased these bonds he thereby paid the debt of the Town of Middleport to the railroad company, as voted by it, and that because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the Town.

The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another, and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the Town. The purpose of the purchase, as well as the sale of these bonds, and what the parties supposed they had

effected by it, was not the payment of that debt, but the sale and transfer of a debt of the Town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the Town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.

The language of this court in *Otis* v. *Cullum*, 92 U. S. 447 [23: 496] is very apt, and expresses precisely what was done in this case. In that case Otis & Company were the purchasers of bonds of the City of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money paid to it for the bonds. After referring to the decision of *Lambert* v. *Heath*, 15 Mees. & W. 486, this court said:

"Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him."

Nor can this case be sustained upon the principle laid down in this court in *Louisiana City* v. *Wood*, 102 U. S. 294 [26: 153]. That was a case in which the City of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for that purpose. These bonds were negotiated by the agents of the city, and the money received for their sale went directly into its treasury. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound *ex æquo et bono* to pay it back. The court said:

"The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied."

In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the Town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road.

The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the Town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the Town to pay that sum to any holder of these bonds.

Litchfield v. *Ballou*, 114 U. S. 190 [29: 132], sustains this view of the subject. That Town had issued bonds for the purpose of aiding in the construction of a system of waterworks. In that case, as in *Louisiana City* v. *Wood*, the bonds were so far in excess of the authority of the town to create a debt that they were held by this court to be void in the case of *Buchanan* v. *Litchfield*, 102 U. S. 278 [26: 138]. After this decision, Ballou, another holder of the bonds, brought a suit in equity, upon the ground that, though the bonds were void, the Town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted in that case to establish the proposition that, the money of the plaintiffs having been used in the construction of the waterworks, there was an equitable lien in favor of the plaintiffs on those works, for the sum advanced. This was also denied by the court.

One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.

But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Ætna Company in the transaction. It had no claim against the Town of Middleport. It had no in-

terest at hazard which required it to pay this debt. If it had stood off and let the railroad company and the Town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the Town to the railroad company.

These propositions are very clearly stated in a useful monograph on the Laws of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and "It is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another." Sheldon, Subrogation, §§ 2, 3.

In section 240 it is said: "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own."

This is sustained by a reference to the cases of *Shinn* v. *Budd*, 14 N. J. Eq. 234; *Sanford* v. *McLean*, 3 Paige, 117; *Hoover* v. *Epler*, 52 Pa. 522.

In *Gadsden* v. *Brown*, Speer's Eq. (S. C.) 37, 41, *Chancellor* Johnson says: "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty."

This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

Chancellor Walworth, in the case of *Sanford* v. *McLean*, 3 Paige, 122, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

In *Memphis & Little Rock Railroad Company* v. *Dow*, 120 U. S. 287 [30: 595], this court said: "The right of subrogation is not founded on contract. It is a creation of equity; it is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties."

In the case of *Shinn* v. *Budd*, 14 N. J. Eq. 234, the New Jersey Chancellor said:

"Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Napoleon, book 3, tit. 3, art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier, Oblig. part 3, chap. 1, art. 6, § 2. 'We are ignorant,' say the Supreme Court of Louisiana, 'of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but only to him who, being bound for it, discharges it.' *Nolte* v. *Creditors*, 7 Mart. N. S. 602; *Curtis* v. *Kitchen*, 8 Mart. O. S. 706; *Cox* v. *Baldwin*, 1 La. 401. The principle of legal subetitution, as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits."

The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the Code of that State is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the State of Illinois, *Suppiger* v. *Garrels*, 20 Bradw. 625—the substance of which is thus stated in the syllabus:

"Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Anyone who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer."

No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our own investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's indorsement, and as a matter of business. The complainant Company has, therefore, no right to the subrogation which it sets up in the present action.

Without considering the other questions, which is unnecessary, *the decree of the Circuit Court is affirmed.*

These principles require also the affirmance of the decrees in the cases of the same appellant against the *Town of Belmont, No. 1135,* and the *Town of Milford, No. 1136; and it is so ordered.*

MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, *Plffs. in Err.*, v. PENNSYLVANIA RAILROAD COMPANY.

SAME v. SAME.

SAME v. ADOLPH E. SCHMIDT

SAME v. SAME.

SAME v. HAMBURG-AMERICAN STEAM PACKET COMPANY.

SAME v. NORTH GERMAN LLOYD STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 656-694.)

New Jersey Act—lands under water—property of State—to whom may be conveyed—extent of title—title absolute—complete bar—exclusive possession.

1. The New Jersey Act of March 31, 1869, authorizing the conveyance of lands under water, is not objectionable, under the State Constitution, on the ground that the title thereof does not sufficiently indicate the subject of the Act and that the subject is not single; it has, and professes to have, but a single object.

2. Such Act of 1869 applies to and embraces the premises in controversy in this action.

3. Under the riparian laws of New Jersey, the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the State, were the property of the State as Sovereign.

4. The title and interest of the State in these shore lands, under the state laws, is a distinct and separate estate, to be dealt with and disposed of in accordance with the terms of the statutes, either by a sale and conveyance to the riparian owner himself or his assignees, or, in case of his or their neglect to take from the State its grants on the terms offered, then to a stranger, who, succeeding to the State's title, would have no relation to the adjacent riparian owner, except that of a common boundary.

5. The title under the New Jersey grants is not only of a new estate, but in a new subject divided from the upland or riparian property by a fixed and permanent boundary. Such grants are of the estate in the land and not of a mere franchise or incorporeal hereditament.

6. Under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles; and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extinguished, except such sovereign right as the State may lawfully exercise over all other private property.

7. The grants from the State of New Jersey, under which the defendants claim, respectively, are a complete bar to the recovery sought against them in these suits.

8. Under these grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claim of the plaintiff to any easement or right of way upon and over them, by virtue of the original dedication of the streets to high water mark on the Loss map.

[Nos. 170, 171, 172, 173, 174, 175.]

Argued Feb. 8, 9, 1888. Decided Feb. 20, 1888.

IN ERROR to the Circuit Court of the United States for the District of New Jersey, to review judgments for defendant, in an action of ejectment, in each of the above causes. *Affirmed.*

Statement by *Mr. Justice* **Matthews**:

These are six actions of ejectment brought by the Mayor and Common Council of the City of Hoboken originally in the Supreme Court of New Jersey, and removed into the Circuit Court of the United States for that district by the several defendants, on the ground of citizenship or alienage. In that court they were tried as one case, the intervention of a jury having been duly waived in writing by the parties. Judgment was rendered in them severally for the defendants, to reverse which these writs of error have been sued out.

The general nature of the controversy is accurately stated by *Judge* Nixon, who tried the causes, in his opinion, as follows, 16 Fed. Rep. 816:

"The claim of the plaintiff is for an easement, and is based upon the dedication of certain streets, in the year 1804, by Col. John Stevens, who was then the owner of between 500 and 600 acres of land on the western shore of the Hudson River, where the City of Hoboken now stands, and who made 'a plan of the new City of Hoboken, in the County of Bergen,' and caused the same to be filed in the clerk's office of said county in the month of April, 1805. This plan, on the map known as the Loss map, exhibits a number of streets running north and south, and a still larger number running east and west, all of the latter, except one, apparently terminating on the river front at their eastern end, and one of the former having a like terminus on the south. Since that date, and by legislative authority, the river bed below the ancient high water mark has been filled in for a long distance to the east and south of the land included in the Loss map, rendering the navigable water inaccessible from the streets as therein laid out and dedicated. This controversy has reference to extending one of these streets, not named on the map, but now called River Street, to the south, and four others, to wit, Newark Street, designated on the map the Philadelphia post road, and First, Second and Third Streets, to the east until they respectively reach the navigable water of the river. The city claims the right of extension by virtue and force of the Stevens dedication. The defendants resist it, asserting that the title of Col. Stevens was limit-

ed to high water mark of the river in 1804; that the soil below he high water mark, as it then existed, belonged to the State of New Jersey, which not only has never acquiesced in any easement over the land, but by various enactments has conferred upon the defendants or their grantors an absolute title inconsistent with any right of way in the public over the same."

The facts in all the cases are embraced in a series of findings by the court constituting a single statement, as follows:

"1. That the tract of land on which the City of Hoboken has been mainly built was formerly the property of Col. John Stevens, and contained originally 564 acres.

"2. That in the year 1804 Col. Stevens, then being the owner of said tract, caused to be made 'a plan of the new City of Hoboken, in the County of Bergen,' known as Loss' map, which was filed in the clerk's office of the County of Bergen, in April, 1805.

"3. That the public streets laid out on said map running east and west extended eastwardly to the high water mark of Hudson River as it then existed.

"4. That the only street thereon running north and south which concerns the present controversy is now called River Street, and its southerly terminus on the map was at the high water mark of said river.

"5. That subsequent to the filing of said map Col. Stevens conveyed several lots or parcels of the land shown thereon to different persons, and describing the lots so conveyed by reference to the map and the streets delineated thereon, and that other owners deriving title from or under him have since conveyed lots within said plan, describing the same by reference to the map and streets.

"6. That at the time of the filing of said map in the clerk's office the title to all the land fronting the said Stevens property and lying between high and low water mark of the west bank of the Hudson River was in the State of New Jersey.

"7. That 'The Hoboken Land and Improvement Company' was incorporated by the Legislature of said State by an Act entitled 'An Act to Incorporate the Hoboken Land and Improvement Company,' approved February 21, 1838; that by section 1 of the Act they were authorized to hold real estate, but the amount held by the company should not exceed 1000 acres at any time; that by the fourth section the company was empowered to purchase, fill up, occupy, possess, and enjoy all land covered with water fronting and adjoining the lands that might be owned by them, and to construct thereon wharves, piers and slips, and all other structures requisite or proper for commercial and shipping purposes, provided that it should not be lawful for the company to fill up any such land covered with water, nor to construct any dock, pier, or wharf immediately in front of the lands of any other person or persons owning down to the water, without the consent of such persons first had in writing.

"8. That by virtue of the powers and privileges of said Act of incorporation the company purchased all the land and real estate described in the deed of conveyance from Edwin A. Stevens and others, bearing date May 6, 1839, and duly recorded in the clerk's office of the County of Bergen, in liber 18 of Deeds, folio 105, and in which, among other land, is included the tract of 564 acres embraced in the Loss map, and formerly the property of Colonel Stevens.

"9. That at the time of said transfer by Edwin A. Stevens and others to the said Hoboken Company the land for which these suits were brought by the City of Hoboken was under water, and since the date of said conveyance has been filled up, occupied, and possessed by said company or their grantees, and that all of said land under water was in front of and adjoining the real estate purchased by the company; that since the time of said purchase the company, or their grantees, have at various times reclaimed the land from the water, and have constructed thereon wharves, harbors, piers and slips, and other structures requisite or proper for commercial purposes, and have been in the exclusive possession, occupancy, and enjoyment of the same from the time of such reclamation.

"10. That the City of Hoboken was incorporated by the Legislature of the State of New Jersey, by an Act approved March 28, 1855, with the powers and privileges therein granted, *prout* the same, and that the territorial limits of the said city embraced all the lands shown on the Loss map, and also a large tract of real estate adjoining the same on the west, extending to the west line of the lands of the late John G. Costar, deceased, and that previous to said incorporation its territory embraced (a portion of) one of the townships of the County of Hudson.

"11. That the City of Hoboken never by ordinance recognized River Street south of Third Street, and only recognized its existence as far south as Third Street by the Ordinance of January 9, 1858; that Newark, First and Second Streets were never recognized by ordinance east of Hudson Street prior to the Ordinance of October 5, 1875, which ordinance provided that said streets should extend to high water mark on the Hudson River; and that Third Street was never recognized east of River Street prior to the said Ordinance of October 5, 1875, which ordinance also provided that the said street should extend to high water mark of said river.

"12. That no proceedings have been taken by the city to condemn the lands in controversy, or to take them for the purposes of a public street, except the passage of the Ordinance of 1875 and the bringing of these actions of ejectment, claiming the dedication of the lands as a public street under the Loss map of 1804.

"13. That the Hoboken Land and Improvement Company, in consideration of $68,583.33, executed a deed to the Camden and Amboy Railroad Company, dated December 1, 1864, conveying a tract of land at the foot or easterly end of Second Street, within the boundaries of which are embraced the premises that the plaintiff seeks to recover in the two suits against the Pennsylvania Railroad Company, and that the Camden and Amboy Railroad Company and its grantees or lessees have been in the possession of said lands since said conveyance.

"14. That the Legislature of the State of New Jersey, by a law approved March 31, 1869, authorized the united railroad companies of New Jersey to reclaim and erect wharves and other improvements in front of any lands then

owned by them or held in trust for them on any tide waters of the State, and when so reclaimed and improved to have, hold, possess, and enjoy the same as the owners thereof, subject only to the provisions that they should pay for such grant unto the treasury of the State the sum of $20,000 before the first day of July next ensuing, and should also file in the office of the Secretary of the State a map and description of the lands under water in front of the upland designated in said Act; that the sum of $20,000 was paid by the companies within the time limited and the map and description filed as required. Exhibit D 9.

"15. That an Act of the Legislature of New Jersey, supplementary to the Act to ascertain the rights of the State and of riparian owners in the lands lying under water, approved April 11, 1864, was passed on the 31st of March, 1869; that by a proviso to the third section of the same 'All previous grants of lands under water or right to reclaim made directly by legislative Act or grant or license power or authority so made or given to purchase, fill up, occupy, possess, and enjoy lands covered with water fronting or adjoining lands owned by the corporation, grantee, or licensee named in the legislative Act mentioned, its, his or their representatives, grantees or assigns,' are excepted from the operation of said supplement; that in the fourth section of said Act the riparian commissioners are authorized, for the consideration therein mentioned, to execute and deliver in the name of the State of New Jersey, to all persons coming within the terms of said proviso, a paper capable of being acknowledged and recorded, conveying and confirming to them the title to all lands, whether then under water or not, which were held by previous legislative grant or lease, either in the hands of the grantees or lessees or by their representatives or assigns.

"16. That under the provisions of said Act the State of New Jersey conveyed to the Hoboken Land and Improvement Company, by deed dated December 21, 1869, for the consideration of $35,500, so much of the land and premises purchased of Edwin A. Stevens and others as was originally below the high water mark of the river, and all lands under water in front of the same, and as was situate between Second and Fourth Streets, if extended, and in front of Third Street, if extended, to the exterior bulkhead and pier lines established by the riparian commissioners, and embracing the premises claimed in the several suits against the Hamburg-American Steam Packet Company and the North German Lloyd Steamship Company, and that the said Company and its grantees have been in the possession of said premises since the date of said conveyance.

"17. That on the 26th of September, 1866, the Hoboken Land and Improvement Company and Edwin A. Stevens executed a conveyance to the New York Floating Dry Dock Company for certain lots and tracts of land, above and under water, in front of and to the east of First Street, and the northerly half of Newark Street, if extended, embracing the premises claimed in the suits against Adolph E. Schmidt and others; that the said the New York Floating Dry Dock Company transferred the same to Frederick Kuhne, trustee of the German Transatlantic Steam Navigation Company, by deed dated August 31, 1872, the said Kuhne, on the same day, executing a formal declaration of trust to the said company; that on the ninth of November, 1872, the State of New Jersey, in consideration of $23,625, granted and conveyed to said Kuhne, trustee as aforesaid, all the right and title of said State in and to the land and premises described in the above recited deed from the Hoboken Land and Improvement Company to the New York Floating Dry Dock Company, and that the same has been in the possession of the said respective grantees from the date of the respective conveyances.

"18. That on the 23d of April, 1872, the Hoboken Land and Improvement Company made a conveyance to the North German Lloyd Steamship Company of a lot of land situate in front of and to the east of Third Street, if continued to the Hudson River, and embracing the premises claimed in the several suits against the North German Lloyd Steamship Company and the Hamburg-American Packet Company, and the premises have been in the possession of said Company and its lessees since the date of said conveyance.

"19. That River Street, as shown on the Loss map, cannot be extended to reach the navigable waters of the Hudson River without crossing land outside of that shown on said map and without crossing land which, prior to April 28, 1874, belonged to the State of New Jersey, and which the said State, by deed of that date, leased in perpetuity to the Morris and Essex Railroad Company. See Exhibit D, 8."

Upon these facts the circuit court founded its conclusions of law, as follows:

"1. That neither Colonel John Stevens, in 1804, nor at any time thereafter, nor his grantees of any portion of the land delineated on the Loss map, had power to dedicate to the public use as a highway any part of the land or water adjoining said lands and lying east of and below high-water mark of the river as it then existed, and that said land under water belonged to the State of New Jersey, and could only be dedicated or subjected to an easement by the State and its grantees.

"2. That the charter granted by the State of New Jersey to the Hoboken Land and Improvement Company was a contract between the State and the corporators; that the fourth section expressly authorized the corporation to fill up all lands covered with water fronting and adjoining the lands they might acquire, and to construct thereon wharves, harbors, piers and slips, and all other structures requisite or proper for commercial or shipping purposes, and that the only restriction imposed upon the corporation by the Act was that it should not fill up or build any dock, pier or wharf upon any land under water 'immediately in front of the lands of any other person or persons owning down to the water;' and that neither the plaintiff in these suits nor the State of New Jersey nor the public was 'another person owning down to the water,' within the legal meaning and intent of said charter or contract.

"3. That the provisions of the charter of incorporation of the plaintiff, so far as they are applicable to the subject of the pending controversy, negative the plaintiff's construction of

its powers under said charter, in that (1) it withholds from the corporate authorities any right or privilege as shore or riparian owners; (2) while it vests the council with power to take any lands that it may judge necessary for the opening of Third Street, it requires payment to be made to the owner for the fair value of the lands so taken and of the improvements thereon, and the damage done to any district lot or parcel or tenement by taking any part of it for such purposes; and (3) it expressly provides that nothing contained in the charter shall be so construed as to interfere with or impair the vested rights and privileges of any person or corporation whatever, except as to property taken for public use, upon compensation as provided for in the Act.

"4. That the State of New Jersey, being the absolute owner of the land under water below high water mark, which was the limit of the Stevens dedication of streets, had the right to fill in and make land as far as its ownership extended; that the soil thus acquired and redeemed from the water was in no sense alluvion or accretion, which became the property of the shore owner, but remained the land of the State or its grantees, and that no right or authority existed in the shore owner, by dedicating the public streets to the limits of its ownership, to charge such newly made land with the burden of an easement over it.

"5. That as to the two several suits against the Pennsylvania Railroad Company, the *locus in quo* is embraced within the descriptions of the deed from the Hoboken Land and Improvement Company to the Camden and Amboy Railroad Company, dated December 6, 1864, and also within the grant of the State to the united railroad companies of New Jersey of the date of March 31, 1869, wherein the said companies were authorized, for the consideration therein expressed and afterwards paid, 'to reclaim and erect wharves and other improvements in front of any lands owned by or held in trust for them,' subject to no restriction other than the regulations as to solid filling and pier lines before recommended by the riparian commissioners, and that the defendant, who is the lessee of the said companies, is entitled to hold said premises against the claim of the plaintiff, unless compensation be first made for the taking thereof according to law.

"6. That as to the two several suits against Adolph E. Schmidt and others the *locus in quo* is covered by the description of the deed from the Hoboken Land and Improvement Company to the New York Floating Dry Dock Company, dated August 31, 1872, and also within the grant from the State by its commissioners, under the provisions of the fourth section of the supplement to the Act entitled 'An Act to Ascertain the Rights of the State and of the Riparian Owners,' etc., to Frederick Kuhne, trustee, etc., under whom the defendants hold by mesne conveyance, and that they are entitled to retain the possession and ownership of said premises against the plaintiff until the same is condemned and payment therefor made according to law.

"7. That, as to the several suits against the Hamburg-American Steam Packet Company and the North German Lloyd Steamship Company, the *locus in quo* is within the grant from the State of New Jersey to the Hoboken Land and Improvement Company of the date of December 21, 1869, and also of the deed of conveyance from the Hoboken Land and Improvement Company to the North German Lloyd Steamship Company, dated April 23, 1872, and that the said defendants are entitled to hold the said premises clear and discharged of any right or claim therein or thereto by said plaintiff.

"8. That none of the land and premises claimed by the plaintiff in either of the said several suits are subject to an easement in consequence of the dedication of public streets made by Col. John Stevens in the Loss map of 1804.

"9. That the several defendants in the several suits should be adjudged not guilty."

Messrs. **James F. Minturn** and **Thomas N. McCarter,** for plaintiffs in error:

The marking of the map, and the sale of lots with reference to it, was a dedication of the land covered by the streets and squares to public use, and the dedicator is thereby estopped.

Washb. Easements, 481, 484; *Hoboken Land & I. Co.* v. *Hoboken*, 36 N. J. L. 540; *Hoboken M. E. Church* v. *Hoboken*, 38 N. J. L. 18; *Clark* v. *Elizabeth*, 37 N. J. L. 125; *Barney* v. *Baltimore*, 1 Hughes, 118; *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431 (8:452); *New Orleans* v. *U. S.* 35 U. S. 10 Pet. 662 (9:573); *Child* v. *Chappell*, 9 N. Y. 246.

The proprietary title to all lands under water is in the State of New Jersey.

Arnold v. *Mundy*, 6 N. J. L. 1; *Gough* v. *Bell*, 21 N. J. L. 156; *S. C.* 22 N. J. L. 441; *N. Y. L. E. & W. R. Co.* v. *Yard*, 48 N. J. L. 632.

A dedicated street, terminating at the waters of a navigable river, is continued to the new water front obtained by filling in in front of the shore by the owner of the land.

Jersey City v. *Morris Canal & Bkg. Co.* 12 N. J. Eq. 548; *Newark Lime & C. Co.* v. *Newark*, 15 N. J. Eq. 64; *People* v. *Lambier*, 5 Denio, 9; *Barclay* v. *Howell*, 31 U. S. 6 Pet. 498 (8:477).

Grants of corporate franchises will not be construed to give by implication any title to lands of the State below high water line.

N. Y. L. E. & W. R. Co. v. *Yard*, *supra*.

A public street cannot be appropriated, either in part or entirely, without compensation to the adjoining owner.

St. Paul & P. R. Co. v. *Schurmeier*, 74 U. S. 7 Wall. 272 (19:74); *Story* v. *N. Y. Elevated R. Co.* 90 N. Y. 122; *Lahr* v. *Metropolitan Elevated R. Co.* 104 N. Y. 268.

He who transfers with a covenant of title shall not be justified in doing anything to defeat his covenant.

Terrett v. *Taylor*, 13 U. S. 9 Cranch, 53 (3:654); *Jackson* v. *Stevens*, 13 Johns. 316; *People* v. *Lambier*, 5 Denio, 9.

Any ambiguity in the grant must operate in favor of the State and against the defendants.

Pa. R. Co. v. *Nat. R. Co.* 23 N. J. Eq. 455; *Perrine* v. *Chesapeake & D. Canal Co.* 50 U. S. 9 How. 192 (13: 100); *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 420 (9: 773); *Leavenworth, L. & G. R. Co.* v. *U. S.* 92 U. S. 733 (23:634); *Rice* v. *Minn. & N. W. R. Co.* 66 U. S. 1 Black, 358 (17:147).

Chapter 886, Laws 1869, p. 1026, should

not be so construed as to work a public mischief.

Sprague v. *Birdsall*, 2 Cow. 419; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 (10:997).

Such a statute must be strictly construed.

Rus v. *Alter*, 5 Denio, 119; *Sharp* v. *Speir*, 4 Hill, 76.

This court will be guided by the law of New Jersey and by the construction placed upon the statutes of the State by the highest tribunals of the State.

Cooley, Const. Lim. 16; *Beauregard* v. *New Orleans*, 59 U. S. 18 How. 502 (15:472); *Falconer* v. *Campbell*, 2 McLean, 195; *Swift* v. *Tyson*, 41 U. S. 16 Pet. 19 (10:870).

The court can only inquire what is the law of New Jersey in regard to the questions involved.

U. S. R. S. 1878, p. 137, § 721 and authorities collected in margin, particularly *Webster* v. *Cooper*, 55 U. S. 14 How. 504 (14:517); *Suydam* v. *Williamson*, 65 U. S. 24 How. 427 (16:742); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 428 (17:304); *Orvis* v. *Powell*, 98 U. S. 176 (25:288); *Barney* v. *Keokuk*, 94 U. S. 324 (24:224); Curtis, Lectures on Jurisdiction of U. S. Courts, 201, 202, 212.

The streets delineated on the Loss map as extending to the Hudson River will be continued to the new water front.

Lockwood v. *New York & N. H. R. R. Co.* 37 Conn. 387; *Peck* v. *Providence Steam Engine Co.* 8 R. I. 353; *Godfrey* v. *Alton*, 12 Ill. 29; *Rowan* v. *Portland*, 8 B. Mon. 232; *Wood* v. *San Francisco*, 4 Cal. 190; *Minor* v. *San Francisco*, 9 Cal. 39; *Van Dolsen* v. *Mayor of N. Y.* 17 Fed. Rep. 817; *Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 672, 685 (27:1070, 1074); *Barney* v. *Keokuk*, 94 U. S. 324, 339 (24:224, 228); *Backus* v. *Detroit*, 49 Mich. 110; Gould, Waters, § 157; *Steers* v. *Brooklyn*, 101 N. Y. 51; *Ledyard* v. *Ten Eyck*, 36 Barb. 102.

The grant of power to purchase, fill up and reclaim the lands of the State was not a grant of the lands of the State.

Hoboken Land & I. Co. v. *Hoboken*, 36 N. J. L. 540; *Jersey City* v. *Morris Canal & Bkg. Co.* 12 N. J. Eq. 547, 551; *Morris Canal & Bkg. Co.* v. *New Jersey Cent. R. Co.* 16 N. J. Eq. 419, 431; *Stevens* v. *Paterson & N. R. R. Co.* 34 N. J. L. 532, 534, 553; *N. Y. L. E. & W. R. Co.* v. *Yard*, 43 N. J. L. 121, 682.

The Statute of 1859 has no application to cities having special powers as to streets.

State v. *Trenton*, 36 N. J. L. 201; *Cross* v. *Morristown*, 18 N. J. Eq. 305, 308; *State* v. *Morristown*, 33 N. J. L. 57; *State* v. *Clarke*, 25 N. J. L. 55; *State* v. *Branin*, 23 N. J. L. 485; *State* v. *Dwyer*, 42 N. J. L. 331; *Vail* v. *Easton & A. R. Co.* 44 N. J. L. 238; *Sheridan* v. *Stevenson*, 44 N. J. L. 378; *Humphreys* v. *Woodstown*, 7 Cent. Rep. 109, 48 N. J. L. 588.

Messrs. **James B. Vredenburgh, Barker Gummere** and **J. D. Bedle,** for defendant in error in Nos. 170 and 171; *Mr.* **Leon Abbett,** for defendants in error in Nos. 172, 173, 174 and 175:

The State has capacity to sell the fee absolute of such lands in New Jersey.

Bell v. *Gough*, 23 N. J. L. 624; *Stevens* v. *Paterson & N. R. R. Co.* 34 N. J. L. 531.

The decision of the New Jersey Court of Errors in *Hoboken Land & I. Co.* v. *Hoboken*, 36 N. J. L. 540, is not a rule of decision in this court; because the Act therein construed is a private Act, and not a public statute.

Williamson v. *Berry*, 49 U. S. 8 How. 543 (12:1190).

Because said Act is a private charter, and therefore a contract between the State and the company.

Piqua Branch Bank v. *Knoop*, 57 U. S. 16 How. 380, 382, 391 (14:981, 982, 986); *Wilmington & W. R. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 264 (20:568); *Jefferson Branch Bank* v. *Skelley*, 66 U. S. 1 Black, 443 (17:177).

Because § 4 of said charter is a grant of the *locus in quo* to the company, having the force of a deed.

Whitney v. *Morrow*, 112 U. S. 693 (28:871); *Thomas* v. *Hatch*, 3 Sumn. 176; *Foxcroft* v. *Mallett*, 45 U. S. 4 How. 379 (11:1019).

Because the decision of the state court is a construction of the common-law doctrines of "alluvion" and "dedication."

Ang. Highways, 2d ed. § 133; *Cincinnati* v. *White*, 31 U. S. 6 Pet. 488 (8:456); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 428 (17:304).

The Mayor, etc., of Hoboken is not the owner of or trustee in whom the easement of highway in the streets of Hoboken is vested; and in this suit it is only the litigant representative of the State.

2 Dill. Mun. Corp. 3d ed. § 656 and note 1; Ang. Highways, 2d ed. § 135; *O'Connor* v. *Pittsburgh*, 18 Pa. 189.

The primary right to bring this suit is in the State.

2 Dill. Mun. Corp. 3d ed. § 660; *Hoboken M. E. Church* v. *Hoboken*, 33 N. J. L. 19; *Hoboken Land & I. Co.* v. *Hoboken*, 36 N. J. L. 549.

The State claims to have held title to the *locus in quo* in fee, at the time of the grant to the company.

Gough v. *Bell*, 22 N. J. L. 457–459; *Glover* v. *Powell*, 10 N. J. Eq. 223, 224; *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 537; Nixon, Dig. 1868, 1025; Revision of 1877, 962.

The State claims the power to vacate highways at its discretion.

Hoboken Land & I. Co. v. *Hoboken*, *supra*; N. J. Const. Rev. of 1877, xxxi.

The *locus in quo* is wholly within the State.

Escanaba Co. v. *Chicago*, 107 U. S. 678 (27: 442).

The rights and powers conferred upon the Company by section four of the charter of 1853 constitute a grant by deed of the use of the entire *locus in quo*.

Whitney v. *Morrow*, 112 U. S. 693 (28:871); public Act of 1869, Revision of 1877, § 8, p. 988.

The easement of highway is a privilege in land, existing distinct from any ownership of the soil.

Ang. Highways, § 1; 2 Dill. Mun. Corp. 3d ed. § 633; *Dovaston* v. *Payne*, 2 Smith, Lead. Cas. 7th Am. ed. 158, 162.

An easement of way is a hereditament.

2 Washb. Real Prop. 3d ed. p. 276, § 3, par. 3.

It is proper subject of ejectment.

Barclay v. *Howell*, 31 U. S. 6 Pet. 498 (8:477); *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431 (8: 452).

Under the general issue any defense might be proved.

Adams, Eject. ed. 1840, p. 270; 1 Saund. Pl. & Ev. 5th Am. ed. 994; 1 Chitty, Pl. 11th Am. ed. 192.

Under the statutory plea any defense could be made.

Stewart v. *Camden & A. R. Co.* 38 N. J. L. 117.

Colonel John Stevens could not dedicate a highway below high water mark.

Hoboken Land & I. Co. v. *Hoboken*, 36 N. J. L. 546; Ang. Highways, § 142; *Pompton* v. *Cooper Union*, 101 U. S. 202 (25:804).

The *locus in quo* is not an alluvion accretion to the lands formerly of Colonel John Stevens, nor parcel thereof.

The Act of March 31, 1869, Pamph. Laws of 1869, p. 1026, is a fresh legislative grant of the *locus in quo* to the grantors of the defendant in error.

Mr. Justice **Matthews** delivered the opinion of the court:

In the year 1873 the Court of Errors and Appeals of New Jersey decided the case of the *Hoboken Land and Improvement Company* v. *Mayor and Common Council of the City of Hoboken*, 7 Vroom, 36 N. J. L. 540. It was an action of ejectment for the recovery of the possession of a strip of land, constituting the extension of Fourth Street as laid out on the Loss map, over lands below the original high water mark, reclaimed by the plaintiff in error in that suit, continued to the new water front. The unanimous judgment of that court affirmed the right of the City of Hoboken to the premises in dispute, being the extension of that street as a public highway. The foundation of that judgment is the dedication, according to the Loss map, of the streets delineated upon it as extending to the line of high water mark at that date, and the nature of the title acquired by the Hoboken Land and Improvement Company, under the terms of their charter, to the land made by filling in, in front of the original high water mark, upon and across which it was proposed to extend the street so as to secure access in behalf of the public to the stream of the river. It is argued that, as the present defendants claim title through the Hoboken Land and Improvement Company, to premises similarly situated and equally affected by the original dedication, the judgment of the Court of Errors and Appeals of New Jersey in that case conclusively establishes the law applicable to the present, and requires a reversal of the judgments of the Circuit Court of the United States.

It becomes necessary, therefore, at the outset, to ascertain and define the terms and scope of that judgment. In that case the court said, p. 546: "The title to the soil between the high water line, as shown on Loss' map, and the present high water line was originally in the State. It became the property of the defendants by reclamation under the powers contained in their charter. The contention was that it was not competent for Colonel Stevens to impress upon lands, the property of the State, a servitude such as the plaintiffs are seeking to have them appropriated to, and that when the defendants acquired title under legislative permission, they were entitled to hold such lands unimpaired by the servitude imposed upon the upland. The first branch of this proposition is conceded. But whether it will be available to his grantees to defeat the present claim of the city will depend upon considerations incident to the nature and effect of the original dedication. The street as dedicated extended to the high water mark as it then was. There is no street shown on the map or in fact along the river in which Fourth Street might terminate. River Street, which is the first street crossing Fourth Street parallel with the river, is laid down on the map at a distance of about 75 feet from the high water line as it appears on the Loss map. The location of Fourth Street, with its terminus at the water, demonstrates conclusively that its purpose was to provide a means of access for the public to the navigable waters, and such was the scope and purpose of the dedication." The court then refers to the case of *New Orleans* v. *United States*, 35 U. S. 10 Pet. 717 [9:594] as showing that, according to the recognized law concerning dedications to public use, a grant of land bounded on a stream which has gradually changed its course by alluvial formations extends to the new boundaries, including the accumulated soil, and that, on the same principle, it had been held in that State, in the case of *Jersey City* v. *Morris Canal & Banking Company*, 1 Beas. 548, that a dedicated street terminating at the waters of a navigable river is continued to the new water front obtained by filling in in front on the shore by the owner of the land over which the street was dedicated; and to the same point the court cites the cases of *People* v. *Lambier*, 5 Denio, 9, and *Barclay* v. *Howell*, 31 U. S. 6 Pet. 498 [8:477]. The learned judge, delivering the opinion of the New Jersey Court of Errors and Appeals, continues thus, p. 548: "In my judgment these cases declare the law correctly on this subject. The essence of the gift is the means of access to the public waters of the river, the advantages of which induced the growth of the city by reason of its adjacency and connection with the important navigable waters of the Hudson, which gave a peculiar commercial value to the lots put in the market by the dedication, which can only be preserved by maintaining unbroken the connection of the streets with the navigable river. Any obstructions of that access would not only derogate from the effect of the gift, but would also be a public nuisance." Referring then to the title claimed by the Hoboken Land and Improvement Company, adverse to the application of this presumptive right growing out of the original dedication on behalf of the public, the court says, p. 549: "The Legislature alone has the power to release the dedicated lands and discharge the public servitude when it once has attached. Extinguishment by legislative action, it is insisted, has been effected as to part of the premises in dispute by the fourth section of the defendants' Act of incorporation. The argument was that the land below high water, being the property of the State, and both the easement and the title being under legislative control, the extinguishment of the former, by a necessary implication, resulted from the grant of the latter. I am unwilling to concur in this construction of the statute. The grant to the defendants is not of lands of the State in express and definite terms. The right conferred

is a mere privilege of reclamation and appropriation to private uses. Its exercise is expressly limited to lands covered with water in front of and adjoining lands that should be owned by the corporation. The proviso annexed to the grant shows clearly the legislative intent that the rights of others owning to the water should not be interfered with without express consent." Referring then to certain authorities as justifying this construction, the opinion proceeds, p. 551: "It is not necessary on the present occasion to express any opinion as to whether the defendants could under their charter have filled in in front of streets terminating at the water, as against the public authorities resisting the execution of the work. The cases above cited are referred to to show the strictness of the construction made of statutes granting privileges of this kind to private persons. * * * The defendants' Act of incorporation would probably relieve the defendants after the work was executed from the consequences of an unlawful encroachment on public lands in front of the streets, and of a nuisance in the obstruction of navigation; but it cannot affect the public easement of access to the navigable waters which existed before the Act was passed. That public right is entirely distinct in its essential qualities from the title of the State in lands under tide waters. The former inheres in the State in its sovereign capacity. The latter is strictly proprietary. A grant of the proprietary title will never operate as a release or extinguishment of a sovereign right not necessarily included within the scope of the grant. *State, Morris Canal & Bkg. Co.* v. *Haight*, 7 Vroom, 471. The grant to the defendants comprised the valuable privilege of acquiring title to lands under tide waters along their entire frontage on the river. The public easement is legally consistent with the title to the soil in a private owner, and the legislative intent to vest the proprietary title in the defendants will have legal effect without extinguishing the public right of access to the river, derived from the original dedication. Where two public rights of different origin, distinct in their nature, and capable of separate enjoyment, exist, a grant of the one will not extinguish the other unless required by clear and unequivocal language. The cardinal rule of construction is the inquiry whether the legislative gift can take effect without drawing to it the additional right claimed. If it can, the latter is by operation of law excluded from the grant. *Stevens* v. *Paterson & N. R. R. Co.* 5 Vroom, 532. * * * The Act incorporating the defendants contains no language indicative of an intent to extinguish the public right of access to the river, and the defendants hold the title acquired by legislative permission, subject to the obligation that resulted from the original dedication of permitting the connection of the street with the navigable waters to remain unbroken."

The two principal propositions established by this decision, so far as are material to be considered in these cases, appear by these extracts from the opinion, therefore, to be as follows: 1, that the scope and purpose of the original dedication of the streets terminating at the water was to provide a means of access for the public to the navigable waters of the Hudson River; and 2, that the intent and purpose of this dedication were not defeated by the rights acquired by the Hoboken Land and Improvement Company, under the terms of its charter, to the lands in front of the streets terminating at the water as filled in by that company.

That company, it will be understood, had become the successor to the title of the original proprietor, Colonel John Stevens, to the lands owned by him embraced within the limits of the Loss map not previously sold. The object of its incorporation, and its principal powers in respect thereto, are stated in the fourth section of its charter, as follows:

"Sec. 4. *And be it enacted*, That the said company be, and they are hereby, empowered to improve all such lands as they are hereby authorized to own or purchase, by laying out that portion of the same which lies north of Fourth Street, in the Village of Hoboken, into lots, streets, squares, lanes, alleys, and other divisions; of leveling, raising, and grading the same, or making thereon all such wharves, workshops, factories, warehouses, stores, dwellings, and such other buildings and improvements as may be found or deemed necessary, ornamental, or convenient, and constructing on the lands of the said company aqueducts or reservoirs, for conveying, collecting, and providing pure and wholesome water; and letting, renting, leasing, mortgaging, selling, or changing the same, or using any lot or other portion of any of the said lands for depots, and for agricultural, mining, or manufacturing purposes; and they shall have power to purchase, fill up, occupy, possess, and enjoy all land covered with water fronting and adjoining the lands that may be owned by them; and they may construct thereon wharves, harbors, piers, and slips, and all other structures requisite or proper for commercial and shipping purposes; and when they shall have purchased the ferry right from the owners thereof they may enjoy the same, and purchase and build steamboats; *Provided*, It shall not be lawful for the said company to fill up any such land covered with water, nor to construct any dock, pier or wharf immediately in front of the lands of any other person or persons owning down to the water, without the consent of such person or persons so owning first had in writing and obtained."

Under this section it was that they proceeded to fill up, occupy and improve the land covered with water fronting and adjoining the lands in the City of Hoboken which they had purchased, filling as they progressed in front of the several streets terminating on the river, as well as in front of the other lands which they had bought. They acquired no title to the lands reclaimed, except according to the terms of the permission granted in this section of the charter. The construction put upon this section by the New Jersey Court of Errors and Appeals was in substance that the license thereby granted to the company did not convey an unqualified title to the reclaimed lands in front of the streets, and therefore that the authority conferred by it was not intended to exclude the public right of access to the navigable water by an extension of the streets and highways laid out on the original land for that purpose.

It remains to be considered whether, consistently with that view of the law, the circumstances of the present cases distinguish them

from the case decided, so as to justify us in affirming upon other grounds the judgments of the Circuit Court of the United States now under review.

It appears from the findings of fact that the several defendants in these causes are the assignees of the Hoboken Land and Improvement Company, and successors to that company in respect to the parcels of land sought to be recovered, of all its rights and title under its charter. The Hoboken Land and Improvement Company conveyed the premises held by the Pennsylvania Railroad Company by a deed executed December 1, 1864, in consideration of $63,583.33, the grantee being the Camden and Amboy Railroad Company. On March 31, 1869, the Legislature of New Jersey passed an Act entitled "An Act to Enable the United Companies to Improve Lands Under Water at Kill von Kull and Other Places." Laws 1869, chap. 386, p. 1026. This Act recites that the united companies had recently secured to the State the payment of $500,000 "for the grant of lands under water in front of lands owned by them, and are desirous of having the right and privilege of erecting and making wharves, piers, and other improvements in front of other lands now owned by or in trust for them, so that they may safely make such improvements as they may find necessary to facilitate their business." It enacts "That the said united companies shall be, and they are hereby, authorized to reclaim and erect wharves and other improvements in front of any lands now owned by or in trust for them, or either of them, or by any company in which they now hold the controlling interest, adjoining Kill von Kull, or any other tide waters of the State, and when so reclaimed and improved, to hold and possess and enjoy the same as owners thereof." It provides that such improvements shall be subject to the regulations, where applicable, as to the line of solid filling and as to pier lines heretofore recommended in the report of the commissioners made and filed under the Act entitled "An Act to Ascertain the Rights of the State and of the Riparian Owners in the Lands Lying Under the Waters of the Bay of New York and Elsewhere in the State," approved April 11, 1864; but "neither said improvements, nor those which may be made by said companies in Harsimus Cove, shall be subject to any other restrictions than those contained in said report." It was further provided that the united companies should pay the further sum of $20,000 in full satisfaction for the right and privilege thereby granted, and that they should, on or before July 1, file in the office of the Secretary of State a map and description of the lands under water in front of the upland referred to in the section.

On the same day on which this Act was passed and took effect, March 31, 1869, the Legislature of New Jersey passed an Act entitled a "Supplement to an Act Entitled 'An Act to Ascertain the Rights of the State, and of Riparian Owners in the Lands Lying under the Waters of the Bay of New York and Elsewhere in this State,' approved April 11, 1864." Laws of 1869, p. 1017; Revision 1877, p. 982. By this Act it was provided that the bulkhead line or lines of solid filling, and the pier lines in the tide waters of the Hudson River, New York Bay, and Kill von Kull, lying between Enyard's dock, on the Kill von Kull, and the New York State line, so far as they had been recommended and reported to the Legislature by the commissioners appointed under the original Act, were adopted and declared to be fixed and established as the exterior bulkhead and pier lines between the points above named, as shown upon the maps accompanying the reports of the commissioners and filed in the office of the Secretary of State. The Act made it unlawful to extend any structures into the river beyond these lines. It repealed an Act approved March 18, 1851, the object of which was to authorize the owners of lands upon tide waters to build wharves in front of the same, so far as the tide waters of the Hudson River, New York Bay, and Kill von Kull were concerned, providing that said repeal "shall not be construed to restore any supposed usage, right, custom, or local common law, founded upon the tacit consent of the State, or otherwise, to fill in any land under water below mean high tide;" and it prohibited any person from filling in, building on, or making any erection on, or reclaiming any land under the tide waters of the State in New York Bay, Hudson River, or Kill von Kull without the grant or permission of the commissioners. This, the third section of the Act, however, contained the following proviso: "*Provided, however*, That neither this section, nor any provision in this Act contained, shall in any wise repeal or impair any grant of land under water, or right to reclaim made directly by legislative Act, or grant, or license, power or authority, so made or given, to purchase, fill up, occupy, possess and enjoy lands covered with water fronting and adjoining lands owned or authorized to be owned by the corporation, or grantee, or licensee, in the legislative Act mentioned, its, his or their representatives, grantees or assigns, or to repeal or impair any grant or license, power or authority to erect or build docks, wharves and piers opposite and adjoining lands owned or authorized to be owned by the corporation, or grantee, or licensee, in the legislative Act mentioned, its, his, or their representatives, grantees or assigns, heretofore made or given directly by legislative Act, whether said Acts are or are not repealable, and as to any revocable license given by the board of chosen freeholders of a county to build docks, wharves or piers, or to fill in or reclaim any lands under water in the said New York Bay, Hudson River or Kill von Kull, the same shall be irrevocable, so far as the land under water has been reclaimed or built upon under such license at the time that this Act takes effect."

The fourth section of the Act provides that in case any person, who by any legislative Act is a grantee or licensee, or has any such power or authority, shall be entitled to a deed in the name of the State of New Jersey conveying the land in the proviso to the third section mentioned, whether under water at that time or not, with the benefit of an express covenant that the State would not make or give any grant or license, power or authority affecting lands under water in front of said lands; and the commissioners, or any two of them, with the Governor and Attorney-General for the time

being, were authorized to execute and deliver and acknowledge, in the name of the State, a lease in perpetuity to such grantee or licensee of such lands and rights, reserving an annual rental of $3 for each lineal foot measuring on the bulkhead line, or a conveyance in fee upon the payment of $50 for each lineal foot measuring on the bulkhead line in front of the land included in said conveyance. It was also provided that "The conveyance or lease of the commissioners, under this or any other section of this Act, shall not merely pass the title to the land therein described, but the right of the grantee or licensee, individual or corporation, his, her or their heirs and assigns, to exclude to the exterior bulkhead line the tide water, by filling in or otherwise improving the same, and to appropriate the land to exclusive private uses, and so far as the upland, from time to time made, shall adjoin the navigable water, the said conveyance or lease shall vest in the grantee or licensee, individual or corporation, and their heirs and assigns, the rights to the perquisites of wharfage, and other like profits, tolls and charges."

Under the provisions of said Act, the State of New Jersey, according to the findings of fact, for a valuable consideration, has conveyed to the Hoboken Land and Improvement Company, by deeds and conveyances properly executed, or to its assigns, the premises claimed in the several suits against the defendants other than the Pennsylvania Railroad Company.

An objection is taken in argument to the validity, under the Constitution of New Jersey, of the Act to enable the united companies to improve land under water at Kill von Kull and other places of March 31, 1869, under which the Pennsylvania Railroad Company claims title, on the ground that the title of the Act does not sufficiently indicate its subject and that the subject is not single. The article of the State Constitution to which this Act is alleged to be repugnant is article 4, section 7, paragraph 4, as follows: "To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." We cannot think, however, that this objection is well founded. The subject of the enactment is single; the united companies, it being recited, having paid $500,000 for the grant of lands under water in front of lands owned by them, were desirous of having the right and privilege of erecting and making wharves, piers, and other improvements in front of other lands now owned by or in trust for them, so that they might safely make such improvements as they might find necessary to facilitate their business. This is the declared purpose of the Act. It has and professes to have but a single object; this was to confirm the title of the united companies to the lands described, and to define the uses to which they were subject, and to which they might lawfully be devoted. The subject matter of the legislation was the interest of the united companies in respect to such land wherever situate. For the right conveyed by the new Act, a further consideration of $20,000 was exacted and paid, and it was certainly appropriate that, in the same Act requiring that consideration to be paid, there should be a full statement of all the rights intended to be secured. The statute, therefore, is unobjectionable in point of form.

It is next objected that this Act of 1869 can have no application to the lands in question, because by its terms it applies only to lands under water in front of upland owned by the grantees, and that it did not appear that at that time the united companies owned any upland which these lands were in front of. We cannot doubt, however, that the land in question refers to and embraces the premises in controversy. It expressly refers to all lands owned by the united companies adjoining any of the tide waters of the State, and undoubtedly had in view the lands conveyed by the Hoboken Land and Improvement Company by the deed of December 1, 1864. These they were authorized to reclaim, so far as necessary, by filling out to the lines fixed by the commissioners under the Act of April 11, 1864, as lines of solid filling and as pier lines, upon which they were authorized to erect wharves and other improvements, and when so reclaimed and improved to have, hold, possess and enjoy the same as owners thereof, and so absolutely such owners as that the improvements should not be subject to any other restrictions than those contained in the report of the commissioners. Under this Act, having paid the consideration required, they filed the map and the description of the lands specified in the last proviso of the section; and the findings of the circuit court authorize us to assume that this map and description embraced the premises in controversy.

In the examination of the effect to be given to the riparian laws of the State of New Jersey by the Act of April 11, 1864, in connection with the supplementary Act of March 31, 1869, it is to be borne in mind that the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as Sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the State, representing the public sovereignty and interest, and of the owners of land bounded by high water mark. The regulations to this end had in view a definite and permanent demarkation of the line in the water, beyond which there should be no obstructions or impediments to the public right of navigation; they also contemplated, as of equal importance, the manner in which and the persons by whom the intermediate space between those exterior lines and the original high water mark should be filled up, reclaimed, occupied, and used, so as to make the enjoyment of such property most valuable to private and public interests involved in the public right of navigating the water. It was for this reason that this space was made the subject of grants by the State to corporations and other persons who were riparian owners adjacent thereto, with authority to erect or build thereon docks, wharves, and piers; and that prior grants of a similar character under legislative authority,

even although in the form of mere executed licenses, were confirmed and perpetuated. It was for that reason that in the grant to the united companies this right and privilege of erecting and making wharves, piers, and other improvements was declared to be "so that they may safely make such improvements as they may find necessary to facilitate their business." For the same reason it was declared in the Act of March 31, 1869, that the conveyance or lease of the commissioners under the Act should not merely pass the title to the land therein described, but the right to reclaim and fill in and otherwise improve the same, and "to appropriate the land to exclusive private uses." In view of the same policy it was that by the same Act, in reference to land under water which had not been improved, and in respect to which no authority or license to reclaim the same had been previously granted, it was provided that the grant from the State should be offered first to the riparian proprietor, and if after six months' notice he declined to buy the same from the State at its statutory price, the commissioners were authorized to grant the same to others having no riparian ownership, on condition, however, that the interest of the riparian owner as such in the shore and front of his land thus to be taken from his use should be paid for at a valuation to be judicially ascertained. The intent of this legislation is therefore manifest to treat the title and interest of the State in these shore lands as a distinct and separate estate, to be dealt with and disposed of in accordance with the terms of the statutes; first, by a sale and conveyance to the riparian owner himself, or to his assignees; and, second, in case of his neglect to take from the State its grant on the terms offered, then to a stranger, who, succeeding to the State's title, would have no relation to the adjacent riparian owner, except that of a common boundary. The title acquired by such a grantee, therefore, differs in every respect from that of a riparian owner to the alluvial accretions made by the changes in a shifting stream which constitutes the boundary of his possessions. The latter comes to him by virtue of his title to land bounded by a stream, and belongs to him because it is within the description of his original grant; but the title under the New Jersey grants is not only of a new estate, but in a new subject divided from the upland or riparian property by a fixed and permanent boundary.

The nature of the title in the State to lands under tide water was thoroughly considered by the Court of Errors and Appeals of New Jersey in the case of *Stevens* v. *Paterson & Newark R. R. Co.* 5 Vroom, 532. It was there declared, p. 549: "That all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner by the common law has no peculiar rights in this public domain as incidents of his estate, and that the privileges he possesses by the local custom, or by force of the wharf Act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the Legislature. The result is that there is no legal obstacle to a grant by the Legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark."

It was therefore held in that case, that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide water, below the high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss. The Act of March 31, 1869, as we have seen, afterward secured to the riparian owner the option of purchasing from the State its title to the shore, or, if granted to a stranger, compensation for the value of his privilege.

Having in view the manifest policy of this legislation, and the force and meaning of its language, we do not hesitate to adopt the conclusion that the several grants of the State to the united companies, under the Act of March 31, 1869, to enable them to improve their lands under water at Kill von Kull and other places, and the grants under the general Act of the same date, under which the other defendants claim, were intended to secure to the grantees the whole beneficial interest and estate in the property described for their exclusive use for the purposes expressed and intended in the grants. And, construing these conveyances most strongly in favor of the public, and yet so as not to defeat the grants themselves, we also conclude that the rights conveyed exclude every right of use or occupancy on the part of the public in the land itself. The land granted is specifically described by metes and bounds. The grant is a grant of the estate in the land, and not of a mere franchise or incorporeal hereditament. The uses declared are such as require an exclusive possession by the grantees, that they may hold, possess, improve and use the same for their own use and profit, according to the nature of the business which by law they are authorized to conduct. In other words, under these grants the land conveyed is held by the grantees on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the State of New Jersey therein, whether proprietary or sovereign, is transferred or extinguished, except such sovereign rights as the State may lawfully exercise over all other private property.

It is further objected, however, that upon this supposition, that the grants of the State in question are absolute and unqualified, nevertheless they operated only upon the title which the State had when it made them; and that, construing the original dedication of Stevens by the Loss map of the streets to the river as containing an implied covenant that they should be extended through any after acquired lands thereafter owned by Stevens or by those claiming under him, the conclusion follows that the defendants, on acquiring the title of the State to the premises in dispute, were thereafter estopped to deny the right of the City of Hoboken to the easement which it seeks to establish by its recovery in these actions. It is admitted in the argument by counsel for the plaintiff that the dedication could not impose a burden on the lands of the State, and that no such burden

existed as long as the State remained the owner; but it is contended that, as the grants of the State only operated on its present title, that "when the State's title passed to the successor of John Stevens, who was estopped from excluding these streets from access to tide water, the right as against him by estoppel sprang at once into existence and estopped him and all claiming under him." Suppose, instead of a dedication, it is said, John Stevens had made an express covenant with the city that, as he acquired the State's title to these lands and reclaimed them, he would continue the streets to the new water line. In such case no one would contend that the riparian Acts, or the grants made under them, would discharge such liability; it would attach to the lands as he acquired them, and bind him and his assigns. The dedication operates, it is claimed, on the same principle. No grant of the State's title would extinguish a liability which could not attach until after the State had parted with all its title to the lands.

But in this case there was no express covenant, and if any to that effect can be applied by law, it arises only upon the principle of an estoppel. Whether such an estoppel would arise upon the circumstances of the case, it is not necessary for us to discuss or decide. If we suppose it to exist, so that if the title acquired by the defendants from the State had been acquired from some other source, it would have been affected by it, nevertheless, the estoppel cannot apply to the defendants as successors to the title of the State. The grant, being from the State, creates an estoppel against the estoppel; for the State, in respect to the easements claimed, is the representative of the public, superior in authority and paramount in right to the City of Hoboken; and, as we have already seen, the existence of the easement defeats the grant of the State. The State, therefore, being estopped by its grant, is estopped to deny its effect to extinguish the public right to the easement claimed. The right insisted upon in these actions by the City of Hoboken is the public right, and not the right of individual citizens, claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors in the title. The public right represented by the plaintiff is subordinate to the State, and subject to its control. The State may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public right.

The extension of the easement of the public streets over the shore, when filled up below the original high water mark to a new water line, is, by the supposition made, a mere legal conclusion. The original proprietor had no power to extend the dedication beyond his own lines over the public domain. The estoppel sought to be raised against him by his subsequent acquisition of the title of the State to the shore is a mere conclusion of law, and may be extinguished by a subsequent law. Such is the present case. If the law prior to the Statutes of March 31, 1869, extended the easements of the dedicated streets to the newly made shore line, a subsequent law might extinguish it. This is what in fact was done, for the statutes of that date were not merely grants of rights of property, but were laws, which had the force of repealing all prior laws inconsistent with them.

Our conclusion, therefore, is that the grants from the State of New Jersey, under which the defendants claim, respectively, are a complete bar to the recovery sought against them in these suits. The effect of these grants was not considered or determined by the Court of Errors and Appeals of New Jersey in the case of the *Hoboken Land and Improvement Company* v. *The Mayor and Common Council of the City of Hoboken*, 7 Vroom, 540, and they were not elements in that judgment. The present cases are decided upon the distinction created by these grants from the State. It has not been necessary, therefore, for us to consider other questions raised in the argument in reference to the soundness in point of law of the judgment of the courts of New Jersey upon the facts involved, nor as to our obligation to follow that judgment as conclusive evidence of the settled law of the State on the subject. The new elements which have been introduced into these cases establish the rights of the defendants, as we have declared them, upon the basis of the absolute and unqualified title derived by them under direct grants from the State of New Jersey. Under these grants they have and hold the rightful and exclusive possession of the premises in controversy against the adverse claim of the plaintiff to any easement or right of way upon and over them, by virtue of the original dedication of the streets to high water mark on the Loss map.

The several judgments of the Circuit Court in these cases are therefore affirmed.

R. FRANK CLARK ET AL., Admrs. of MILO HOADLEY, Deceased, *Plffs. in Err.*,

v.

CITY AND COUNTY OF SAN FRANCISCO.

(See S. C. "*Hoadley* v. *San Francisco*," Reporter's ed. 639–646.)

California titles—squares dedicated to public use—Act of Congress—San Francisco Ordinance.

1. The Act of Congress of July 1, 1864, to settle titles in California, conveyed to the City of San Francisco lands within its corporate limits, for the uses and purposes specified in the ordinances of the City, ratified by the Act of the State Legislature, of March 11, 1858.

2. In this way the two squares "Alta Plaza" and "Hamilton Square," as designated in the report of the commissioners, approved by the order of the board of supervisors of October, 1856, were dedicated to public use as squares.

3. Lands so dedicated could not lawfully be conveyed by the City to private parties; and, therefore, the conveyance by the Act of Congress did not enure in respect to the lands sued for in this action, to the benefit of the plaintiff.

4. The Ordinance of the City, No. 822, passed June 20, 1855, for the settlement and quieting of land titles in the City, granted only such title as the City was permitted by Congress and the State to convey, and does not contain any contract with plaintiff, the obligation of which was impaired by the California Act of March 11, 1858.

[No. 879.]

Submitted Dec. 8, 1887. Decided Feb. 20, 1888.

IN ERROR to the Supreme Court of the State of California, to review a judgment of that Court affirming a judgment of the District Court of San Francisco in favor of defendant, in an action to quiet the title of plaintiff to lands in that City. *Affirmed.*

The facts are fully stated by the court.

Mr. S. W. Holladay, for plaintiffs in error:

There has been a final decision herein, in the highest court in this State. In this decision the validity of a statute of this State was drawn in question, on the ground of its being repugnant to the Constitution of the United States; and the decision is in favor of its validity. The statute whose validity is drawn in question is the Act of March 11, 1858.

It appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment.

Bridge Proprs. v. *Hoboken L. & I. Co.* 68 U. S. 1 Wall. 142, 143 (17: 575, 576) and cases cited; *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 634 (22: 443).

The opinion of the court may be consulted to see what was really adjudged.

Louisville & N. R. R. Co. v. *Palmes*, 109 U. S. 256 (27: 926); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359); *Piqua Branch Bank* v. *Knoop*, 57 U. S. 16 How. 391 (14: 986); *Murray* v. *Charleston*, 96 U. S. 441 (24: 761); *Armstrong* v. *Athens County Treasurer*, 41 U. S. 16 Pet. 281 (10: 965); *Scott* v. *Jones*, 46 U. S. 5 How. 380 (12: 198); *Medberry* v. *Ohio*, 65 U. S. 24 How. 414 (16: 739); *Steines* v. *Franklin County*, 81 U. S. 14 Wall. 21 (20: 848); *Dubuque & S. C. R. R. Co.* v. *Richmond*, 82 U. S. 15 Wall. 7 (21: 119).

It was error for the court to decide that the Act of March 11, 1858, was valid.

The statute, in ratifying this series of ordinances, operated to give effect to each.

Marshall County v. *Schenck*, 72 U. S. 5 Wall. 781 (18: 558); *Pickett* v. *Hastings*, 47 Cal. 284; *Hart* v. *Burnett*, 15 Cal. 610; *San Francisco* v. *Beideman*, 17 Cal. 462; *Carleton* v. *Townsend*, 28 Cal. 223; *Wolf* v. *Baldwin*, 19 Cal. 315; *Valentine* v. *Mahoney*, 37 Cal. 398; *De Bernal* v. *Lynch*, 36 Cal. 144; *Payne* v. *Treadwell*, 16 Cal. 233; *Merryman* v. *Bourne*, 76 U. S. 9 Wall. 603 (19: 687); *Seabury* v. *Arthur*, 28 Cal. 150; *Landes* v. *Brant*, 51 U. S. 10 How. 373 (13: 460); *Touchard* v. *Crow*, 20 Cal. 160; Vin. Abr. title, *Relation*, 290; *McCracken* v. *San Francisco*, 16 Cal. 623; *Megerle* v. *Ashe*, 33 Cal. 85; *Truchelut* ads. *City Council*, 1 Nott & McC. 136, 227; *Gibson* v. *Hibbard*, 13 Mich. 217; *State* v. *Norwood*, 12 Md. 206; *Southern Pacific R. R. Co.* v. *Dull*, 22 Fed. Rep. 489; *S. C.* 10 Sawy. 506.

Where the rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the state court.

Chicago v. *Robbins*, 67 U. S. 2 Black, 428 (17: 304).

The grant is *in præsenti*. Ordinance 822 is a present grant of the whole property, passing the title from the City to the possessors.

St. Joseph & D. C. R. R. Co. v. *Baldwin*, 103 U. S. 426 (26: 578); 4 Kent's Com. 129; *Holmes* v. *Grant*, 8 Paige, 243; *Davis* v. *Thomas*, 1 Russ. & M. 506; Roper, Legacies, 618; *Ferris* v. *Coover*, 10 Cal. 614, 615; Shep. Touch. 188.

The grant was a contract.

Holladay v. *Frisbie*, 15 Cal. 635; *People* v. *Westchester County*, 4 Barb. 79; *People* v. *Bond*, 10 Cal. 571, 572; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Piqua Branch Bank* v. *Knoop*, 57 U. S. 16 How. 385 (14: 988); *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 429 (14: 1002); *Westervelt* v. *Gregg*, 12 N. Y. 212.

The obligation of this contract must be protected.

McCauley v. *Weller*, 12 Cal. 532, 533; *State* v. *McCauley*, 15 Cal. 457; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 58 (19: 376).

A part of a statute may be in conflict with some constitutional provision and therefore void, while the balance would be valid and binding.

Cooley's Const. Lim. 177, 178, and cases cited; *People* v. *McCann*, 16 N. Y. 61; *People* v. *Hill*, 7 Cal. 108; *Robinson* v. *Bidwell*, 22 Cal. 386, and cases cited; *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 206 (13: 389); *French* v. *Teschemaker*, 24 Cal. 536; *Meshmeier* v. *State*, 11 Ind. 485; *Fisher* v. *McGirr*, 1 Gray, 21, 22; *Houghton* v. *Austin*, 47 Cal. 646, 647.

Upon this writ of error we present no question arising under the construction of that Act, but we rely entirely upon the state statute passed in confirmation of the ordinance of grant.

Hoadley v. *San Francisco*, 94 U. S. 5 (24: 34).

The decision here decides a part of the statute to be valid which impairs the obligation of the contract by destroying the estate.

Furman v. *Nichol*, *supra*; *Louisville & N. R. R. Co.* v. *Palmes*, 109 U. S. 256 (27: 926).

Messrs. **George Flournoy** and **John B. Mhoon**, for defendant in error:

In the court below the sole issue was whether or not the title had been transferred by the ordinance and Act mentioned. No federal question is presented by the record.

Romie v. *Casanova*, 91 U. S. 379 (23: 374); *Hammond* v. *Mason & H. Organ Co.* 92 U. S. 724 (23: 767); *Palmer* v. *Low*, 98 U. S. 16 (25: 64); *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326 (18: 547); *The Pueblo Case*, 4 Sawy. 554; *San Francisco* v. *Canavan*, 42 Cal. 541; *Montgomery* v. *Bevans*, 1 Sawy. 653; *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 363 (18: 863); *Hoadley* v. *San Francisco*, 50 Cal. 275.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought by Milo Hoadley to quiet his title to certain lands in the City of San Francisco. The material facts are these:

Prior to 1848 there existed at the place now occupied by the City of San Francisco a town or pueblo, which was organized under the Mexican Government, and which claimed title to four square leagues of land, including the premises in controversy. The present City of San Francisco is the legal successor of this town or pueblo. In the spring of 1850 Hoadley entered into possession of a part of the claim, including the land now in dispute. The City of San Francisco was incorporated by the State of California, April 15, 1851, and, on the 6th of July, 1852, it presented to the board of

land commissioners, organized under the Act of Congress of March 3, 1851, 9 Stat. at L. 631, chap. 41, "to ascertain and settle the private land claims in the State of California," its claim, as the successor of the pueblo, to the four leagues of land held, as alleged, by the pueblo under Mexican authority. The commission, in December, 1854, confirmed the claim to only a portion of the four leagues, *Trenouth* v. *San Francisco*, 100 U. S. 251, 253 [25: 626, 627], and the City took an appeal to the district court.

On the 20th of June, 1855, while this appeal was pending and undisposed of, the common council of the City passed Ordinance No. 822, commonly called the Van Ness Ordinance, "for the settlement and quieting of the land titles in the City of San Francisco." By the first section it was made the duty of the mayor to enter at the proper land office at the minimum price all the lands within the City above the natural high water mark of the Bay of San Francisco "in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests." The second section relinquished and granted all the right and claim of the City to the lands within the corporate limits to the parties in the actual possession thereof, with certain exceptions not material to this case. The third section provided that the patent issued or any grant made by the United States to the City should inure to possessors "as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name." Sections 6, 8 and 10 of the same ordinance were as follows:

"Sec. 6. The City * * * may lay out and reserve upon the said lands * * * public squares, which shall not embrace more than one block, corresponding in size to the adjoining block; *Provided*, That the selection shall be made within six months from the time of the passage of this ordinance; and that the City shall not, without due compensation, occupy, for the purposes mentioned in this section, after the laying out the streets aforesaid, more than one twentieth part of the land in the possession of any one person."

"Sec. 8. The selection of said lands and lots shall be made by a commission, to consist of three persons, who shall be chosen by the common council in joint convention, who shall report the same to the common council for its approval; and, upon such approval, deeds of release to the corporation for the lands thus selected shall be executed, acknowledged and recorded, in which deeds shall be specified the uses for which they are granted, reserved and set apart respectively."

"Sec. 10. Application shall be made to the Legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands for the uses and purposes hereinbefore specified."

No entry of the land was ever perfected under this or any other ordinance. Neither was there any selection of squares made before the 27th of September, 1855, when the common council passed Ordinance No. 845, being an "ordinance providing for, selecting, and designating public squares, * * * according to the provisions of Ordinance No. 822," and confirmatory thereof. This ordinance provided for the election of three commissioners to act under No. 822, and to discharge the duties specified in section 8 thereof. Under this ordinance commissioners were chosen, and, by another ordinance, passed April 7, 1856, they "were granted until the 20th day of April, 1856, to complete their labors." On the 19th of April, 1856, these commissioners made their report, by which they laid out and reserved, among others, "Alta Plaza" and "Hamilton Square;" and in so doing they took for each four blocks instead of one, and they also took more than one tenth of the whole land in the possession of Hoadley. No compensation has been made him for any part of the land so taken.

On the 15th of October, 1856, this taking and these reservations were approved by an order of the board of supervisors of the City and County of San Francisco, then the governing body of the City. On the 11th of March, 1858, the Legislature of California passed an Act embodying and reciting literally the two ordinances of the common council and the order of the board of supervisors above mentioned, and then enacted as follows:

"*Be it therefore enacted*, That the within and before cited order and ordinances be, and the same are hereby, ratified and confirmed, and all the land entered, or to be entered, in the United State Land Office, in pursuance of section one of the first recited of said ordinances, in trust, shall pass and inure to and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests, in execution of the trust designated in an Act of Congress entitled 'An Act for the Relief of Citizens of Towns upon the Public Lands of the United States under Certain Circumstances,' approved May twenty-third, one thousand eight hundred and forty-four, as extended and applied by an Act of Congress entitled 'An Act to Provide for the Survey of the Public Lands in California, the Granting of Preemption Rights Therein, and for Other Purposes,' approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually to all intents and purposes as if they were public Acts of the State Legislature.

"Sec. 2. That the grant or relinquishment of title made by the said City in favor of the several possessors by sections two and three of the ordinance first above recited shall take effect as fully and completely, for the purpose of transferring the City's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof; *Provided*, That nothing in this Act shall be so construed as to release the City of San Francisco, or City and County of

San Francisco, from the payment of any claim or claims due or to become due this State against said City, or City and County, nor to effect or release to said City and County any title this State has or may have to any lands in said City and County of San Francisco."

By section 5 of the Act of July 1, 1864, 13 Stat. at L. 332, chap. 194, "to expedite the settlement of titles to lands in the State of California," Congress enacted as follows:

"Sec. 5. *And be it further enacted*, That all the right and title of the United States to the lands within the corporate limits of the City of San Francisco, as defined in the Act incorporating said City, passed by the Legislature of the State of California on the fifteenth of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said City and its successors, for the uses and purposes specified in the ordinances of said City, ratified by an Act of the Legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An Act Concerning the City of San Francisco, and to Ratify and Confirm Certain Ordinances of the Common Council of the City.'"

Under the authority of the same statute (§ 4) the appeal of the City of San Francisco, then pending in the district court, was transferred to the circuit court, and that court on the 18th of May, 1865, entered a decree confirming the claim so as to include the land now in dispute, but declaring that "This confirmation is in trust for the benefit of the lotholders under grants from the Pueblo, Town, or City of San Francisco, or other competent authority; and as to any residue, in trust for the use and benefit of the inhabitants of the City."

Upon these facts Hoadley claimed title to the parts of the "Alta Plaza" and "Hamilton Square," which were taken from the lands originally occupied by him under his entry in 1850. The Supreme Court of the State decided that the title was in the City, and enjoined him from "meddling or interfering with the same." To reverse that judgment this writ of error was brought.

This case was before us at October Term, 1876, upon an appeal from an order of the Circuit Court of the United States remanding it to the state court from which it had been removed under the Act of March 3, 1875, 18 Stat. at L. 470, chap. 137. We then said that "The questions involved did not arise under the laws of the United States, but under the ordinances of the City as ratified by the Act of the Legislature. The Act of Congress operated as a release to the City of all the interests of the United States in the land. The title of the United States was vested in the City. Whether the City took the beneficial interest in the property as well as the legal title depended upon the effect to be given to the Act of the Legislature and the ordinances, and not upon the Act of Congress." For this reason we affirmed the order remanding the case which had been removed upon a petition "alleging that it was one arising under the Constitution and laws of the United States." *Hoadley* v. *San Francisco*, 94 U. S. 4 [24: 34].

The record in that case presented all the questions which arise in this except one, which is thus stated in the specification of error found in the brief of counsel for Hoadley:

"It was error for the court to decide that that part of the Act of March 11, 1858, was valid which ratified the order of the board of supervisors of October 16, 1856, adopting the plan or map of the City 'in respect to the reservation of squares for public purposes,' and thereby deciding that plaintiff has no title, thus impairing the obligation of the contract of grant, in Ordinance 822, in violation of article 1, section 10, of the Constitution of the United States.

"It was error, because, under said decision, that part of the Act of 1858 took plaintiff's property without due process of law, and without just compensation, in violation of the Fifth Amendment of the Constitution of the United States."

This makes it necessary to inquire whether Ordinance 822 contains any contract with Hoadley, the obligation of which was impaired by the Act of March 11, 1858, or whether it vested in him any property which would be taken away without due process of law if the statute is adjudged to be valid. In the consideration of federal questions of the character presented by this specification of error our first duty is to determine whether there is such a contract, or such right of property as is alleged. The existence of the contract or of the right is part of the federal question itself. *Bridge Proprietors* v. *Hoboken Land & I. Co.* 68 U. S. 1 Wall. 116, 145 [17: 571, 576].

As to this branch of the case the record shows that the Supreme Court of California said in its opinion:

"Whatever rights the plaintiff acquired under the Van Ness Ordinance he took subject to the Act of 1858, which approved the survey and map above mentioned. This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The Act of approval ratified the Ordinance 822 allowing title to be made under it by a possession designated in it, and ratified also Ordinance 845 and the order of the justices approving the survey and map above mentioned; and when the Act of 1858 was passed the doctrine of relation could vest in the plaintiff no greater rights than he took under the Act of 1858. Any rights which plaintiff derived under the Act of 1858 would be subject to all its provisions. At the same time that Ordinance 822 was ratified the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the Act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace of a contract between the plaintiff and anyone which ever vested in plaintiff any rights different from those accorded to him herein."

To this we agree. When the ordinance was passed the title of the City to the property covered by the claim then pending before the district court on appeal was imperfect. It never did acquire title by entry as contemplated in the first section, and that further action was required both by the Legislature of California and by Congress before occupants could secure title under the grants contemplated in section 2, is clearly shown by section 10, which specially provides for application to the Legislature to confirm and ratify the ordinance, and to Congress to relinquish the title of the United

States. The ordinance granted only such title as the City was permitted by Congress and the State to convey. In its legal effect the Act of Congress conveyed the lands to the City for the uses and purposes specified in the ordinances and the order of the City ratified by the Act of the Legislature. In this way the two squares, as designated in the report of the commissioners, approved by the order of October, 1856, were dedicated to public use as squares. Lands so dedicated could not lawfully be conveyed by the City to private parties, and therefore the conveyance by Congress did not inure in this particular to the benefit of Hoadley. In short, the State refused to confirm the ordinance, so far as it had reference to the grant by the City of any part of these squares, and Congress in its conveyance followed in this particular what had been done by the State.

The judgment is affirmed.

WILLIAM D. ANDREWS ET AL., *Appts.*,

v.

GEORGE HOVEY.

(See S. C. Reporter's ed. 694-719.)

Driven well patent—rule of Patent Office—construction of statute—decision of commissioner of patents, not conclusive—prior use of more than two years invalidates patent.

1. Patents are often granted with a view to leaving open, to be decided by the courts, questions which the Patent Office does not deem it proper to adjudicate against the applicant by withholding the patent.

2. The promulgation and enforcement by the Patent Office, of a rule that a patent will not be granted if the invention has been in public use or on sale, with the consent of the inventor, more than two years before his application, cannot have the effect of a judicial or authoritative adjudication of the question whether the patent granted had been in use or on sale for such time, with such consent.

3. A question arising in regard to the construction of a statute of the United States concerning patents for inventions, where such question is reviewable by this court, cannot be regarded as finally or judicially settled until it has been determined by this court, the highest judicial authority which can pass upon it.

4. The question as to the validity of the patent, by reason of pre-existing acts or omissions of the inventor, of the character of those involved in the present case, is not a question of executive administration, but is a judicial question; and the determination of the commissioner of patents in granting the patent does not conclude the determination of the courts in regard to such question.

5. Under the second clause of section 7 of the Act of 1839, where the purchase, sale or prior use referred to therein has been for more than two years prior to the application, the patent will be held invalid without regard to whether such purchase, sale or use was with the consent or allowance of the inventor.

The cases on this subject reviewed by the court, and its prior decision in this case adhered to.

[No. 16.]

Submitted Jan. 16, 1888. Decided Feb. 20, 1888.

APPEAL from a judgment of the Circuit Court of the United States for the Southern District of Iowa deciding the patent known as the "Driven Well Patent" to be invalid.

On petition for a rehearing. *Denied.*

The case is reported in 123 U. S. 267, *ante*, 160.

Messrs. **Joseph C. Clayton** and **Anthony Q. Keasbey,** for appellants, petitioners:

A plain omission and mistake has been made. The very point of the decree had been decided the other way by this court.

Kendall v. *Winsor*, 62 U. S. 21 How. 322 (16:165); *Andrews* v. *Carman*, 18 Blatchf. 307; *Andrews* v. *Cross*, 19 Blatchf. 294; *Klein* v. *Russell*, 86 U. S. 19 Wall. 433 (22:116); *Seymour* v. *McCormick*, 57 U. S. 16 How. 486 (14:1026); *Bates* v. *Coe*, 98 U. S. 46 (25:78); *Pierson* v. *Eagle Screw Co.* 3 Story, 405; *Wright* v. *Sill*, 67 U. S. 2 Black, 544 (17:333); *Elizabeth* v. *Ang. Nich. Pavement Co.* 97 U. S. 126 (24:1000); *Smith & G. Mfg. Co.* v. *Sprague*, 123 U. S. 249 (*ante*, 141).

Two years' use in public of an invention before application is not a bar to a patent, unless such use be with the consent or allowance of the inventor.

Heath v. *Hildreth*, 1 MacArth. Pat. Cas. 20; *Arnold* v. *Bishop*, Id. 34; *Hunt* v. *Howe*, Id. 373; *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1 (7:327); *Rugg* v. *Haines*, 1 MacArth. Pat. Cas. 422; *Mowry* v. *Barber*, Id. 566; *Carroll* v. *Gambrill*, Id. 583; *Ellithorp* v. *Robertson*, Id. 593; *Blackinton* v. *Douglass*, Id. 622; *Justice* v. *Jones*, Id. 635; *Wickersham* v. *Singer*, Id. 645; *Savary* v. *Lauth*, Id. 691; *Spear* v. *Belson*, Id. 699; *Hovey* v. *Stevens*, 1 Wood. & M. 290; *Sargent* v. *Seagrave*, 2 Curt. 555; *Pierson* v. *Eagle Screw Co.* 3 Story, 406; *Sanders* v. *Logan*, 2 Fish. Pat. Cas. 167; *Howes* v. *McNeal*, 3 Ban. & Ard. 376; *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 (23:952); *Godfrey* v. *Eames*, 68 U. S. 1 Wall. 317 (17:684); *Draper* v. *Wattles*, 3 Ban. & Ard. 618; *Campbell* v. *Mayor of N. Y.* 20 Blatchf. 67; *McCormick* v. *Seymour*, 2 Blatchf. 254.

A public use or sale, to defeat the right of an inventor to a patent, must have been for the period prescribed, with his consent and allowance.

Pierson v. *Eagle Screw Co.* 3 Story, 405; *Bates* v. *Coe, supra; Kelleher* v. *Darling*, 4 Cliff. 441; *Davis* v. *Fredericks*, 21 Blatchf. 557; *Brickill* v. *Mayor of N. Y.* 18 Blatchf. 273; *Henry* v. *Francestown Soapstone Stove Co.* 2 Ban. & Ard. 221; *Egbert* v. *Lippman*, 104 U. S. 333 (26:755); *Henry* v. *Providence Tool Co.* 3 Ban. & Ard. 513.

After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself.

Douglass v. *Pike County*, 101 U. S. 677 (25:968).

Long, uninterrupted practice under a statute is good evidence of its construction.

McKeen v. *DeLancy*, 9 U. S. 5 Cranch, 22 (3:25); *Brown* v. *U. S.* 113 U. S. 568 (28:1079); *The Laura*, 114 U. S. 411 (29:147); *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206 (6:603); *Atkins* v. *Fiber Disintegrating Co.* 85 U. S. 18 Wall. 301 (21:844); *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 382 (23:49); *U. S.* v. *Pugh*, 99 U. S. 265 (25:322); *U. S.* v. *Moore*, 95 U. S. 763 (24:589); *U. S.* v. *Bank of North Carolina*, 31 U. S. 6 Pet. 29 (8:308); *U. S.* v. *Alexander*, 79 U. S. 12 Wall. 177 (20:381); *Peabody* v. *Stark*, 83 U. S. 16 Wall. 240 (21:311); *Hahn* v. *U. S.* 107 U. S. 402 (27:527); *Stuart* v. *Laird*, 5 U. S. 1 Cranch, 308

(2:118); *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 57 (28:351).

Mr. **George Ticknor Curtis** filed supplemental brief, and *Mr.* **Albert H. Walker** suggestions, in support of petition.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a petition by the appellants in the case of *Andrews* v. *Hovey*, reported in 123 U. S. 267 [*ante*, 160], for a rehearing of that case upon the points upon which the decision was based.

The suit was a suit in equity, brought by the appellants for the infringement of reissued letters patent No. 4872, granted to Nelson W. Green, one of the appellants, May 9, 1871, for an "improvement in the method of constructing artesian wells," the original patent, No. 73425, having been granted to said Green, as inventor, January 14, 1868, on an application filed March 17, 1866. The circuit court had dismissed the bill on the ground of the invalidity of the patent. The plaintiffs appealed and this court affirmed the decree. In its opinion, it was said: "The patent is familiarly known as the driven well patent. The specifications and drawings of the original and reissued patents are set forth in the opinion of this court in *Eames* v. *Andrews*, 122 U. S. 40 [30:1064]. Numerous defenses are set up in the answer in the present case, and voluminous proofs have been taken in respect to those defenses; but it is necessary to consider only one of them, which in our view is fatal to the validity of the patent, and that is, that the invention was used in public, at Cortland, in the State of New York, by others than Green, more than two years before the application for the patent. The brief of the appellants concedes that it is shown in this case that other persons than Green put the invention into public use more than two years before his application was filed. It is contended for the appellants that this was done without his knowledge, consent, or allowance. The appellee contends that such knowledge, consent, or allowance was not necessary in order to invalidate the patent, while the appellants contend that it was necessary. The whole question depends upon the proper construction of section 7 of the Act of March 8, 1839, 5 Stat. at L. 354, interpreted in connection with sections 6, 7, and 15 of the Act of July 4, 1836, 5 Stat. at L. 119, 123." 123 U. S. 269 [*ante*, 161].

Our decision was that the patent was invalid because the invention covered by it had been in public use more than two years before Green applied for the patent, without reference to the question whether he consented to such use or not. The views which led to this conclusion were set forth at length in the opinion, and a further consideration of them, in the light of the arguments presented on this application for a rehearing, has only served to confirm us in the conviction that they were correct. But, as the briefs of counsel in support of the application proceed upon the ground that certain views and authorities, which they think bear upon the question involved, were not presented to us upon the original hearing, we deem it proper to state the reasons for our adherence to our conclusion.

The main proposition urged by the counsel for the appellants is that the question involved was adjudged by this court in accordance with their views, in the case of *Kendall* v. *Winsor*, 62 U. S. 21 How. 322 [16:165], decided in 1858. In the same connection, other authorities, which it is alleged were not cited by counsel on the former hearing, are presented. It is also urged that the court omitted to give due weight to what is said to be the current of executive and judicial authority in favor of the construction upon which the appellants rely; and that the 7th section of the Act of 1839 does not apply to the patent in question, because it is a patent for a process.

The question involved arises upon the second clause of section 7 of the Act of 1839, which section was in these words: "That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale or prior use has been for more than two years prior to such application for a patent."

This section contains two clauses, all that precedes the first semicolon being the first clause, and all that comes after the first semicolon being the second clause. The first clause relates to the right of a person, as against a suit by the patentee for infringement, to use and sell the specific machine, manufacture or composition of matter purchased or constructed prior to the application for the patent, and the use of which would otherwise be a violation of the patent. The second clause relates to the effect upon the validity of the patent, of such purchase, sale, or use prior to the application. The questions involved in the two clauses are quite different. The first clause relates to the particular right of a particular defendant to use a particular machine, manufacture, or composition of matter after the grant of the patent, and notwithstanding its grant, and in no manner relates to the validity or invalidity of the patent. The second clause relates wholly to the validity of the patent. Most of the authorities laid before us and relied upon on the present application relate entirely to the first clause of the section.

The first case in which the 7th section of the Act of 1839 appears to have come under consideration in this court was that of *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 [11:102], decided in 1843. But that was a case which involved only the first clause of the section. The patent was for an improvement in the mode of casting chilled rollers. It was, therefore, a patent for an improvement in a process. The patentee invented it while he was a workman in the employ of the defendants. They put it into use in their business. He left their employment, and then applied for and obtained his patent. His assignees sued the defendants in an action at law for continuing to use the improvement. There was a verdict for the de-

fendants, upon the ground that, by reason of their unmolested, notorious use of the invention before the application for the patent, they had a right to continue to use it, under the provisions of the first clause of the 7th section. The judgment for the defendants was affirmed by this court upon that ground. It held that the defendants were on the same footing as if they had had from the inventor a special license to use his invention, given before he applied for his patent, and that the first clause of the 7th section extended to the invention or thing patented in that case, although it consisted of a new mode of operating an old machine, as contradistinguished from a patent for a machine. The court distinctly held that the words "newly invented machine, manufacture, or composition of matter," and the words "such invention," in the first clause of the 7th section, meant the invention patented; and that the words "the specific machine, manufacture, or composition of matter" meant the thing invented, the right to which was secured by the patent. We see nothing in this case which sustains the position of the appellants.

The first reported case in a circuit court, involving any part of the 7th section, is that of *Pierson* v. *Eagle Screw Co.* 3 Story, 402, in 1844, in the Circuit Court for the District of Massachusetts, before *Mr. Justice* Story. That was a case which involved only the first clause of the section. The defendant had, prior to the patentee's application for his patent, purchased the right to use a certain number of machines embracing the patented improvement, from the assignee of an independent inventor thereof, and claimed the right, under the 7th section, to use the machines which it had actually in operation, notwithstanding the fact that the patentee was the first inventor. The circuit court charged the jury that the first clause of the 7th section did not confer such right upon the defendant, because there was no license or consent by the patentee, as inventor, to the use of the machines by the defendant. In considering that question the court observed, in regard to the second clause of the 7th section, that it limited the right to apply for a patent to the period of two years after the inventor had sold his invention or allowed it to be used by others. But the second clause was not directly in judgment in the case. This observation on the subject appears to have been the origin of much that has been said on the question in subsequent cases, for this case of *Pierson* v. *Eagle Screw Co.* is generally cited as the leading authority in favor of the position taken by the appellants.

In *Hovey* v. *Stevens*, 1 Wood. & M. 290, in the Circuit Court for the District of Massachusetts, in 1846, before *Mr. Justice* Woodbury, a motion was made for a preliminary injunction, on a patent granted to Hovey. The question arose whether Stevens did not himself, before Hovey obtained his patent, discover or construct the patented invention. The court considered the question whether Stevens had not obtained a knowledge of Hovey's invention through a workman in his employ, who had previously been in the employ of Hovey and had used the improvement, and whether Stevens did not copy the improvement from Hovey's, without Hovey's consent, and before Hovey made his machine public or sold it. The court observed that, in such a case, the use of the machine by Stevens, though begun before Hovey obtained his patent, would be a use by fraud, not contemplated and saved under the 7th section of the Act of 1839. The question was solely as to the right of Stevens to continue to use the machine which he had so begun to use before Hovey obtained his patent. The court declined to determine the question of fact involved, as an action at law, to be tried by a jury, for a violation of the patent, between the same parties, was then pending, and refused to grant the injunction. As appears by the report of the case of *Hovey* v. *Stevens*, 3 Wood. & M. 17, 32, the bill in equity was dismissed and the jury case was tried, and the plaintiff was nonsuited upon grounds not involving those considered on the motion for the preliminary injunction.

The next case cited is *Pitts* v. *Hall*, 2 Blatchf. 229, in 1851, in the Circuit Court for the Northern District of New York, before *Mr. Justice* Nelson and *Judge* Conkling. In that case the only questions were whether the patentee had forfeited his right to his invention by using it in public more than two years prior to his application, or whether such use by him was only experimental, with a view to further improvements; and also whether he had dedicated or abandoned his invention to the public use. The case in no manner involved the question before us.

In *McCormick* v. *Seymour*, 2 Blatchf. 240, in 1851, in the Circuit Court for the Northern District of New York, before *Mr. Justice* Nelson, the points involved related wholly to the acts of the patentee himself, more than two years prior to his application, in respect to his own use in public of the patented improvement; and to the question of his abandonment of the invention to the public within the two years. The jury having failed to agree upon a verdict, the case was again tried, and resulted in a verdict and judgment for the plaintiff, thus overruling the defenses set up. At December Term, 1853, this court reversed the judgment on the question of damages, but it approved the rulings below on the above points. *Seymour* v. *McCormick*, 57 U. S. 16 How. 480 [14: 1024].

The case of *Sargent* v. *Seagrave*, 2 Curt. 553, in 1855, in the Circuit Court for the District of Massachusetts, before *Mr. Justice* Curtis, involved only the questions, on a motion for a preliminary injunction, of the exclusive possession of the right by the patentee, and the acquiescence of the public therein, after the issue of the patent, for the period of about two years, and its acquiescence in the claim of the patentee to a right under a *caveat*, for about two years before the date of the patent.

Then came the case of *Kendall* v. *Winsor*, 62 U. S. 21 How. 322 [16:165] decided by this court at December Term, 1858. It was a writ of error to the Circuit Court for the District of Rhode Island, where the case was tried before *Mr. Justice* Curtis and a jury. The suit was an action at law for damages for the infringement of a patent granted to Winsor, who had a verdict and a judgment. The particular question in the case arose wholly under the first clause of the 7th section of the Act of 1839. The defendants claimed a right to use certain specific machines under that clause. The application for the patent was made in November, 1854.

Prior to that time, the defendants had constructed one machine containing the patented invention, and they constructed others in the autumn of 1854. In the course of that fall, Winsor had knowledge that the defendants had built, or were building, one or more machines like his invention, and did not interpose to prevent them. Winsor had completed in 1849 four machines containing the patented improvements, and had made on them articles which he had sold. But he kept the machines from the view of the public, allowed none of the hands employed by him to introduce persons to view them, and the hands pledged themselves not to divulge the invention. Among those hands was one Aldridge, who left the plaintiff's employment in the autumn of 1852, and entered into an arrangement with the defendants to copy the plaintiff's machine for them, and did so, and the defendants' machines were built and put in operation by Aldridge, and under his superintendence, and by means of the knowledge which he had gained while in the plaintiff's employment, under a pledge of secrecy. On the basis of these facts, the defendants' counsel prayed the court to instruct the jury that, under the 7th section of the Act of 1839, if the jury were satisfied that the machines for the use of which the defendants were sued were constructed and put in operation before the plaintiff applied for his patent, then the defendants possessed the right to use, and vend to others to be used, the specific machines made or purchased by them, without liability therefor to the plaintiff. The court did not grant this prayer, but instructed the jury that, if Aldridge, under a pledge of secrecy, obtained knowledge of the plaintiff's machine, and thereupon, at the instigation of the defendants, and with a knowledge on their part of the surreptitiousness of his acts, constructed machines for the defendants, they would not have the right to continue to use the same after the date of the plaintiff's patent; but that, if the defendants had the machines constructed before the plaintiff applied for his patent, under the belief, authorized by him, that he consented and allowed them so to do, they might lawfully continue to use the same after the date of the patent, and the plaintiff could not recover. It was on this state of the case that the question came before this court. The first clause of the 7th section was the only one involved in the instruction asked for and in that above recited as given. This court affirmed the judgment and the propriety of the action of the circuit court. In its opinion, it observed that inventors were "entitled to protection against frauds or wrongs practiced to pirate from them the results of thought and labor;" that "The shield of this protection has been constantly interposed between the inventor and fraudulent spoliator by the courts of England, and most signally and effectually has this been done by this court, as is seen in the cases of *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1 [7: 327] and of *Shaw* v. *Cooper*, 32 U. S. 7 Pet. 292 [8:689]." The opinion of the court treated the case as one in which the rights of Winsor could not be affected, because the knowledge of the invention had been surreptitiously obtained and communicated to the public; and went on to remark that the instruction to the jury at circuit was in strict conformity with that principle, and with the doctrines declared in *Pennock* v. *Dialogue* and *Shaw* v. *Cooper*. It closed the opinion by saying: "That instruction diminishes or excludes no proper ground upon which the conduct and intent of the plaintiff below, as evinced either by declarations or acts, or by omission to speak or act, and on which also the justice and integrity of the conduct of the defendants, were to be examined and determined. It submitted the conduct and intentions of both plaintiff and defendants to the jury, as questions of *fact* to be decided by them, guided simply by such rules of law as had been settled with reference to issues like the one before them; and upon those questions of fact the jury have responded in favor of the plaintiff below, the defendant in error. We think that the rejection by the court of the prayers offered by the defendants at the trial was warranted by the character of those prayers, as having a tendency to narrow the inquiry by the jury to an imperfect and partial view of the case, and to divert their minds from a full comprehension of the merits of the controversy."

It is thus seen that this case not only turned upon a right claimed wholly under the first clause of the 7th section, but that it was held that a fraudulent, piratical, and surreptitious purchase or construction of a machine, like that shown in that case, was not such a purchase or construction as was covered by the first clause of the 7th section. The decision in that case does affect the one now before the court.

It may well be that a fraudulent, surreptitious and piratical purchase or construction or use of an invention prior to the application for the patent would not affect the rights of the patentee under either clause of the 7th section; but the present is not such a case as that which existed in *Kendall* v. *Winsor*. In the use of driven wells in public, at Cortland, by others than Green, more than two years before his application, we see nothing in the evidence under which such use can properly be characterized as fraudulent, piratical, or surreptitious. Green's invention was made in 1861. The brief of the appellants at the former hearing contained this statement: "But it is not denied that in this case there is proof that after the invention by Green in 1861, and his public exhibition of it in Cortland, the rumor of it spread, and the value of it became apparent; and other persons, without Green's consent and allowance, did put the invention into public use without his knowledge." The application for the patent was made March 17, 1866. It is true that the driven wells thus referred to were constructed, some by Mudge and some by Suggett, who obtained knowledge of the invention from Green. It is admitted in the appellants' brief on the present application that, subsequently to Green's invention, and more than two years prior to his application, Suggett put down four driven wells, for persons named Copeland, Seaman, Foster, and Samson respectively, and Mudge, five wells, for persons named Pomeroy, Bolles, Bates, Seaman and Hicks, respectively. But there is nothing that indicates in regard to these wells fraud or piracy or surreptitiousness, in the sense of the decision in *Kendall* v. *Winsor*. The invention was made by Green and

publicly exhibited, the rumor of it spread, and its value became apparent, and the persons for whom the wells so put down were made, had them constructed during the time when, for five years after the invention, Green failed to apply for a patent. Of course, Green, from the moment of the invention, had an inchoate property therein, which he could complete by taking a patent. The first clause of the 7th section of the Act of 1839 gave to the persons for whom those wells were constructed a right to use them without the consent of Green, and the second clause of that section had the effect to make Green's patent invalid because of the use of the invention by those persons more than two years before he applied for his patent.

In the case of *Sanders* v. *Logan*, 2 Fish. Pat. Cas. 167, in 1861, in the Circuit Court for the Western District of Pennsylvania, before *Mr. Justice* Grier and *Judge* McCandless, the bill was dismissed because the patentee had abandoned his invention, and because it had been publicly used, with his knowledge, consent and approbation, more than two years prior to the application for the patent.

In the case of *American Hide & L. S. & D. M. Co.* v. *American Tool & M. Co.* 4 Fish. Pat. Cas. 284, in 1870, in the Circuit Court for the District of Massachusetts, before *Judge* Shepley, the question tried was whether the invention was in public use or on sale, with the knowledge and consent of the inventor, more than two years before he applied for his patent, and whether he had abandoned his invention to the public prior to his application. On these issues the jury found for the defendants.

In *M'Millin* v. *Barclay*, 5 Fish. Pat. Cas. 189, in 1871, in the Circuit Court for the Western District of Pennsylvania, before *Judge* McKennan, two patents were involved. In regard to one of them, the defense was that the patentee had himself used the invention in public more than two years before he applied for his patent. It was held that when it was so used it was a complete invention, and the patent was held to be invalid. In regard to the other patent, the defense was that of abandonment by the patentee subsequently to the making of his application, the application having been made in 1855, and the patent having been granted in 1867, and the invention having gone into use subsequently to the application. The defense of the abandonment of the invention after the application was filed was overruled.

In *Russell & E. Mfg. Co.* v. *Mallory*, 10 Blatchf. 140, in 1872, in the Circuit Court for the District of Connecticut, before *Judges* Woodruff and Shipman, the question involved related entirely to an abandonment of the invention and to the effect of the acts of the patentee within two years prior to the application.

In *Jones* v. *Sewall*, 3 Cliff. 568, in 1878, in the Circuit Court for the District of Massachusetts, before *Mr. Justice* Clifford, it was set up as a defense that the several improvements covered by the patent sued on were in public use and on sale more than two years before the patentee made his application for the patent. The court overruled the defense, holding that there was no evidence to show that the inventions, or either of them, were in public use or on sale more than two years before the inventor applied for a patent, or for any shorter period, with his consent and allowance, or that he had any knowledge of any such sale or public use at the time it was made; and that, on the contrary, the evidence showed that he never gave his consent to any such sales, and that he constantly asserted that he intended to apply for a patent. The decision was placed upon the ground that such consent and allowance were necessary to the invalidity of the patent. This was a direct adjudication upon the point involved in the present case.

In *Klein* v. *Russell*, 86 U. S. 19 Wall. 433, [22:116] at October Term, 1873, the defense was want of novelty. The plaintiff had a judgment which was affirmed by this court. At the trial, the defendant requested the court to charge the jury: "1. That the invention, as described in the patent of February, 1870, is the treatment of bark-tanned sheep and lamb skins by the employment of fat liquor; and, if such treatment was known to others, and more than two years before the plaintiff applied for his patent, his patent is void." He also requested the court to instruct the jury: "7th. That, if fat liquor had been used substantially in the manner specified in the plaintiff's patent, for the purpose of rendering any kind of leather soft and supple, more than two years before the plaintiff applied for a patent, the plaintiff cannot recover, even though it had not been so used in dressing bark-tanned lamb or sheep skins." These instructions were refused, and the failure to give them was alleged as error. The defendant in error contended, in this court, that the first request did not correctly or fully describe the invention; that the employment of fat liquor merely was not the whole of the invention, but that it was the employment of fat liquor in the condition and manner described in the specification; and that the refusal to charge the seventh request was proper.

In regard to the first request, this court said that the instruction was properly refused, and that it stated inaccurately the rule of law which it involved. The court added: "A patent relates back, where the question of novelty is in issue, to the date of the invention and not to the time of the application for its issue. The jury had already been sufficiently instructed upon the subject. The instruction assumes that the reissue was for the use of fat liquor, without reference to the point whether it were hot or cold." The court then proceeded to hold that the two claims of the patent sued on required that the fat liquor should be heated, and that therefore the first instruction asked was improper. It is quite apparent that the court considered only the issue of novelty, and that it did not pass upon the question involved in the present case.

The seventh request, like the first, was inaccurate, because it referred to the time of the application, and not to the date of the invention; and, in regard to the seventh request, the court merely said that it was satisfied with the rulings of the court below in regard to that request and four others which, it stated, might be "grouped and disposed of together;" and it added that neither of them required any special remark. We cannot regard the case of *Klein* v. *Russell* as adjudicating the question now presented.

In *Henry* v. *Francestown Soapstone Stove Co.* 2 Ban. & Ard. 221, in 1876 in the Circuit Court for the District of New Hampshire, before *Judge* Shepley, the defense was the public use and sale of the invention by the patentee more than two years before he applied for his patent. It was held that the use and sales by him were experimental.

In *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92 [24: 68] at October Term, 1876, a patent granted in 1870, on an application made in January, 1868, the invention having been completed in June, 1859, was held void, because (1) there was a purchase, sale, and prior use of the invention more than two years before the application, and (2) at the time of the application the invention had been abandoned to the public. The sale and prior use were by the inventor himself. This case does not adjudge the point here involved.

In *Kellsher* v. *Darling*, 4 Cliff. 424, in 1878, in the Circuit Court for the District of Massachusetts, before *Mr. Justice* Clifford, the original patent was issued in 1871, under the Act of July 8, 1870, and was divided, on its subsequent surrender, into two reissued patents. No question arose in thecase under the Act of 1839.

So, too, the case of *Henry* v. *Providence Tool Co.* 3 Ban. & Ard. 501, in 1878, in the Circuit Court for the District of Rhode Island, before *Mr. Justice* Clifford, arose under the Act of 1870.

In *Draper* v. *Wattles*, 3 Ban. & Ard. 618, in 1878, in the Circuit Court for the District of Massachusetts, before *Judge* Lowell, the original patent was issued in 1869, on an application made in June, 1868. The court held that, under the 7th section of the Act of 1839, the sale or use more than two years prior to the application must have been with the consent or allowance of the inventor, in order to invalidate the patent, and that the patent was not invalidated by the sale by the inventor more than two years before he applied for his patent of an article which did not embody the whole of his invention as subsequently patented. The point involved in the present case was thus directly adjudged.

In *Bates* v. *Coe*, 98 U. S. 31 [25:68] at October Term, 1878, the original patent was issued in 1868. *Mr. Justice* Clifford, in delivering the opinion of the court, stated that the answer did not set up as a defense that the invention had been in public use or on sale in this country for more than two years before the application for the patent, and that there was nothing in the record to support that proposition, if it had been well pleaded. His observation, therefore, citing *Pierson* v. *Eagle Screw Co.* 3 Story, 402, that, under the 7th section of the Act of 1839 the public use or sale, in order to defeat the right of the inventor to the patent must have been with his consent and allowance, for more than two years prior to the application, was an observation made in regard to a point not in issue or in judgment.

In *Henry* v. *Francestown Soapstone Stove Co.* 5 Ban. & Ard. 108, in the Circuit Court for the District of New Hampshire, in 1880, before *Judge* Lowell, the patent had been granted in 1859, on an application filed in 1857. On proof that the inventor had, more than two years prior to his application, sold articles containing his invention, not experimentally, the patent was held invalid.

In *Graham* v. *McCormick*, 10 Biss. 39; *S. C.* 5 Ban. & Ard. 247, in the Circuit Court for the Northern District of Illinois, in 1880, before *Judge* Drummond, the patent having been granted in 1868, the question was as to a use or sale by the inventor more than two years before his application; and it was held that, as a matter of fact, the sale and use by him were experimental.

In *Brickill* v. *Mayor of N. Y.* 18 Blatchf. 273, in 1880, in the Circuit Court for the Southern District of New York, before *Judge* Wheeler, the patent had been granted in 1868; and the defendant, the City of New York, set up a right to use the invention, which was for the combination of a heating apparatus with a steam fire engine, by reason of the fact that the patentee had made it while in the employ of the Fire Department of the city, and had attached it to two of the city fire engines. The court held, notwithstanding the construction put upon the first clause of section 7 of the Act of 1839 by this court in *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 [11:102] that the defendants had acquired no right beyond the right to use the specific machines constructed prior to the application for the patent.

In *Campbell* v. *Mayor of N. Y.* 20 Blatchf. 67, in 1881 in the Circuit Court for the Southern District of New York, before *Judge* Wheeler, the patent having been granted in 1864, and the invention having been made, sold, and used by others than the patentee after he had invented it, and more than two years before he applied for his patent, but without his consent and allowance, it was held by the court that, under the second clause of the 7th section of the Act of 1839, the public use and sale having been without the consent or allowance of the inventor, the patent was not invalid. This was a direct adjudication upon the point involved in the present case.

In *Davis* v. *Fredericks*, 21 Blatchf. 556, in 1884, in the Circuit Court for the Southern District of New York, before *Judge* Wheeler, the patent having been granted in 1868, the invention had got into public use and on sale more than two years prior to the application for the patent, but without the inventor's consent or allowance. The court held, following *Campbell* v. *Mayor of N. Y.* that the patent was not invalid, thus adjudging the point in question here.

Reference is also made in the brief for the appellants, to twelve cases reported in 1 MacArthur's Patent Cases, running from 1841 to 1859, decided by the Judges of the Circuit and Supreme Courts of the District of Columbia, on appeals from the commissioner of patents; but in none of them was the point here involved in judgment. In *Heath* v. *Hildreth*, p. 12, no question arose under the Act of 1839. In *Arnold* v. *Bishop*, p. 27, consent by the applicant to the use of his invention for more than two years prior to his application was shown. In *Hunt* v. *Howe*, p. 366, the sale was made by the inventor. In *Rugg* v. *Haines*, p. 420, the use and sale were with the consent and allowance of the applicant. In *Mowry* v. *Barber*, p. 563, the making and selling were by the applicant. In *Carroll* v. *Gambrill*, p. 581, the applicant was defeated upon the ground of estop-

pel and of abandonment of the invention. In *Ellithorp* v. *Robertson*, p. 585, he was defeated upon the ground of laches on his part, amounting to abandonment. In *Blackinton* v. *Douglass*, p. 622, there was public use with the consent of the inventor. This was also the case in *Justice* v. *Jones*, p. 635. In *Wickersham* v. *Singer*, p. 645, there were abandonment by the inventor and consent and allowance by him. In *Savary* v. *Lauth*, p. 691, the applicants were defeated on the ground of laches by them and presumed acquiescence. In *Spear* v. *Belson*, p. 699, it was held that laches and delay on the part of the applicant had caused a forfeiture of his right.

The review we have given of the cases now cited on behalf of the appellants shows no adjudication by this court on the question involved, and a direct adjudication as to the effect of the second clause of the 7th section of the Act of 1839, in accordance with that contended for by the appellants, in only four cases in circuit courts, not including *Andrews* v. *Carman*. To the contrary effect is the case of *Egbert* v. *Lippmann*, 15 Blatchf. 295, commented on in the former opinion, 123 U. S. 270, 271 [*ante*, 161, 162].

It is alleged by the appellants that this court was in error in stating, as it did in its former opinion—123 U. S. 269 [*ante*, 161]—that, in *Andrews* v. *Carman*, 13 Blatchf. 307, 324, the question of the use of Green's invention by others more than two years prior to his application does not appear to have been raised; that it was in fact raised; and that the inference to the contrary grows out of a clerical error in the published opinion in *Andrews* v. *Carman*. It may be accepted that this is so, but the question of law involved is the very question now under consideration.

It is also alleged that the same question was distinctly raised, in proof and argument, in the interference case between Green and Suggett respecting this invention, and that Green's patent was thereafter granted, with the understanding in the Patent Office that the Cortland wells now in question had been constructed subsequently to Green's invention and more than two years before his application. But patents are often granted with a view to leaving open, to be decided by the courts, questions which the Patent Office does not deem it proper to adjudicate against the applicant by withholding the patent.

It is also urged that in the rules of the Patent Office, promulgated between the time of the passage of the Act of March 3, 1839, and the enactment of the Act of July 8, 1870, it was made known to applicants for patents that a patent would not be granted if the invention had been in public use or on sale, with the consent and allowance of the inventor, for more than two years before his application. It was undoubtedly true that such a state of facts was sufficient ground for withholding a patent; but the promulgation and enforcement of such a rule cannot be regarded as having the effect of a judicial or authoritative adjudication of the question under consideration.

The argument sought to be founded upon the various phases assumed by the provisions of the Act of July 8, 1870, in its passage through the two Houses of Congress, is very unsafe and unreliable, as a basis of judicial action, particularly when the only inference sought to be drawn is one as to what view Congress took of the Act of 1839, in enacting the Act of 1870. If any inference is to be drawn on the subject, it can only properly be drawn from the Act of 1870 as it stands on the statute book, and that inference is commented on in the former opinion of this court, at page 275 of 123 U. S. [*ante*, 163].

The doctrine invoked by the appellants, that where the meaning of a statute has been settled by judicial construction, that construction becomes a part of the statute, is not applicable to the present case. A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question. The earliest decision of a circuit court, directly adjudging the point here involved, was in 1878. This court has always had jurisdiction to review suits on patents to a specified extent, and that jurisdiction was extended by section 56 of the Act of July 8, 1870, 16 Stat. at L. 207, to writs of error and appeals, in such suits, without regard to the sum or value in dispute. No question arising in any such case, reviewable by this court, can be regarded as finally settled, so as to establish the law for like cases, until it has been determined by this court. This view of the matter has been applied by this court in analogous cases. Thus, in *Wilson* v. *City Bank*, 84 U. S. 17 Wall. 473 [21:723], a decision was made as to the construction of sections 35 and 39 of the bankruptcy Act of March 2, 1867, which, this court said in its opinion, was contrary to the view taken by "a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided." So, too, in *Ex parte Wilson*, 114 U. S. 417 [29: 89], as to the proper construction of the constitutional provision that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and as to what criminal prosecutions required an indictment, and in what an information was allowable, this court said, p. 425, [92]: "Within the last fifteen years prosecutions by information have greatly increased; and the general current of opinion in the circuit and district courts has been towards sustaining them for any crime, a conviction of which would not, at common law, have disqualified the convict to be a witness." The court cited seven cases in the courts of the United States, besides the one before it, which had adopted such view; but that view was overruled, and a contrary one established.

Nor is this a case for the application of the doctrine that, in cases of ambiguity, the practice adopted by an executive department of the government in interpreting and administering a statute is to be taken as some evidence of its proper construction. The question before us, as to the validity of a patent, by reason of pre-existing acts or omissions of the inventor, of the character of those involved in the present case, is not a question of executive administration, but is properly a judicial question. Although it may be a question which, to some extent, may come under the cognizance of the

commissioner of patents, in granting a patent, yet, like all the questions passed upon by him in granting a patent, which are similar in character to the question here involved, his determination thereof, in granting a particular patent, has never been looked upon as concluding the determination of the courts in regard to those questions, respecting such particular patent, and, *a fortiori*, respecting other patents.

It is contended for the appellants that the claim of the Green patent is for a process, being for "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward as it is in boring, substantially as herein described;" that the 7th section of the Act of 1839 applies only to "a machine, manufacture, or composition of matter;" and that, therefore, that section does not apply to the present case. In addition to the view to the contrary taken by this court in *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 [11: 102], before commented on, it was held by this court in *Beedle* v. *Bennett*, 122 U. S. 71 [30: 1074], a suit on this very patent, that the patent covers the process of drawing water from the earth by means of a well driven in the manner described in the patent, and that the use of a well so constructed was therefore a continuing infringement, because every time water was drawn from it the patented process was necessarily used.

The most plausible argument presented on the part of the appellants is that, under sections 6, 7, and 15 of the Act of July 4, 1836, a patent was invalid if the thing invented had been in public use or on sale, with the consent and allowance of the inventor, prior to his application for the patent; that section 7 of the Act of 1839 was intended only to limit the effect on the validity of the patent of the acquisition of single specimens of the patented invention; that the interests of purchasers or constructors of such specific articles were the sole objects of that section; that the second clause of the section was intended only to provide that the patentee should hold his right against the general public, unless there was proof of abandonment by him, or unless the purchase, sale, or prior use by or to individuals who had acquired such specific articles, had been for more than two years prior to the application for the patent; that in this respect alone were the provisions of the Act of 1836 intended to be modified; and that a defendant, in order to show the invalidity of a patent, under section 7 of the Act of 1839, must show that he claims exemption from liability to the patentee because he purchased or constructed a specific article covered by the patent prior to the application therefor, and must show that the invention was abandoned or that the purchase, sale, or prior use, or construction of the specific article occurred more than two years before the application for the patent, and with the consent and allowance of the inventor.

But our views in regard to the proper construction of the 7th section do not admit the soundness of this contention, and were fully set forth in the former opinion.

It is proper to notice the suggestion that there is no declaration in the 7th section of the Act of 1839 that either in the case of an abandonment of the invention, or of the existence, for more than two years prior to the application, of the purchase, sale, or prior use referred to in the second clause of the section, the patent shall be held to be invalid; and the further suggestion that there is only a hypothetical implication that the patent shall be invalid in the excepted cases. But we cannot so interpret the statute. Under sections 6, 7, and 15 of the Act of 1836, a patent was made invalid if, at the time of the application therefor, the invention had been in public use or on sale, with the consent or allowance of the patentee, however short the time. The second clause of the 7th section seems to us to clearly intend that, where the purchase, sale, or prior use referred to in it has been for more than two years prior to the application, the patent shall be held to be invalid, without regard to the consent or allowance of the inventor. Otherwise the statute cannot be given its full effect and meaning.

The result of these views is that the application for a rehearing is denied.

WILLIAM D. ANDREWS ET AL., *Appts.*,
v.
ROYAL D. CONE.

(See S. C. Reporter's ed. 720.)

Driven well patent.

The decree, dismissing suit for the infringement of the Driven Well Patent, affirmed, pursuant to a stipulation that it should abide the result of the case of *Andrews* v. *Hovey*, 123 U. S. 267, *ante*, 160.

[No. 156.]

Decided Feb. 20, 1888.

APPEAL from the Circuit Court of the United States for the District of Minnesota. *Affirmed.*

Messrs. **George F. Edmunds** and **J. C. Clayton**, for appellants.

Mr. **Thomas Wilson**, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the plaintiffs in a suit in equity in the Circuit Court of the United States for the District of Minnesota, from a decree dismissing the bill. The suit was brought for the infringement of the "driven well" patent which was the subject of the decision of this court in *Andrews* v. *Hovey*, 123 U. S. 267 [*ante*, 160], and in which case an application for a rehearing has just been denied, 124 U. S. 694 [*ante*, 557]. The decree below in *Andrews* v. *Hovey*, 5 McCrary, 181, dismissed the bill and this court affirmed it, holding the patent to have been invalid. In the present case there is a written stipulation, filed in this court, signed by the counsel of record here, that this case shall abide the result of the case of *Andrews* v. *Hovey*, in this court, and that the decree and mandate herein shall be the same as the decree and mandate in that case, except that no costs shall be taxed or awarded, or disbursements or officer's fees allowed or awarded, in this case, in favor of or against either party hereto, and that each party shall pay his own costs and disbursements. In accordance with such stipulation, *the decree of the Circuit Court is affirmed, subject to the above recited provisions of the stipulation.*

UNITED STATES, *Appt.*,
v.
MATHILDE DEMORANT ET AL.

(See S. C. Reporter's ed. 647, 648.)

Judgment amended.

Judgment amended, by adding instructions to the court below to amend its decree by describing the lands confirmed, and by declaring that if any of said lands have been sold by the United States, the appellees may enter a like quantity of the public lands, and by declaring them entitled to scrip certificates therefor, and by directing a reference to ascertain what sales have been made.

[No. 36.]

Submitted Jan. 30, 1888. Decided Feb. 20, 1888.

APPEAL from the District Court of the United States for the Northern District of Florida. Reported *ante*, 171.

Motion to amend decree and remand cause with instructions. *Granted.*

Mr. **Robert B. Lines,** for appellees:

It has been the practice heretofore, in such cases, for the decree of the lower court to state whether any and what lands have been so sold within the limits of private land claims.

See mandates and Records in *U. S.* v. *Cushing*, October Term, 1873; *U. S.* v. *Marquis of Casa Yrujo*, October Term, 1878.

Mr. Justice **Bradley** delivered the opinion of the court:

It is ordered that the judgment in this case be amended by adding thereto instructions to the district court from whose decree the appeal was taken to amend its decree by describing, according to United States surveys, the lands applied for by the appellees and confirmed to them by the decree, and by declaring that if any parts of said lands have been sold or granted by the United States, the appellees shall have the right to enter upon any of the public lands of the United States, a quantity of land equal in extent to that so sold or granted; and by directing a reference to be made to a master to ascertain whether any such sales, and if so what, and to what extent, have been made; and by declaring the appellees entitled to scrip certificates to the extent and amount of such sales and grants.

And the said district court is further instructed to take such further proceedings as may be necessary to carry out the instructions of this decree.

ROBERT K. DOW ET AL., Trustees, *Appts.*,
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

(See S. C. Reporter's ed. 652–656.)

Mortgagor, rights of—account of earnings.

1. The mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage.

2. A demand for the possession may be made by the bringing of a suit for that purpose, and, from the time of the bringing of such suit, the mortgagor must account to the mortgagee for such earnings, and it is of no consequence that a receiver was not appointed until subsequently.

[No. 165.]

Argued Jan. 9, 1888. Decided Feb. 20, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, directing the restoration of money by a receiver to the above named Railroad Company. *Reversed.*

The facts are stated by the court.

Mr. **U. M. Rose,** for appellants:

The court erred in striking from the decree that part of it which required the money on hand to be turned over to the receiver.

Fitzgerald v. *Beebe*, 7 Ark. 311; *Gilchrist* v. *Patterson*, 18 Ark. 579; *Galveston, H. & H. R. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 483 (20: 207); *Gibbes* v. *Greenville & C. R. R. Co.* 15 Shand (S. C.) 518; *S. C.* 9 Am. & Eng. R. R. Cas. 728.

Mr. **Wager Swayne,** for appellee:

When a mortgagee allows a mortgagor to remain in possession after default, the latter takes the rents and profits to his own use, and the former cannot require him to account therefor, nor recover them from him. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise the right he cannot claim the profits.

Jones, Mort. §§ 670, 771; 1 Hill. Mort. 179–222, *passim*; 2 Washb. Real Prop. 156, par. 11; Jones, R. R. Securities, § 114; *Higgins* v. *York Buildings Co.* 2 Atk. 107; *Chinnery* v. *Blackman*, 3 Doug. (Eng.) 391; *S. C. sub. nom. Chinnery* v. *Blackburne*, 1 H. Bl. 117, note; *Gilman* v. *Illinois & M. Tel. Co.* 91 U. S. 615 (23:409); *Wilder* v. *Houghton*, 1 Pick. 87; *Noyes* v. *Rich*, 52 Me. 115; *Mississippi Valley & W. R. Co.* v. *U. S. Express Co.* 81 Ill. 534; *Boston Bank* v. *Reed*, 8 Pick. 461; *Long* v. *Wade*, 70 Me. 358; *Field* v. *Swan*, 10 Met. 112; *Chase* v. *Palmer*, 25 Me. 341; *Smith* v. *Eastern R. R. Co.* 124 Mass. 154; *Ellis* v. *Boston, H. & E. R. R. Co.* 107 Mass. 1; *Bath* v. *Miller*, 51 Me. 341; *Williamson* v. *New Albany R. R. Co.* 1 Biss. 198; *De Graff* v. *St. Paul & P. R. R. Co.* 23 Minn. 144; *Merchants Bank* v. *Petersburg R. R. Co.* 12 Phila. 482; *Galveston, H. & H. R. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 482 (20: 207); *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798 (24: 144); *DeGraff* v. *Thompson*, 24 Minn. 452.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The facts on which this case rests are these:

Robert K. Dow, Watson Matthews and Charles Moran are the trustees in two mortgages executed by the Memphis and Little Rock Railroad Company as reorganized, one on the first and the other on the second of May, 1877, to secure two separate issues of bonds. Each of the mortgages covered, among other things, "all the incomes, rents, issues, tolls, profits, receipts, rights, benefits and advantages had, received or derived by the party of the first part from any of the hereby conveyed premises," which included the railroad of the Company; but it was provided that until default in the payment of interest or principal the Company should "retain the possession of all the property hereby conveyed, and receive and enjoy the income thereof." In case of default for sixty

days in the payment of interest the Trustees were authorized to enter upon and take possession of "all and singular the charter, franchises and property * * * conveyed," "and take and receive the income and profits thereof."

The Company failed to pay its interest falling due July 1, 1882, and thereafter. For this reason the Trustees began this suit against the Company in the Circuit Court of the United States on the 12th of February, 1884, praying that they might be put into the possession of the mortgaged property in accordance with the terms of the mortgage of May 2, 1877, and for the purposes therein expressed, "and that the defendant may be enjoined from interfering with their possession, or disturbing it in any way." On the 24th of March they applied for the appointment of a receiver, and the court on the 27th of that month granted the parties until April 7 to file briefs on the motion, but ordered "that the defendant, until further order herein, hold the property mentioned in the bill subject to the order of the court." On the 15th of April a receiver was appointed, and the Company was ordered at once to "surrender possession of its said railroad, rolling stock, and all other money and property of every character" to him. To this order exceptions were taken by the Company, so far as it directed the delivery of money to the receiver, on the ground "that all the money in its hands or possession was derived by it from the operation of the railroad and other property mentioned in the bill, and was its income and the income of said property, and that it had no money whatever, save such as was thus derived and received;" and that at no time had the plaintiff demanded possession of the property. On the 18th of April this motion was denied, but the receiver was directed to hold the moneys to be paid him "subject to the order of the court, and to be repaid to defendant should the court so adjudge."

On the 27th of March the Company had in its hands $42,123.68. Between that date and April 15 the Company paid out $46,458.16, and its earnings were such that, when added to the $42,123.68, there was enough to make these payments and leave a balance of $32,216.20, which was paid over to the receiver.

Certain persons, who were holders of bonds secured by the mortgage of May 1, 1877, recovered judgments at law against the Company for past due coupons amounting in the aggregate to more than the sum thus put in the hands of the receiver, and they presented petitions for payment out of the fund. Afterwards the court ordered the receiver to pay back the $32,216.20 to the Company, and to turn over the mortgaged property to the Trustees. The record does not show that there are any other creditors than such as are secured by the mortgages, which exceed in amount the value of the property.

From that part of the decree directing the restoration of the money to the Company the Trustees took this appeal. The creditors who presented petitions for the payment of their judgments did not appeal, so that the only question presented here is whether the court erred in ordering the receiver to pay the $32,216.20 to the Company instead of the Trustees.

It is well settled that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Galveston, H. & H. R. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459, 488 [20: 199, 207].

In the present case a demand was made for the possession, by the bringing of this suit, February 12, 1884; and from that time, in our opinion, the Company must account. The bill was not filed to foreclose the mortgage, but to enforce a surrender of possession to the Trustees in accordance with its terms. The court below decided that the Trustees were entitled to the possession when the suit was begun, and from the decree to that effect no appeal has been prosecuted. We must assume, therefore, that the demand was rightfully made, and ought to have been granted. It follows that after the suit was begun the Company wrongfully withheld the possession; and under such circumstances equity forbids that it should retain, as against the mortgagee, the fruits of its refusal to do what it ought to have done. It is a matter of no consequence that a receiver was not appointed until April 15, or that an application was not made for such an appointment until March 24. If the surrender of possession had been made, as we must assume it ought to have been, as soon as the suit was begun, a receiver would have been unnecessary. All that was done afterwards in that particular was in aid of the suit and because of the refusal of the Company to comply with the demand that had been made. It follows that from the time of the bringing of the suit the Company itself is to be treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it should be found to concern, and liable to account accordingly. In *Galveston, H. & H. R. R. Co.* v. *Cowdrey*, before cited, the controversy was in respect to earnings before suit brought, and the suit was for foreclosure only, the court being careful to say in its opinion that it did not "appear that the complainants or their Trustees made any demand for the tolls and income until they filed the present bill," and that "the bill itself did not contain any allegation of such a demand."

It remains only to inquire when the money which is the subject matter of the controversy was actually earned; and we have no hesitation in deciding, upon the evidence, that it must have been after the suit was begun. The admission is that on the 27th of March the amount in the hands of the Company was $42,123.68. Between that date and April 15, the Company paid out $46,458.16, which was $4,334.48 in excess of what it had on hand at the beginning. On the 15th of April it had on hand $32,216.20, thus showing that its earnings from March 27 until then must have been $36,550.68. The fair inference from the evidence is that the receipts were all from the current earnings and the disbursements for the current expenses. The railroad was all the time, before and after the suit, a "going concern," and its receipts and disbursements the subjects of current income account. Applying the disbursements as

they were made from the income to the payment of the older liabilities for the expenses, as is the rule in ordinary running accounts, it is clear that, in the absence of proof to the contrary, the money on hand was earned pending the suit.

Under these circumstances, as there are no current expense creditors claiming the fund, we are satisfied that the money is to be treated as income covered by the mortgages, and should be paid to the Trustees to be held as part of that security.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to enter a decree in accordance with this opinion.

PACIFIC NATIONAL BANK OF BOSTON, by PETER BUTLER, Receiver, *Plff. in Err.*,

v.

GEORGE MIXTER.

PACIFIC NATIONAL BANK OF BOSTON AND PETER BUTLER, Receiver, *Plffs. in Err.*,

v.

HENRY M. WHITNEY.

PACIFIC NATIONAL BANK OF BOSTON, PETER BUTLER, Receiver, *Plffs. in Err.*,

v.

DANIEL L. DEMMON.

PETER BUTLER, Receiver of the PACIFIC NATIONAL BANK, *Appt.*,

v.

LEWIS COLEMAN ET AL.

(See S. C. Reporter's ed. 721-730.)

Attachment against national bank—bond on attachment, when void—suit in equity by receiver.

1. An attachment cannot issue against a national bank before judgment in a suit begun in the Circuit Court of the United States.

2. A bond given to dissolve an attachment creates no liability when the attachment on which it is predicated was prohibited by law. Such a bond is not good under the statute, nor at common law.

3. A suit in equity may be maintained by a receiver of a bank against attaching creditors and sureties on the bonds given to dissolve the attachments, to reduce to the possession of the receiver securities held by such sureties for their protection, and to restrain the attaching creditors from enforcing the attachment bonds, although such bonds are invalid, and a decree in such action will, if the sureties are held not to be liable, conclude the creditors from all further proceedings against them on the bonds.

[Nos. 129, 130, 440, 439.]

Argued Jan. 9, 10, 11, 1888. Decided Feb. 20, 1888.

THE three first named cases were brought to this court by writs of error issued to the Circuit Court of the United States for the District of Massachusetts, to review judgments against the plaintiffs in error, on debts owing by the Bank. The last of the above named cases is an appeal from a decree of the same court, dismissing an action in equity, brought by the Receiver, to reduce securities to his possession, and to restrain attaching creditors. Judgments in the first three cases *affirmed*. The decree in the last case *reversed*.

See opinion below, 22 Fed. Rep. 694.

The facts are fully stated in the opinion.

Mr. **A. A. Ranney,** for plaintiffs in error and appellant:

The appellant is a receiver of a national banking association, administering a trust in the winding up of the same; and the power of the court to enjoin the plaintiffs in suits at law is clear.

Hendee v. *Conn. & P. R. Co.* 26 Fed. Rep. 677; R. S. § 5284.

Injunction may be made after verdict.

Kerr, Inj. p. 21, cases in note *f*.

The sureties withhold personal securities which cannot be reached by an ordinary legal process of replevin.

Brigham v. *Home L. Ins. Co.* 131 Mass. 319; Story, Eq. §§ 703, 906; *Pierce* v. *Lamson*, 5 Allen, 60.

Section 5242 of the Revised Statutes has been construed and enforced in several cases.

First Nat. Bank v. *Colby*, 88 U. S. 21 Wall. 609 (22:687); *Harvey* v. *Allen*, 16 Blatchf. 29; *Robinson* v. *Newberne Nat. Bank*, 81 N. Y. 385; *Market Nat. Bank* v. *Pac. Nat. Bank*, 30 Hun, 50; *Raynor* v. *Pac. Nat. Bank*, 17 Jones & S. 119; S. C. 98 N. Y. 371; *Horton* v. *Pac. Nat. Bank* (unreported), cited in the brief and opinion in 17 Jones & S. 119; *Venango Nat. Bank* v. *Taylor*, 56 Pa. 14; *Case* v. *Citizens Bank*, 2 Woods, 23; *Irons* v. *Mfrs. Nat. Bank*, 6 Biss. 301.

The courts in New York have allowed attachments in that State, in the state courts, of the property of solvent banking associations—that is to say, of other States.

Bowen v. *First Nat. Bank*, 34 How. Pr. 408; *Southwick* v. *First Nat. Bank*, 7 Hun, 96.

A national bank could not be put into insolvency and wound up under the state Insolvency Acts.

Re Mfrs. Nat. Bank, 5 Biss. 499.

If evil intention is a material element, the court will find it.

Case v. *Citizens Bank, supra; Watson* v. *Taylor*, 88 U. S. 21 Wall. 378 (22:576); *Forbes* v. *Howe*, 102 Mass. 427.

The statute does not allow the attaching creditor a preference.

Venango Nat. Bank v. *Taylor, supra.*

As to what constitutes insolvency under Revised Statutes, § 5242, see *Market Nat. Bank* v. *Pac. Nat. Bank*, 30 Hun, 50; *Robinson* v. *Newberne Nat. Bank*, 81 N. Y. 385.

When a national banking association becomes insolvent, the right of a creditor to prosecute a suit is a limited one.

Bethel Nat. Bank v. *Nat. Pahquioque Bank*, 81 U. S. 14 Wall. 383 (20:840); *Case* v. *Citizens Bank*, 100 U. S. 446 (25:695).

The principles of law which should preclude the defendants in error from getting judgment are established in the following cases:

R. S. § 5242; *First Nat. Bank* v. *Colby*, 88 U. S. 21 Wall. 609 (22:687); *Schmidt* v. *First Nat. Bank*, 22 La. Ann. 314; *Robinson* v. *Newberne Nat. Bank*, 81 N. Y. 385; *Stanton* v. *Wilkeson*,

8 Ben. 357; *Harvey* v. *Allen*, 16 Blatchf. 29; *Raynor* v. *Pac. Nat. Bank*, 93 N. Y. 371; *Market Nat. Bank* v. *Pac. Nat. Bank*, *supra*.

No attachment shall be issued before final judgment.

Chesapeake Bank v. *First Nat. Bank*, 40 Md. 269; *Cent. Nat. Bank* v. *Richland Nat. Bank*, 52 How. Pr. 136.

The power of the court over the judgment is clear. It has been exercised often.

Bates v. *Tappan*, 99 Mass. 376; *Peck* v. *Jenness*, 48 U. S. 7 How. 612 (12:841); *Upton* v. *Hubbard*, 28 Conn. 277; *Case* v. *Citizens Bank*, *supra*; *Leighton* v. *Kelsey*, 57 Me. 85; *Kittredge* v. *Emerson*, 15 N. H. 227; *Goodsell* v. *Benson*, 13 R. I. 225.

Messrs. **Joshua D. Ball, Alfred D. Foster, Richard Stone** and **Henry Wheeler,** for defendants in error and appellees:

There is nothing which prevents a suit against even an insolvent bank, and the prosecution of the suit to a final judgment. The appointment of a receiver does not abate the suit, or prevent its further prosecution.

Bethel Nat. Bank v. *Nat. Pahquioque Bank*, 81 U. S. 14 Wall. 383 (20:840); *Central Nat. Bank* v. *Conn. Mut. L. Ins. Co.* 104 U. S. 54, 76 (26:693, 702); *Rosenblatt* v. *Johnston*, 104 U. S. 463 (26:833); *Com. Nat. Bank* v. *Mechanics Nat. Bank*, 94 U. S. 437 (24:176); *Watson* v. *Phœnix Bank*, 8 Met. 217; *Security Bank* v. *Com. Nat. Bank*, 2 Hun, 287; *Tracy* v. *First Nat. Bank*, 37 N. Y. 523; *Folger* v. *Col. Ins. Co.* 99 Mass. 276; *White* v. *Knox*, 111 U. S. 784 (28:603); *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353.

Bankruptcy or the insolvency of a corporation, and the appointment of an assignee, do not prevent suits against the corporation.

New Lamp Chimney Co. v. *Ansonia Brass & C. Co.* 91 U. S. 656 (23:336); *Coburn* v. *Boston Papier Maché Mfg. Co.* 10 Gray, 243; *Johnson* v. *Somerville Dyeing & B. Co.* 15 Gray, 218; *Chamberlin* v. *Huguenot Mfg. Co.* 118 Mass. 532; *Munson* v. *Boston, H. & E. R. Co.* 120 Mass. 81; *Athol Nat. Bank* v. *Hingham Mfg. Co.* 121 Mass. 399; *First Nat. Bank* v. *Hingham Mfg. Co.* 127 Mass. 563; *Phœnix Warehousing Co.* v. *Badger*, 6 Hun, 293.

A receiver takes merely the rights of the bank.

Casey v. *La Société de Credit Mobilier*, 2 Woods, 77; *Hubbard* v. *Hamilton Bank*, 7 Met. 340, 346; *Watson* v. *Phœnix Bank*, 8 Met. 217, 222; *Curtis* v. *Leavitt*, 15 N. Y. 44, 45, 106; *Lincoln* v. *Fitch*, 42 Me. 456, 469; High, Receivers, § 359; Beach, Receivers, § 474.

There was no intent to prefer. The pursuit by a creditor of his legal remedies cannot be an illegal preference. An intent to prefer is essential to constitute a preference.

Wilson v. *City Bank*, 84 U. S. 17 Wall. 473, 484–488 (21:723, 727, 728); *Tenth Nat. Bank* v. *Warren*, 96 U. S. 539 (24:640); *Mayo* v. *Fritton*, 87 U. S. 20 Wall. 414, 420 (22:389, 391); *Tiffany* v. *Lucas*, 82 U. S. 15 Wall. 422 (21:199); *Jones* v. *Howland*, 8 Met. 377, 386–388; *Smith* v. *Merrill*, 9 Gray, 144; *Curtis* v. *Leavitt*, 15 N. Y. 109–112.

Payment of a check by a bank, insolvent, the depositor being wholly ignorant of its financial condition, will be protected.

Dutcher v. *Importers & T. Nat. Bank*, 59 N. Y. 5; *Wilson* v. *City Bank*, *supra*.

The attaching creditors believed the Bank solvent.

Grant v. *First Nat. Bank*, 97 U. S. 80 (24:971); *Barbour* v. *Priest*, 108 U. S. 293 (26:478); *Stucky* v. *Masonic Sav. Bank*, 108 U. S. 74 (27:640); *Medsker* v. *Bonebrake*, 108 U. S. 67 (27:654); *Tiffany* v. *Lucas*, *Dutcher* v. *Importers & T. Nat. Bank*, and *Wilson* v. *City Bank*, *supra*.

It is no defense to the sureties upon a bond to dissolve an attachment, that the original attachment was invalid, or that no attachment was ever made.

Coleman v. *Bean*, 1 Abb. App. Dec. 394; *McMillan* v. *Dana*, 18 Cal. 339; *Bacon* v. *Daniels*, 116 Mass. 474.

Or that the property attached did not belong to the defendant.

Beal v. *Alexander*, 1 Rob. (La.) 277; *Hazelrigg* v. *Donaldson*, 2 Met. (Ky.) 445; *Pierce* v. *Whiting*, 63 Cal. 538.

Or that the sureties were induced to sign by the fraud of the principal, unless the attaching plaintiff was party to the fraud.

Dair v. *U. S.* 83 U. S. 16 Wall. 1 (21:491); *Carroll Co.* v. *Ruggles*, 69 Iowa, 269; *Coleman* v. *Bean*, *supra*.

Or the discharge in bankruptcy, of the defendant, after the judgment was obtained.

McCombs v. *Allen*, 83 N. Y. 114; *N. E. Steam & G. Pipe Co.* v. *Parker*, 10 Gray, 333.

Refusal to pay a disputed claim cannot be considered as any evidence of insolvency.

Re Westcott, 7 Nat. Bank. Reg. 285; *Re Hercules Mut. L. Assur. Society*, 6 Nat. Bank. Reg. 338, 349; *Re Manheim*, 7 Nat. Bank. Reg. 342.

By the execution of the bond to dissolve the attachment, the defendant Whitney does not obtain any preference over the other creditors.

Petty v. *Cooke*, L. R. 6 Q. B. 790; *Newington* v. *Levy*, L. R. 5 C. P. 612; *Watson* v. *Poague*, 42 Iowa, 582.

A certificate of deposit has all the attributes of an ordinary promissory note.

Pardee v. *Fish*, 60 N. Y. 265; *Miller* v. *Austen*, 54 U. S. 13 How. 218 (14:119); *Kilgore* v. *Bulkley*, 14 Conn. 363.

The bond is not a substitute for the property attached.

Mass. Pub. Stat. chap. 161, § 122; U. S. R. S. § 933; *Tapley* v. *Goodsell*, 122 Mass. 182; *Carpenter* v. *Turrell*, 100 Mass. 452; *Gass* v. *Smith*, 6 Gray, 112; *Irvin* v. *Howard*, 37 Ga. 18.

Even if the attachment had been void, the sureties would not be discharged.

McMillan v. *Dana*, 18 Cal. 339; *Hazelrigg* v. *Donaldson*, 2 Met. (Ky.) 445; *Beal* v. *Alexander*, 1 Rob. (La.) 277; *Bacon* v. *Daniels*, 116 Mass. 474; Brandt, Sureties, § 408.

Being merely a substitution of one security for another, this transfer cannot be avoided, unless the previous transfer of the certificate was invalid.

Cook v. *Tullis*, 85 U. S. 18 Wall. 332 (21:933); *Tiffany* v. *Boatman's Sav. Inst.* 85 U. S. 18 Wall. 375 (21:868); *Clark* v. *Iselin*, 88 U. S. 21 Wall. 360 (22:568); *Sawyer* v. *Turpin*, 91 U. S. 114 (23:235); *Stevens* v. *Blanchard*, 3 Cush. 169.

The transfer of the certificate of deposit to these defendants is legal and valid, unless it was in violation of some provision of the Banking Act.

Reed v. *McIntyre*, 98 U. S. 507, 510 (25:171, 172); *Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 765 (24:589).

"Insolvency," as applied to a national bank, means an inability to pay its debts in the ordinary course of business, as banks usually do; an "act of insolvency" is a failure so to pay its debts; and "contemplation of insolvency" is an expectation that it will be unable so to pay its debts.

Toof v. *Martin*, 80 U. S. 13 Wall. 47 (20:482); *Wager* v. *Hall*, 83 U. S. 16 Wall. 599 (21:505); *Paige* v. *Loring*, 1 Holmes, 275, 277; *Beals* v. *Quinn*, 101 Mass. 262.

If it is found that no preference was in fact intended, then the transaction is not in law a preference, even if the result is to give one creditor an advantage over another.

Tiffany v. *Lucas*, 82 U. S. 15 Wall. 410 (21: 198); *Tiffany* v. *Boatmans Sav. Inst.* 85 U. S. 18 Wall. 375 (21:868); *Re McKay*, 1 Low. 562; *Rice* v. *Grafton Mills*, 117 Mass. 228, 232.

The refusal to pay disputed claims was not an act of insolvency.

Re Hercules Mut. L. Assur. Soc. 6 Nat. Bank. Reg. 338; *Re Westcott*, 7 Nat. Bank. Reg. 285; *Re Manheim*, 7 Nat. Bank. Reg. 342.

The bonds stand in place of the attachments.

Lehman v. *Berdin*, 5 Dill. 340; *Bilderee* v. *Aden*, 62 Barb. 175; *Cadwell* v. *Colgate*, 7 Barb. 253; *Homan* v. *Brinckerhoff*, 1 Denio, 184; *Gass* v. *Williams*, 46 Ind. 253; *Egan* v. *Lumsden*, 2 Disney, 168; *Love* v. *Voorhies*, 13 La. Ann. 549.

The bond, even if it does not conform to the requirements of the statute, is good at common law.

Mosher v. *Murphy*, 121 Mass. 276; *Smith* v. *Meegan*, 122 Mass. 6; *Sweetser* v. *Hay*, 2 Gray, 49; *Central Mills Co.* v. *Stewart*, 133 Mass. 461.

The breach of the Bank's agreement would be no defense to an action on the bond against the sureties.

Butler v. *U. S.* 88 U. S. 21 Wall. 272 (22-614); *York County M. F. Ins. Co.* v. *Brooks*, 51 Me. 506; *Ordinary* v. *Thatcher*, 41 N. J. L. 403; *Dixon* v. *Dixon*, 31 Vt. 450; *Passumpsic Bank* v. *Goss*, 31 Vt. 315; *Brown* v. *Hazen*, 11 Mich. 219; *Yorkshire Railway Wagon Co.* v. *Maclure*, L. R. 19 Ch. Div. 478; *Chambers* v. *Manchester & M. R. Co.* 5 Best & S. 588, 612; *Dair* v. *U. S.* 83 U. S. 16 Wall. 1 (21:491); *Carroll County* v. *Ruggles*, 69 Iowa, 269; *Brown* v. *Kent County Probate Judge*, 42 Mich. 501.

Even if a surety be induced to sign by the fraud of the principal, this will afford him no defense if the obligee be not a party to the fraud.

Mason Lumber Co. v. *Buchtel*, 101 U. S. 683 (25:1072); *Coleman* v. *Bean*, 1 Abb. App. Dec. 394; *Lepper* v. *Nuttman*, 35 Ind. 384; *Western N. Y. L. Ins. Co.* v. *Clinton*, 66 N. Y. 326; *Ladd* v. *Trustees*, 80 Ill. 233; *Anderson* v. *Warne*, 71 Ill. 20; *Graves* v. *Tucker*, 10 Smedes & M. 9; *Kelly* v. *Christal*, 16 Hun, 242.

Mr. Chief Justice **Waite** delivered the op'nion of the court:

All of these cases involve the same general question, and they may properly be considered and decided together. From the records it appears that the Pacific National Bank of Boston was an association for carrying on the business of banking, organized under the National Bank Act. On the 20th of November, 1881, it became embarrassed, and was placed in charge of a bank examiner, in whose control it remained until March 18, 1882, when its doors were opened for business with the consent of the Comptroller of the Currency.

By statute in Massachusetts civil actions are begun by original writ, which "may be framed either to attach the goods or estate of the defendant, and, for want thereof, to take his body; or it may be by original summons, with or without an order to attach the goods or estate." Pub. Stat. Mass. 1882, chap. 161, §§ 13, 14. "All real and personal estate liable to be taken on execution * * * may be attached upon the original writ in any action in which debt or damages are recoverable, and may be held as security to satisfy such judgment as the plaintiff may recover." Sec. 38. "A person or corporation whose goods or estate are attached on mesne process in a civil action may, at any time before final judgment, dissolve such attachment by giving bond with sufficient sureties, * * * with condition to pay to the plaintiff the amount, if any, that he may recover within thirty days after the final judgment in such action." Sec. 122.

At the time the Bank resumed business, it was indebted to George Mixter in the sum of $15,000; to Henry M. Whitney also in the sum of $15,000; to Daniel L. Demmon in the sum of $25,000; and to Calvin B. Prescott in the sum of $5,000.

On the 24th of March, 1881, Mixter and Prescott each began a suit against the Bank in the Circuit Court of the United States for the District of Massachusetts, by writ directing an attachment, to recover the amounts due them respectively. Demmon also began a suit in the same court and in the same way on the 28th of March, to recover the amount due him, and Whitney another on the 28th of April, upon the claim in his favor. At the time these suits were begun, the Bank had money on deposit to its credit in the Maverick National Bank and in the Howard National Bank, and the necessary steps were taken to subject these deposits to the attachments which were issued in the several suits.

The Bank arranged with Lewis Coleman and John Shepard to become its sureties upon bonds to dissolve attachments in any actions that might be brought against it, and placed in their hands a certificate of deposit in the Maverick National Bank for $100,000, to be held as their protection against all liabilities which should be thus incurred. This certificate was afterwards exchanged for $121,000 of the bonds of the Nantasket Company, $20,000 of the bonds of the Toledo, Delphos and Burlington Railroad Company, and $15,000 of the bonds of the Lebanon Springs Railroad Company.

Immediately after each of the attachments in the above actions had been made, the Bank executed a bond to the plaintiff in a penal sum suited to the amount of the claim, with Coleman and Shepard as its sureties, reciting the attachment, and that the Bank "desires to dissolve said attachment according to law," and conditioned to be void "if the Pacific National Bank of Boston shall, within thirty days after the final judgment in the aforesaid action, pay to the plaintiff therein named the amount, if any, which he shall recover in such action." Upon the execution of the bond in each case, the attachment was dissolved.

After this the Bank closed its doors a second time, and on the 22d of May, 1882, a receiver was appointed by the Comptroller of the Currency in accordance with the provisions of section 5234 of the Revised Statutes, and at once took possession of its assets and proceeded to wind up its affairs.

When the Receiver was appointed he found the several suits which had been commenced still pending. In the cases of Mixter, Whitney and Demmon he appeared, answered for the Bank, filed motions to discharge the attachments, and motions to dismiss the suits. His motions were all overruled, and, his defenses not being sustained, judgments were rendered against the Bank in each of the cases, for the amounts found to be due the several plaintiffs respectively. For the review of the action of the court in these cases the writs of error which are now under consideration were brought.

The suit of Prescott still remains undisposed of in the circuit court.

Failing in his motions and in his defenses at law, the Receiver filed a bill in equity in the circuit court against the several attaching creditors, and the sureties on the bonds given to dissolve the attachments, the object of which was to reduce to his possession the securities which were held by the sureties for their protection against liability, and to restrain the several attaching creditors from enforcing the attachment bonds on the ground among others "that the attachments made in said actions were unauthorized, illegal and void." This bill was dismissed by the circuit court (22 Fed. Rep. 694), and from that decree the appeal which is now one of the subjects of consideration was taken.

In the view we take of the case, the most important question to be considered is whether an attachment can issue against a national bank before judgment in a suit begun in the Circuit Court of the United States. Section 5242 of the Revised Statutes of the United States contains this provision: "No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court." The original National Bank Act contained nothing of this kind, but the prohibition first appeared in the Act of March 3, 1873, chap. 269, § 2, 17 Stat. at L. 603, as a new proviso added to section 57 of the Act of June 3, 1864, chap. 106, 13 Stat. at L. 116. That section was originally as follows:

"That suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; *Provided, however*, That all proceedings to enjoin the comptroller under this Act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

The amending Act was as follows:

"That section fifty-seven * * * be amended by adding thereto the following: '*And provided further*, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any state, county, or municipal court.'"

Section 52 of the original National Bank Act was as follows:

"That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of any deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this Act, or with a view to the preference of one creditor to another, except the payment of its circulating notes, shall be null and void." 13 Stat. at L. 115.

This was evidently intended to preserve to the United States that "first and paramount lien upon all the assets of such association" which was given by section 47 as security for the repayment of any amount expended by them to redeem the circulating notes, over and above the proceeds of the bonds pledged for that purpose, and to place all the other creditors on that equality in the distribution of the assets of an insolvent bank which was clearly provided for in section 50, where the Comptroller of the Currency is required to make ratable dividends of the proceeds of the assets of the association realized by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." *First Nat. Bank* v. *Colby*, 88 U. S. 21 Wall. 609, 613 [22:687, 688].

In the Revision of the Statutes, section 52 of the original Act, and the amendment of section 57 adopted in 1873, relating to attachments and injunctions in state courts, were reenacted as section 5242, the amendment of section 57 being put in the revision at the end of what had been the original section 52. As the Revised Statutes were first adopted, the proviso of section 57, which related specially to proceedings to enjoin the comptroller, was re-enacted as section 736, but all the rest of the original section was left out. That omission was, however, supplied by the Act of February 18, 1875, chap. 80, 18 Stat. at L. 316, 320, which re-enacted it as part of section 5198, putting it at the end of that section as it originally stood in the revision.

The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of section 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of section 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for then it was part of a section which, while providing for suits in the courts of the United

States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the Act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.

The prohibition does not in express terms refer to attachments in suits begun in the Circuit Courts of the United States, but as by § 915 of the Revised Statutes those courts are not authorized to issue attachments in common-law causes against the property of a defendant, except as "provided by the laws of the State in which such court is held for the courts thereof," it follows that, as by the amendatory Act of 1873, now part of § 5242 of the Revised Statutes, all power of issuing attachments against national banks before judgment has been eliminated from state statutes, there cannot be any laws of the State providing for such a remedy on which the circuit courts may act. The law in this respect stands precisely as it would if there were no state law providing for such a remedy in any case. It was suggested in argument that the prohibition extended only to the use of the remedy by state courts, and that the remedy itself still remained to be resorted to in the courts of the United States. But we do not so understand the law. In our opinion the effect of the Act of Congress is to deny the State remedy altogether so far as suits against national banks are concerned, and in this way it operates as well on the courts of the United States as on those of the States. Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.

It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true. While the law as it stood previous to the Act of July 12, 1882, chap. 290, § 4, 22 Stat. at L. 163, gave the proper state and federal courts concurrent jurisdiction in all ordinary suits against national banks, it was careful to provide that the jurisdiction of the federal courts should be exclusive when relief by attachment or injunction before judgment was sought. Until the Act of 1882 the federal courts had ample authority to grant injunctions in proper cases, and all a person need do to invoke that authority was to bring his suit in one of those courts. Whether since the Act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary, but this does not shed any light on the interpretation of the old law. The difficulty arises from the change that has been made, not from the law as it stood originally.

We are, therefore, of opinion that the attachments in all the suits were illegal and void, because issued without any authority of law. But it is insisted that notwithstanding this the bonds are valid and may be enforced.

It is undoubtedly true that the sureties on a bond of this kind are estopped from setting up, as a defense to an action for a breach of its condition, any irregularities in the form of proceeding to obtain an attachment authorized by law which would warrant its discharge upon a proper application made therefor. As the purpose of the bond is to dissolve an attachment, its due execution implies a waiver both by the defendant and his sureties of all mere irregularities. So, too, it is no defense that the property attached did not belong to the defendant, or that it was exempt, or that the defendant has become bankrupt or is dead. In all such cases, where there was lawful authority for the attachment, the simple question is whether the condition of the bond has been broken; that is to say, whether there has been a judgment in the action against the defendant for the payment of money which he has neglected for thirty days afterwards to make.

In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal and therefore a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment, although not affected by all the contingencies which might have discharged the attachment itself. *Carpenter* v. *Turrell*, 100 Mass. 450, 452; *Tapley* v. *Goodsell*, 122 Mass. 176, 182. Such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond. If the attachment itself is illegal and therefore void, so also must be the bond which takes its place. Objections can be made to an attachment issued on proper legal authority, which cannot be used as a defense to a bond taken under the statute for its dissolution; but if there can be no lawful attachment, there can be no valid bond for its dissolution. The case is to be considered as though there was no law whatever for the seizure of property by attachment before judgment in any case. As the taking of the property under such circumstances would be unlawful, so also would be the act of the magistrate in accepting the bond.

Neither is the bond binding as a common-law bond. If the attachment had been valid, and the bond taken had not been in all respects such as the statute had required, it could nevertheless have been enforced as a common-law bond, because it was executed for a good consideration, and the object for which it was given had been accomplished. But here the difficulty is that there was no lawful attachment, and therefore no lawful authority for taking any bond whatever. The bond is consequently neither good under the statute nor at common law, because there is no sufficient foundation to support it.

Objection is made to the relief which is sought in equity, because if the attachment bonds are void there is an adequate remedy at law in the suits that may be brought for their

enforcement. If the suit in equity had been brought by the sureties to get rid of their obligation, this objection might be good; but such is not its character. The sureties have in their hands assets of the Bank which the Receiver seeks to reduce to his possession, and which they claim the right to hold until they have been fully indemnified against or discharged from liability on the bonds. The Receiver says there is no liability, because the bonds are invalid; and to have that question settled once for all he has brought the persons interested, creditors as well as sureties, before the court in order that it may be conclusively adjudicated between them. Such a suit is clearly cognizable in equity. The sureties are in a sense stakeholders. They do not claim the securities unless they are liable on the bonds; and the suit, although not brought by them, is in the nature of an interpleader to save them "from the vexation of two proceedings on a matter which may be settled in a single suit." The decree will bind all alike, and if the sureties are held not to be liable it will conclude the creditors from all further proceedings against them on the bonds, and leave them free to surrender the securities to the Receiver. This will not affect the judgments that the creditors have recovered, any further than to limit their operation, so far as the Receiver and the sureties on the attachment bonds are concerned, to the adjudication of the debts as claims entitled to dividends from the proceeds of the assets on the Bank. To that extent, certainly, the court had jurisdiction in each of the suits after the insolvency; but as the attachments were void the judgments are inoperative as a basis of recovery upon the bonds.

The judgment in each of the suits at law is affirmed; but the decree in the suit in equity is reversed, and the cause remanded, with instructions to enter a decree setting aside and annulling the bonds which were given to dissolve the attachments, and enjoining each and all of the creditors, and those claiming under them, from proceeding in any manner to enforce the same against the sureties, and directing the sureties to surrender to the Receiver the securities they hold for their indemnity.

ROBERT C. CRAWFORD, *Plff. in Err.*,

v.

WILLIAM F. HALSEY.

(See S. C. Reporter's ed. 648-651.)

Member of firm, when estopped—purchaser from assignee—necessary party.

1. A member of a firm which has assigned a claim due it from a third person is not permitted to show that the assignment was fraudulent as against his creditors, where the assignment was not within the prohibition of the Bankrupt Law and he was a party to it.
2. A purchaser of a claim from an assignee in bankruptcy has only the rights of such assignee.
3. Where a claim was assigned more than two months before bankruptcy proceedings against the owner of it, the assignee in bankruptcy has no interest in the claim and is not a necessary party to the submission of it to arbitration.

[No. 155.]

Submitted Feb. 2, 1888. Decided Feb. 20, 1888.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana, to review a judgment dismissing a suit brought by assignees in bankruptcy to recover moneys had and received for and on account of the bankrupt. *Affirmed.*

The facts are stated by the court.

Mr. **E. M. Hudson,** for plaintiff in error:

Certainty is necessary in a plea of estoppel; and this applies to the allegations of the facts, the mutuality, the privity, the reciprocity, the detriment sustained, the intent, the materiality, and also to the substantial justice to be effected by the estoppel.

Herman, Estop. 11, § 9; *Russell* v. *Place*, 94 U. S. 606 (24:214); 6 Wait, Act. & Def. 680, § 2; *Chrisman* v. *Harman*, 29 Gratt. 494.

As to how far recitals create estoppels, also as to their operation on estates, see Herman on Estoppels, 8, section 4. Such estoppels operate only between the parties and privies to the recital.

Herman, Estop. 322, 328.

Strangers to the act are not bound.

6 Wait, Act. & Def. 681; *Masure* v. *Noble*, 11 Ill. 581; *Murray* v. *Sells*, 53 Ga. 257; *Sunderlin* v. *Struthers*, 47 Pa. 411; *Glidden* v. *Unity*, 30 N. H. 104.

The act which one is induced to do must be other than he would have done, or there is no estoppel; *Helser* v. *McGrath*, 52 Pa. 531; *Austin* v. *Thomson*, 45 N. H. 113; and it must be detrimental; *Commonwealth* v. *Elwell*, 48 Mass. 192; *Reynolds* v. *Garner*, 66 Barb. 310; 6 Wait, Act. & Def. 679, 681, art. 2, § 1; *Louks* v. *Kenniston*, 50 Vt. 116.

The person so estopped must have willfully misled the other (Herman, Estop. 8, § 4; *Titus* v. *Morse*, 40 Me. 348; 6 Wait, Act. & Def. 684, § 4; *Martin* v. *Zellerbach*, 38 Cal. 300; *Hambleton* v. *Central Ohio R. Co.* 44 Md. 551; *Woods* v. *Wilson*, 37 Pa. 379-384); and he must have intended that the opposite party should act on the recital to his prejudice. 6 Wait, Act. & Def. 684, § 5.

Estoppels by recitals must be mutual; both parties must be bound or neither is bound.

Miles v. *Miles*, 8 Watts & S. 135; *Lansing* v. *Montgomery*, 2 Johns. 382; *Deery* v. *Cray*, 72 U. S. 5 Wall. 795 (18:653); 6 Wait, Act. & Def. 680, §§ 3, 4.

Arbitrations only operate as estoppels as to the matters submitted and adjudicated.

Herman, Estop. p. 172, § 159, p. 174, § 161.

Estoppels apply only in furtherance of substantial justice.

6 Wait, Act. & Def. 679, 688, § 9; *Van Rensselaer* v. *Kearney*, 11 How. 297, 326 (13:708, 715); *Sprigg* v. *Mt. Pleasant Bank*, 1 McLean, 384; *Thomas* v. *Bowman*, 29 Ill. 426; *Pennell* v. *Hinman*, 7 Barb. 644.

Article 546 of the Louisiana Code of Practice requires all judgments to be signed by the judge; and until so signed, such judgment does not become final and no appeal or writ of error will lie.

Smith v. *Harrathy*, 5 Mart. N. S. 320; *Smelser* v. *Williams*, 4 Rob. (La.) 152; *Re New York L. & F. Ins. Co.* v. *Wilson*, 33 U. S. 8 Pet. 292, 296 (8:949, 951).

Messrs. **Thomas L. Bayne** and **George Denegre,** for defendant in error:

The writ of error should be dismissed.

Ex parte Cutting, 94 U. S. 14 (24:49); *Payne* v. *Niles*, 61 U. S. 20 How. 220 (15:896); *Müller* v. *Ehlers*, 91 U. S. 250 (23:319).

There were no exceptions to pleadings, nor bill of exceptions.

Generes v. *Bonnemer*, 74 U. S. 7 Wall. 565 (19:227); *Mercantile Mut. Ins. Co.* v. *Folsom*, 85 U. S. 18 Wall. 248 (21:882).

A motion for a new trial cannot be entertained after the end of the term in which judgment was rendered.

Cambuston v. *U. S.* 95 U. S. 287 (24: 449); *Coughlan* v. *District of Columbia*, 106 U. S. 7 (27: 74).

The authority to set aside, vacate and modify its final judgment after the term at which it was rendered can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.

Bronson v. *Schulten*, 104 U. S. 417 (26: 799); *Freeman* v. *Dawson*, 110 U. S. 269 (28: 148); *Sheppard* v. *Wilson*, 47 U. S. 6 How. 265 (12: 432); *Brush* v. *Robbins*, 3 McLean, 486; *Phillips* v. *Negley*, 117 U. S. 665 (29:1013).

The courts of the United States, in dealing with motions for new trials, the signing of judgments and the control of process, are governed by their own rules.

Indianapolis & St. L. R. Co. v. *Horst*, 93 U. S. 301 (23: 901); *Henderson* v. *Moore*, 9 U. S. 5 Cranch, 11 (3:22); *Doswell* v. *De la Lanzo*, 61 U. S. 20 How. 29 (15:824); *Schuchardt* v. *Allen*, 68 U. S. 1 Wall. 359 (17:642); *Newcomb* v. *Wood*, 97 U. S. 583 (24: 1086).

There is no exception nor any statement of facts, and none could be taken or made after the end of the term.

Müller v. *Ehlers*, and *Generes* v. *Bonnemer*, *supra*; *Flanders* v. *Tweed*, 76 U. S. 9 Wall. 425 (19:678); *Walton* v. *U. S.* 22 U. S. 9 Wheat. 651 (6: 182); Phill. Prac. Sup. Ct. 119, 127; *Marye* v. *Strouse*, 6 Sawy. 205.

Assignees are necessary parties to an action in which the assignment to them is sought to be set aside.

Shields v. *Barrow*, 58 U. S. 17 How. 130 (15:158); *Florence S. M. Co.* v. *Singer Mfg. Co.* 8 Blatchf. 128; *Coiron* v. *Millaudon*, 60 U. S. 19 How. 113 (15:575).

The assignee in bankruptcy takes only such rights as the bankrupt had.

Bump, Bankruptcy, 484–487; *Winsor* v. *Kendall*, 3 Story, 515; *Jarrell* v. *Harrell*, 1 Woods, 477; *Anderson* v. *Miller*, 7 Smedes & M. 586; *Baker* v. *Vining*, 30 Me. 121.

The additional right to sue for and recover property transferred by the bankrupt in fraud of his creditors cannot accrue to the bankrupt himself.

Tiffany v. *Boatmans Sav. Inst.* 85 U. S. 18 Wall, 387 (21:870); *Carr* v. *Hilton*, 1 Curt. 235; *Clark* v. *Clark*, 58 U. S. 17 How. 321 (15: 79); *Glenny* v. *Langdon*, 98 U. S. 24 (25:44); *Moyer* v. *Dewey*, 103 U. S. 303 (26:395); *Trimble* v. *Woodhead*, 102 U. S. 649 (26:290); *Campbell* v. *Holt*, 115 U. S. 620 (29: 483).

The exception filed by defendants is in accordance with the law and practice in Louisiana.

Code Prac. art. 330, 589; *Williams* v. *Bethany*, 7 La. 94; *Foss* v. *Brentel*, 14 La. Ann. 810.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought on the 29th of July, 1876, by Henry Barnewell and William C. Gaynor, assignees in bankruptcy of Crawford, Walsh, Butt & Co., a mercantile firm doing business at Mobile, Alabama, composed of James Crawford, Charles Walsh, Cary W. Butt, Robert C. Crawford, and Charles Walsh, Jr., against William F. Halsey, to recover $4,118.55 and interest at the rate of 8 per cent per annum from February 28, 1874, claimed to be due for moneys had and received for and on account of the bankrupts. The defense was that the firm had assigned the claim on the third of December, 1873, and that, to avoid litigation, it was, on the 12th of May, 1875, submitted by all parties, including the firm and the person to whom the claim had been transferred, to the arbitrament of certain persons, "with the powers of amicable compounders," who, on the 10th of June following, determined that there was nothing due from Halsey.

On the 27th of May, 1879, the assignees in bankruptcy sold the claim to Robert C. Crawford, one of the firm, and authorized him to prosecute the suit which had been begun. This assignment was filed in the cause April 20, 1880. The parties then went to trial, a jury having been waived, and on the first of May, 1880, a judgment was announced by the court in the following form: "The court, considering that an assignment was made by Crawford, Walsh, Butt & Co., to Parker & Son, that the matter was submitted to amicable compounders, who rendered their judgment for defendant, and the present plaintiff in interest (Robert Crawford, a member of the late firm of Crawford, Walsh, Butt & Co., bankrupts) cannot be heard to set up the invalidity of the transfer by said firm, it is ordered, adjudged, and decreed that this suit be dismissed with costs."

This judgment was duly entered on the minutes of the court, which were signed by the judge on the 5th of June, 1880, at the end of the term, but the judgment was not engrossed in the judgment book nor signed by the judge, as required by section 546 of the Code of Practice of Louisiana.

On the first of February, 1883, Crawford again appeared in court and entered a motion for a new trial on the following grounds: "That said judgment is contrary to the law and the evidence in that the court failed to give effect to the evidence showing an assignment of the claim sued on by the bankrupts within less than two months of the commencement of the proceedings in bankruptcy, and in that the court erred in holding that one of the discharged bankrupts, now subrogated herein, could not be heard to contest the validity of the said assignment of April 6, 1874."

This motion was denied, but on the 23d of June, 1883, the court filed its findings of facts in the case to the effect: 1. That Crawford, Walsh, Butt & Co. assigned the claim to G. M. Parker, December 8, 1873, and that Robert C. Crawford was then a member of the firm. 2. That on the 6th of April, 1874, the firm made another assignment of the claim to William Dunn, for the benefit of G. M. Parker & Son, Vass Ulmer & Co., and the Mobile and

Ohio Railroad Company, in certain proportions. 3. That the petition in bankruptcy was filed June 3, 1874, and the adjudication had on the 12th of that month. 4. That Barnewell & Gaynor were appointed assignees, and after this suit was begun assigned the claim to Robert C. Crawford, one of the original partners.

At the end of this finding of facts appears the following:

"That said assignments having been adduced in evidence, and it appearing by the facts above recited that the said Robert C. Crawford was now prosecuting this suit for his sole use and benefit, the court held and ruled, as matters of law, that he could not be heard to impeach the acts of assignment to which he was a party, on the ground of their being void, as against the creditors, and that the petition herein must be dismissed, and there must be judgment for defendant."

Thereupon the judgment as originally entered on the minutes was recorded in the judgment book and signed. To review the judgment thus rendered this writ of error was brought, the amount of the claim with interest added to the time of the judgment being more than $5,000.

Without undertaking to determine whether the court could properly entertain the motion for a new trial and file an additional finding of facts after the end of the term at which the judgment was entered, we decide that there is no error in the record as it now stands. The finding of the award of the amicable compounders, which appears both in the judgment as originally entered and in that finally recorded, must be taken as part of the findings of facts in the case; and the ruling of the court upon the right of Robert C. Crawford to contest the validity of the assignments must be taken in connection with the motion for a new trial which confined the objection to the assignment of April 7, 1874. As the court has found that there was an assignment to Parker as early as December 3, 1873, to which Robert C. Crawford as one of the partners was a party, and which was not within the prohibitions of the Bankrupt Law, it was clearly right to hold that he was not permitted to show that it was fraudulent as against his creditors. As to the assignment of April 7, which was within two months of the date of the commencement of the proceedings in bankruptcy, the case might have been different. But as an assignment had been made before which was valid both as against the assignees and Crawford himself, it was a matter of no importance that the one made afterwards was void under the Bankrupt Law. The rights of Crawford as purchaser of the claim were only those of the assignees in bankruptcy.

There can be no question here as to the fact of the assignment in December. That is settled by the finding of the court below, to the effect that "the claim on which the suit is brought" was assigned. This disposes of all that is said in the brief of counsel as to the fact that the coffee, out of which the claim arose, had not been sold at the date of that assignment. As the assignment was made more than two months before the bankruptcy proceedings, it was not necessary that the assignees should be parties to the submission to arbitration. The title to the claim at the time of the bankruptcy was in Parker, and not in the bankrupts. Therefore nothing passed to the assignees, and there was nothing for them to submit.

The judgment is affirmed.

MATTHEW J. SHOECRAFT, *Appt.*,

v.

WILLIAM D. BLOXHAM, Governor of Florida, ET AL., Trustees of the INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA, ET AL.

(See S. C. Reporter's ed. 730-736.)

Florida Statute as to suit—assignment of contract, effect of.

*1. A suit to enforce the performance of a contract is a suit to recover the contents of a chose in action, within the meaning of section 629 of the Revised Statutes.

2. A deed of trust, in the nature of a mortgage, set out in full a contract between the mortgagor and certain parties for the conveyance of several parcels of land to him, and then conveyed to the mortgagee all the right, title, and interest which he, the mortgagor, had, or might thereafter acquire, "in and to" the lands embraced by the contract. *Held*, that the conveyance was in legal effect an assignment of the contract; and that the assignee could not maintain a suit for the enforcement of this contract in the Circuit Court of the United States, under section 629 of the Revised Statutes, if the assignor could not have maintained the suit in such circuit court if no assignment had been made.

[No. 159.]

Argued Feb. 2, 1888. Decided Feb. 20, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Florida, dismissing an action brought to compel the performance of a contract by the execution of a conveyance and to determine the rights of the parties in the lands. *Affirmed.*

The facts are stated in the opinion.

Mr. C. K. Davis, for appellant:

The bill is not multifarious.

Caldwell v. *Taggart*, 29 U. S. 4 Pet. 190 (7: 828); *Gaines* v. *Chew*, 43 U. S. 2 How. 619 (11: 402); *Oliver* v. *Piatt*, 44 U. S. 3 How. 333 (11: 622); *Shields* v. *Thomas*, 59 U. S. 18 How. 253 (15: 368); *Fitch* v. *Creighton*, 65 U. S. 24 How. 159 (16: 596).

There is no question of laches in this case; and if there were, it is sufficiently excused by the bill, and the excuse is admitted by the demurrer.

Pom. Contr. § 387; *Potter* v. *Tuttle*, 22 Conn. 512; *Snyder* v. *Spaulding*, 57 Ill. 486; *Oliver* v. *Piatt*, *supra*; Perry, Tr. §§ 520, 869.

The provisions of the Judiciary Act of 1789 were never held to apply to cases affecting real estate where the title itself had been transferred or encumbered.

Sheldon v. *Sill*, 49 U. S. 8 How. 441 (12: 1147); *Deshler* v. *Dodge*, 57 U. S. 16 How. 622 (14: 1084); *Briggs* v. *French*, 2 Sumn. 251; *McDonald* v. *Smalley*, 26 U. S. 1 Pet. 620 (7: 287); *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 (12: 666).

The Act of 1875 does not change this rule.

Seckel v. *Backhaus*, 7 Biss. 354.

*Head notes by *Mr. Justice* FIELD.

Messrs. W. S. Chisholm and **R. G. Erwin,** for appellees:

The appellant could not maintain his suit in the Circuit Court of the United States for the Northern District of Florida.

Corbin v. *Black Hawk County*, 105 U. S. 659 (26: 1136); *N. Y. Guaranty & I. Co.* v. *Memphis Water Co.* 107 U. S. 211 (27: 486).

The amended bill in this case contains no averment showing that the suit could have been maintained by the assignors of the contracts if no assignments had been made.

Turner v. *Bank of North America*, 4 U. S. 4 Dall. 8 (1: 718); *Mollan* v. *Torrance*, 22 U. S. 9 Wheat. 537 (6: 154); *Bank of U. S.* v. *Moss*, 47 U. S. 6 How. 31 (12: 331); *Bradley* v. *Rhines*, 75 U. S. 8 Wall. 393 (19: 467).

The appellant cannot have an accounting from the defendants.

Wilkinson v. *Wilkinson*, 2 Curt. 582.

In executing this contract the trustees exceeded their powers.

Perry, Tr. §§ 287, 408, 775.

This is a power to sell for cash and not on credit.

2 Perry, Tr. § 786a.

This contract was *ultra vires*.

Pacific R. R. Co. v. *Seely*, 45 Mo. 212.

The contract of May 31, 1871, was void.

Pierce, Railroads, 512, 515; *Bissell* v. *Michigan Southern & N. I. R. R. Co.* 22 N. Y. 259; *Madison, W. & M. Pl. Road Co.* v. *Watertown & P. Pl. Road Co.* 7 Wis. 59.

The specific performance of such a contract will not be enforced.

Pierce, Railroads, 516, 517; Green's Brice, Ultra Vires, 42, 747; *Hitchcock* v. *Galveston*, 96 U. S. 351 (24: 662).

The appellant's assignor has been guilty of gross laches.

Coddington v. *Pensacola & G. R. R. Co.* 103 U. S. 409 (26: 400); *Lansdale* v. *Smith*, 106 U. S. 391 (27: 219); *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 806 (24: 324); *Leavenworth County* v. *Chicago, R. I. & P. R. Co.* 12 Am. & Eng. R. R. Cas. 354; *Young* v. *Rathbone*, 16 N. J. Eq. 224; *Willard* v. *Tayloe*, 75 U. S. 8 Wall. 557, 565, 566 (19: 501, 503).

The grants to the other railroad companies passed to the companies therein named a present interest in the lands thereby granted.

Missouri, K. & T. R. Co. v. *Kansas Pac. R. Co.* 97 U. S. 491 (24: 1095); *Van Wyck* v. *Knevals*, 106 U. S. 360 (27: 201).

The bill is multifarious and there is a misjoinder of parties.

Dial v. *Reynolds*, 96 U. S. 340 (24: 644); *Banks* v. *Walker*, 2 Sandf. Ch. 344; *Eagle Fire Co.* v. *Lent*, 6 Paige, 635; *Corning* v. *Smith*, 6 N. Y. 82; *Wilkins* v. *Kirkbride*, 27 N. J. Eq. 93.

Only the original parties to the contract are proper parties to a bill for specific performance; those claiming under one of the parties to the contract cannot be joined as defendants.

Willard v. *Tayloe*, 75 U. S. 8 Wall. 571 (19: 505).

If the object of the bill was to recover the lands, the action should be at law and not in equity.

Hipp v. *Babin*, 60 U. S. 19 How. 271 (15: 633); *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189, 212 (26: 975, 983).

Mr. Justice **Field** delivered the opinion of the court:

This is a suit in equity to enforce the performance of a contract, made between the Trustees of the Internal Improvement Fund of the State of Florida and the Jacksonville, Pensacola and Mobile Railroad Company, for the conveyance of certain lands in Florida, and to determine the rights of various parties claiming interests in them.

As alleged in the bill, by the Act of Congress of September 28, 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits (9 Stat. at L. 519), there was granted to the State of Florida the whole of the swamp and overflowed lands within it, made unfit thereby for cultivation, which were at the date of the Act unsold; and this grant was accepted by the State. By an Act of the Legislature, approved January 6, 1855, all of these lands and the proceeds thereof were set apart as a separate fund, called the Internal Improvement Fund of the State, to be applied as there provided. To insure the proper application of the fund to the purposes declared, the lands and the charge of the proceeds arising from their sale were vested in five trustees; namely, the Governor, the Comptroller of Public Accounts, the State Treasurer, the Attorney-General, and the Register of Public Lands of the State, and their successors in office, in trust, with power to sell the lands, to receive payment thereof, and to make such disposition of the proceeds as the Act directed, and, among other things, to pay the interest as it should become due on the bonds to be issued by different railroad companies under the authority of the Act; and also to receive semi-annually one half of one per cent of the bonds of each separate line of railroad, and invest the same in certain specified securities. The Act provided that all bonds issued under its provisions by any railroad company should be a first mortgage on its roadbed, iron, equipment, workshops, depots, and franchises, and that upon its failure to provide the interest on the bonds issued by it, and the sum of one per cent per annum as a sinking fund, the Trustees should take possession of its road and property and sell the same, and apply the proceeds to the purchase and cancellation of the outstanding bonds on which default was thus made.

The provisions of the Act were accepted by various railroad companies, namely, the Florida, Atlantic and Gulf Central Railroad Company, the Tallahassee Railroad Company, and the Florida Railroad Company, each of which was, prior to 1860, a corporation created under the laws of the State, and had issued its bonds, and prior to the year 1867 had made default in the payment of the interest on them and of the one per cent required for the sinking fund. These bonds, or at least the interest thereon in default and the one per cent, were a first lien upon all the swamp lands granted to the State. The amount of the bonds, interest and percentage in default reached nearly three millions of dollars. In 1868 and 1869 the Trustees seized each of these roads and sold them to various purchasers for sums which in the aggregate were less by one million and a half of dollars than the amount in default, leaving the Inter-

nal Improvement Fund and the lands liable for the deficiency.

Among the holders of railroad bonds issued was one Francis Vose, a citizen of New York, who held bonds of the Florida Railroad Company, and he brought a suit in equity in the United States Circuit Court for the Northern District of Florida against the Trustees of the Improvement Fund, praying that the amount due him might be collected and enforced out of the lands conveyed to the Trustees. On December 6, 1870, an injunction was issued in that suit, restraining the Trustees from selling or disposing of the lands otherwise than in accordance with the provisions of the Act of 1855. At this time the Improvement Fund and the lands were encumbered for a very large amount; and the Trustees, being desirous to arrange for the payment of the debts, including the claim of Vose, and to aid in the construction of a certain railroad, on May 31, 1871, entered into an agreement with the Jacksonville, Pensacola and Mobile Railroad Company, by which they were to convey to it all the lands held or to be held by them in trust under the Act of 1855, with some few exceptions not necessary to be mentioned; and the railroad company, in consideration thereof, was to satisfy and pay all existing liabilities in the nature of liens on the Internal Improvement Fund, to cancel and surrender the evidences thereof to the Trustees, to pay the sum of $100,000 for the benefit of the fund, and to construct a certain railroad from Jacksonville to Mobile, by extending the road from Quincy, its then terminus, and complete it within five years. The Trustees were to execute deeds of all of said lands and to deliver the same to the railroad company as soon as the injunction in the *Vose Case* should be dissolved or modified. This contract was, in December, 1871, submitted to the court by Vose and the Trustees for its consideration and approval, and the court thereupon decreed substantially as follows:

That there was due Vose by the Trustees the sum of $211,885.45 upon the past due coupons of the bonds held by him, and also certain other sums, making in the aggregate $278,000; that the articles of agreement between the Trustees and the railroad company be confirmed and made valid upon the following conditions: that the Trustees should forthwith, upon the payment by the railroad company of the sum of $100,000 as provided, execute and deliver to one Littlefield, president of the company, or such person or corporation as he should designate, a deed of conveyance of a certain 100,000 acres of land, and also execute and deliver deeds of conveyance to the Jacksonville, Pensacola and Mobile Railroad Company of all the lands embraced in said articles of agreement, not in the decree otherwise provided for; which deeds were to be deposited with Brown Brothers and Company of New York City, and to be delivered by such firm to the railroad company upon the payment by it to said Vose of his claim upon the Internal Improvement Fund, upon such terms as should be arranged between him and the company, within ten months from the date of the decree.

Various transactions were had between the Jacksonville, Pensacola and Mobile Railroad Company and other parties subsequently to this contract; and, among others, it executed and delivered to the Security Construction and Trust Company eight hundred of its bonds, for the sum of $10,000 each, running to the complainant Matthew J. Shoecraft or bearer, and payable January 1, 1903, with interest annually at the rate of 6 per cent per annum; and, in order to secure the payment of the principal and interest of said bonds, executed to him a trust deed or mortgage, bearing date January 28, 1888, upon the property and franchises of the railroad company and upon the right, title and interest which the company had or might thereafter acquire in and to the lands granted or agreed to be granted by the Trustees of the Internal Improvement Fund by the contract of May 31, 1871. The trust thus created was accepted by Shoecraft, and to compel a performance of the contract of May 31, 1871, by the execution of a conveyance of the lands held by the Trustees, and to determine the rights of others claiming interest in the lands, this suit is brought.

The conveyance to the company of the lands held by the Trustees pursuant to the contract between those parties is essential to the value of the security offered for the bonds executed to the Security Construction and Trust Company, and to enable the complainant to discharge the trust accepted by him. But the contract being between citizens of the State of Florida, a suit upon it could not be maintained by the railroad company in the Circuit Court of the United States, and therefore could not be maintained by its assignee, the complainant. Section 629 of the Revised Statutes, which was in force when the suit was commenced, declares that "No circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." The terms used, "the contents of any promissory note or other chose in action," were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin* v. *Black Hawk County*, 105 U. S. 659 [26: 1186], where the subject is fully considered, and the decisions cited. There a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a chose in action, and therefore not maintainable, under the statute in question, in the Circuit Court of the United States, by an assignee, if it could not have been prosecuted there by the assignor had no assignment been made.

It is contended, however, that the complainant is not the assignee of the contract of May 31, 1871, but a mortgagee in trust of the lands mentioned therein, and can therefore maintain the suit by reason of his citizenship in New York. We cannot assent to this position. It is true the complainant is a mortgagee in trust of such interest as the mortgagor had in the lands, but he brings the suit, not to foreclose the mortgage, but as one having a beneficial inter-

est in the contract, and consequently a right to enforce it. The object of the suit is to perfect the title to the lands mortgaged by enforcing the performance of the contract. The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the Trustees by their contract of May 31, 1871. This conveyance of all right, title and interest "in and to" the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself. If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, is worthless as a security. If he has no interest in the contract he has no standing in court to ask its enforcement; and if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the circuit court, by section 629 of the Revised Statutes. He is subject to the same disability in that respect as his assignor.

Decree affirmed.

EDWARD B. THORNTON, *Plff. in Err.*,

v.

FRANCIS SCHREIBER Sr., ET AL., Trading as SCHREIBER & SONS.

(See S. C. Reporter's ed. 612-621.)

Copyright of a photograph—remedy for infringement—employee, when not liable—construction of statute.

1. Section 4965, Revised Statutes, gives no right of action to recover damages, merely as such, by the owner of the copyright of a photograph, but limits the remedy for an infringement of the owner's right to the forfeiture of the plates on which the infringing article is copied, and "every sheet thereof, either copied or printed;" and to the further forfeiture of one dollar for every sheet of the same found in the possession of the infringer.

2. One who is merely an employee in a store of a firm which has control of the plates and of the sheets of the photograph printed thereon, which infringed plaintiff's copyright, cannot be said to have the possession of those sheets, although he may have a principal place in the establishment.

3. The words "found in his possession" in said statute are not to be construed as referring to the finding of a jury, but refer to a time before the cause of action accrues at which they are found in the possession of the defendant.

[No. 187.]

Argued Jan. 19, 20, 1888. Decided Feb. 13, 1888.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment of that court affirming a judgment of the District Court for that district in favor of plaintiffs for a forfeiture amounting to $14,800, under section 4965, Revised Statutes. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Frank P. Prichard** and *John G. Johnson*, for plaintiff in error:

In paying the artists for their work, the plaintiffs acquired no right to the copy right-able idea.

Yuengling v. *Schile*, 12 Fed. Rep. 97-105.

There was no averment in the declaration of any authorship of such an idea, design, or pose, as was copyrightable.

Trade-Mark Cases, 100 U. S. 82 (25: 550); *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 (28: 349).

Plaintiffs were not entitled to recover in a penal action for infringement of an alleged copyright, unless the declaration averred performance by them of all things which the statute made prerequisite to a right to recover.

Rosenbach v. *Dreyfuss*, 2 Fed. Rep. 217; *Chicago Music Co.* v. *Butler Paper Co.* 19 Fed. Rep. 758.

To recover against Thornton it was necessary to prove the copies were in his possession.

Backus v. *Gould*, 48 U. S. 7 How. 805 (12: 922); *Simpson* v. *Blount*, 3 Dev. L. 34; *Hubbard* v. *Austin*, 11 Vt. 129; *Ellicott* v. *Pearl*, 1 McLean, 214, 215; 2 Bl. Com. 116; 1 Hale, P. C. chap. 43, p. 506; *Rex* v. *Bazeley*, 2 Leach, 835; *Reg* v. *Reed*, Dears. Cr. Cas. 168, 257.

Messrs. H. P. Brown, J. R. Paul, **A. S. Biddle** and *J. K. Valentine*, for defendants in error:

A third person may become owner by virtue of an original employment under a contract with the author which, by agreement, is to confer upon the owner both complete ownership of the work itself and of any copyright that may be obtained thereon.

Parton v. *Prang*, 3 Cliff. 537-547, 551; *Grace* v. *Newman*, L. R. 19 Eq. 623; *Boucicault* v. *Fox*, 5 Blatchf. 87; *Little* v. *Gould*, 2 Blatchf. 362; *Sheldon* v. *Houghton*, 5 Blatchf. 285; *Paige* v. *Banks*, 7 Blatchf. 152; *S. C.* 80 U. S. 13 Wall. 608 (20: 709); Drone, Copyright, 238, 248-5, 257-9.

In both trover and replevin the plaintiff must allege that he possessed the goods as of his own property.

Demick v *Chapman*, 11 Johns. 132; *Schermerhorn* v. *Van Volkenburgh*, 11 Johns. 529; *Hoyt* v. *Gelston*, 13 Johns. 141; *Aikin* ads. *Buck*, 1 Wend. 466; *Butts* v. *Collins*, 13 Wend. 139; *Kissam* v. *Roberts*, 6 Bosw. 154, 163; *Hoffman* v. *Harrington*, 44 Mich. 183; Judge Hare's note to *Armory* v. *Delamirie*, 1 Smith, Lead. Cas. (7th Am. ed.) *470, 471; *S. C.* 1 Strange, 504.

Mr. Justice **Miller** delivered the opinion of the court:

This is a *qui tam* action brought by the defendants in error, constituting a partnership in the name of Schreiber & Sons, against Thornton, the plaintiff in error, under section 4965 of the Revised Statutes. This is found in chapter 3, title LX, which has relation to copyrights. As we have heretofore decided in the case of *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 [28: 349] photographs are included, under certain circumstances, among the things which may be copyrighted.

The plaintiffs in this action allege themselves to be the owners of a valid copyright of a photograph, entitled "The Mother Elephant 'Hebe' and her Baby 'Americus,'" and that the defendant, Thornton, was liable to them under the above section for an infringement of their ex-

clusive right in such photograph. The declaration consisted originally of four counts, but the plaintiffs afterwards obtained leave to amend it by striking out the third and fourth. Of the two counts which remained, the first was for copying and printing said photograph, with the charge that 15,000 sheets of the same were found in the defendant's possession, printed and copied by him, and claiming the sum of $15,000 as forfeited to plaintiffs and to the United States under said section. The second count alleged that the defendant published said photograph, and that 15,000 sheets of the same were found in his possession.

Section 4965, on which this action is founded reads as follows:

"If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed to sale; one half thereof to the proprietor and the other half to the use of the United States."

It will be observed that this section gives no right of action to recover damages, merely as such, by the owner of the photograph, but limits the remedy to the forfeiture of the plates on which the infringing article is copied, "and every sheet thereof, either copied or printed," and to the further forfeiture of "one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale." In case of "a painting, statue, or statuary," there is to be a forfeiture of ten dollars for every copy found in the defendant's possession, or by him sold or exposed for sale.

In section 4964, immediately preceding the one under consideration, it is declared that every person who shall, without the consent of the proprietor of a copyrighted *book*, print, publish, import, sell, or expose for sale any copy of such book shall not only forfeit every copy thereof to such proprietor, but shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor. And so in section 4966, which immediately follows the one under consideration, it is declared that "Any person publicly performing or representing any *dramatic composition* for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first, and fifty dollars for every subsequent, performance, as to the court shall appear to be just.

It will thus be seen that while this chapter provides a remedy by a civil action on behalf of the owner of a copyright of a book or dramatic composition which has been violated, it makes no such provision in favor of a copyright of "any map, chart, musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model," etc., except so far as it forfeits the plates on which they are copied, and the sheets, either copied or printed, and one dollar for every sheet found in the possession of the defendant. Section 4967 also allows an action for damages by the author or proprietor of any *manuscript* published without his consent.

As the action in the present case is brought by plaintiffs below, who sued as well for the United States as for themselves, under the idea that the government was entitled to one moiety of the penalty recovered, an examination of the statute presents a question at the outset as to whether the United States has any interest in the only penalty sought to be recovered, namely, that of one dollar for each sheet of the photographs found in the possession of the defendant. Looking critically at the language of the statute, the question is suggested whether the one half of the amount recovered which is to go to the United States extends beyond the case of "a painting, statue, or statuary."

It will be observed that in the beginning of the penalty denounced in this section it is said that the defendant "shall forfeit to the proprietor [meaning the proprietor of the copyright] all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale;" and recurring, after a semicolon, to another branch of the subject, it is said that "in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one half thereof to the proprietor and the other half to the use of the United States."

With regard to the copyrighted articles mentioned in the section under consideration, it would seem that the first penalty is a forfeiture of them to the *proprietor;* and afterwards, when other copyrighted articles, enumerated as "a painting, statue, or statuary," where the amount forfeited is different, it provides that one half of the forfeiture shall be to the proprietor and the other half to the use of the United States.

This point, however, was not raised by either counsel in the argument; and as we are of opinion that the copies for which judgment was recovered in this case against the defendant were not found in his possession, within the meaning of the statute, it is unnecessary to decide it here.

The suit was brought originally in the District Court of the United States for the Eastern District of Pennsylvania. It was there tried

before a jury, and a verdict rendered in favor of the plaintiffs for a forfeiture of one dollar for each of the copies found in defendant's possession, amounting to $14,800, for which judgment was entered in that court. A bill of exceptions, taken at that trial, is found in the record. A writ of error took the case to the circuit court for that district, which, on the case as made in the district court, affirmed its decision. To this latter judgment the present writ of error is directed.

The assignment of errors questions the validity of the copyright, both as regards the subject matter of the photograph, and as regards the evidences of proper proceedings with the librarian to make the copyright effective. There are also other errors assigned, which it might be interesting to examine, but which we do not think necessary to a decision of the case as it is now before us.

The judge in the trial in the court below charged the jury as follows:

"The court instructs you that under the evidence, if you believe it, and the court sees nothing that would justify disbelief, the plaintiff is entitled to recover and to have damages assessed at the rate of one dollar ($1.00) for every sheet of that copied photograph found in his [defendant's] possession; and every sheet under his control at the time must be treated as in his possession, notwithstanding the interest his employers may have had in it." * * *

"A large number of the copies, according to the testimony, were upon a shelf." * * *

"And he [the defendant] obtained these copies for the purpose of labels. They were found in the store where he was and under his charge."

"Now, I repeat what I have said, that every sheet under his control (then [thus] under his control)—notwithstanding the interest that the firm of Sharpless & Sons may have had in them—every sheet thus subject to his control must be regarded for the purposes of this suit, as in his possession, and for every sheet thus found in his possession, if you find for the plaintiff, and I see nothing that would justify you in not so finding."

This left nothing for the jury to consider but whether they would believe the testimony; if they did, it was a peremptory instruction to them to find a verdict against defendant of one dollar for every sheet found in the store of Sharpless & Sons. There is no contradiction in the testimony on the subject of the relation of the defendant, Thornton, to the possession of these 15,000 sheets of the photographs. Sharpless & Sons were a partnership in the City of Philadelphia, and large wholesale dealers in dry goods. Mr. Thornton was, according to his own testimony and that of Mr. Sharpless, employed by them somewhat in the character of a business manager; but his main business was, however, the purchasing of goods which were afterwards sold by that firm. Their place of business was a three or four story building, in which they had large quantities of textile fabrics stowed away for sale; and it was in the second or third story of this building that the sheets were found which are the subject of this suit. They were among other goods, and were to be used by pasting them upon parcels of dry goods, which was also often done at the dyer's before the goods were brought to the business house for sale. That these copies were the property of Sharpless & Sons can admit of no doubt; that they were in their building, subject to their control and use, in the same manner as any of the other goods that they had there, is also clear, as well as the fact that the plaintiffs in this case so understood it.

It appears from the evidence of Francis Schreiber, who was not, however, a member of the plaintiffs' firm, that he went, in company with his brother Henry, to the place of business of Sharpless & Sons, and sought an interview with Mr. Sharpless. In the course of the conversation which ensued he asked Mr. Sharpless where he got the pictures from, and he said "his man who had charge had got it at Queen's" —by "his man" evidently meaning Thornton, the defendant. Then, after some conversation about the injury done the proprietors of the picture, Mr. Sharpless said that he did not intend to do anything wrong; whereupon, witness then asked him whether he had any of them, to which the reply was, yes, he had a great many of them upstairs. The witness asked him whether they could have them, and Sharpless said yes, they could have the copies.

This language is inconsistent with any other idea than that Mr. Sharpless considered the matter entirely under his control. This conversation with Mr. Sharpless occurred on the 8th day of May, in their place of business at the corner of Eighth and Chestnut Streets; it was in the second story of the building, and Henry Schreiber, a brother of the witness, was also present.

In regard to this same conversation the witness, Francis Schreiber, was asked: "How came you to ask Mr. Sharpless if he would surrender any of the pictures?" His answer was: "I wanted to know if he had any. * * * That was my object in going there."

Henry Schreiber, one of the plaintiffs, was also sworn, and stated that he was present upon the Saturday morning when the conversation occurred with Mr. Sharpless as to which his brother Francis testified; that he had been there a few days before, upon which occasion he saw Mr. Thornton, who was employed there, to the best of his knowledge. He testified that Thornton showed him a picture; that he saw the place from which it was taken, a shelf, and that they were others, quite a package of them, on the shelf. He further testified that in the conversation on Saturday, Mr. Sharpless said: "Mr. Thornton has the sole charge of that; he gets up the labels, and gets everything that he thinks will be appropriate," or something to that effect; and that Mr. Sharpless also said that Thornton had shown him this picture before it was used, and he (Sharpless) told him to go ahead. He also states that Mr. Sharpless said that they had a lot upstairs, and that he (the witness) could have them all.

Mr. Thornton himself testified that he got up this plate, and ordered 15,000 copies to be made; that these copies were delivered to Sharpless & Sons; that the tickets were often put on the goods at the dyeing establishment, received afterwards by Sharpless & Sons, and sold to other parties. After some further testimony as to the details of this transaction, Mr. Thornton was asked: "Tell us what your business was then at that store of Sharpless & Sons." He

replied: "I was employed there as the superintendent of the wholesale domestic department; I have the purchasing of all the goods, the making of the price, and seeing that they are sold." He testified in substance that these prints or copies were paid for by Sharpless & Sons; that he never paid out any money, but that they were paid for as other goods were by that firm in the course of business; that they were contracted for by him and paid for by Sharpless & Sons when the bill was sent to them.

The attempt was made to establish the fact that Thornton had the possession or control of these prints by showing that he was the man who first conceived the idea of getting up and using them in the business of Sharpless & Sons; that he did in effect order the photograph to be made, and only showed it to Mr. Sharpless after this was done. Thornton, however, states that before it was used, and a month before the time the prints were found at the store by the plaintiffs, Mr. Sharpless had known about the photograph and copy; that he approved it, and that the bills were paid by his firm.

We do not see how Mr. Thornton, merely as an employé, although he may have had a principal place in that establishment, could be said to have had the possession of these prints when they were found by the plaintiffs in the store of Sharpless & Sons. In any other light that it can be viewed, that firm would be held to be in possession. An action of replevin could have been sustained against them for the possession of these goods, or an action of trover, if they had been the property of plaintiffs, on account of the possession of them by Sharpless & Sons. Sharpless & Sons could have done what they pleased with them; they could have ordered them thrown out and burned; they could have given them up, and they did offer to give them up to plaintiffs. It was Sharpless himself who made this offer, and the plaintiffs obviously understood that Sharpless was the man with whom they were dealing all this time. Their first visits were to him; they talked the matter over with him; they recognized him as having control of the plates, of the prints, of the entire transaction; and it is impossible to conceive that Mr. Thornton had any other control over those sheets than he had over any piece of dry goods in the building. What he did during all the time in which this transaction occurred was as an employé of Sharpless & Sons; and any other clerk, porter or salesman in that establishment, who handled these articles, or who had access to them and could use them upon packages of goods, had as much possession of them as Mr. Thornton, and any such person could have been sued and a recovery had against him as lawfully as against Thornton, so far as the matter of possession is concerned. What right of action might have been maintained against Thornton for actively copying, printing, selling, or exposing these prints for sale, is not now in question; the recovery here is based upon the fact of their being found in his possession.

Counsel for defendants in error, Schreiber & Sons, insist that the words "found in his possession" are to be construed as referring to the finding of the jury; that the expression means simply that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit one dollar for each sheet so ascertained to have been in his possession. We, however, think that the word "found" means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant. If, however, plaintiffs' view of the subject were tenable, the fact still remains that the only possession Mr. Thornton ever had of these prints was the possession of Sharpless & Sons, holding them merely as their employé, subject always to their order and control, and never with any claim of right in him to control them except in their service.

The instructions of the court to the jury, therefore, on this subject, were erroneous, and the testimony did not justify the charge.

For this reason the judgment of the Circuit Court is reversed, and the case remanded with instruction to set aside the verdict, and for further proceedings in accordance with this opinion.

UNITED STATES, *Appt.*, *v.* THE BRITISH STEAMER STRATHAIRLY, Her Tackle, etc., JOHN McINTYRE, Claimant.

(See S. C. "*The Strathairly*," Reporter's ed. 558–581.)

Fine, when lien on vessel—section 4270, Rev. Stat.—steam vessel, subject to penalties—section 4266, Rev. Stat.—amount of penalty.

1. The fine imposed upon the master of a vessel by section 4253 of the Revised Statutes for the violation of that and the preceding section is, by section 4270, a lien upon the vessel itself to be recovered by a proceeding *in rem*.
2. The meaning of section 4270 of the Revised Statutes is to make the vessel liable *in rem* as itself guilty of the offense for every pecuniary penalty that may be assessed for a violation of any of the previous provisions of the statute regulating the carriage of passengers in merchant vessels.
3. Section 4264 of the Revised Statutes, as amended by Act of Feb. 27, 1877, 19 Stat. at L. 250, subjects vessels propelled in whole or in part by steam and navigating from, to, and between the ports therein named to the provisions, requisitions, penalties and liens included within section 4255, as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers.
4. The penalty imposed for a violation of section 4266, Revised Statutes, cannot be charged as a lien on the vessel named in the libel in this action. That section does not apply to vessels propelled in whole or in part by steam.
5. The penalty recoverable against the vessel, and which by section 4270 is made a lien upon it, is limited to the amount adjudged as the penalty by way of fine against the master; and payment on the part of either is satisfaction of the whole.

[No. 154.]

Argued Feb. 1, 1888. Decided Feb. 13, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of California, affirming a decree of the District Court of that district dismissing a libel of information *in rem* against the British steamer Strathairly. *Reversed.*

Statement by *Mr. Justice* **Matthews**:

This is a libel of information *in rem* filed in the District Court of the United States for the District of California, July 1, 1882, on behalf of the United States against the British steamer

Strathairly. The claimant having interposed peremptory exceptions, a decree in the district court was entered August 30, 1882, sustaining the exceptions and dismissing the libel. From this decree the libelant appealed to the Circuit Court of the United States for the District of California, in which, October 3, 1882, a decree was entered sustaining the exceptions and dismissing the libel. From that decree the libelant has appealed.

The libel contains three counts. The first is for the recovery of $16,300 for an alleged violation of the provisions of sections 4252 and 4253 of the Revised Statutes. In this count it is alleged that the steamship Strathairly was a British vessel owned by citizens of Great Britain, and propelled in whole or in part by steam; that W. B. Fenwick, the master thereof, brought on said steamer from Hong Kong, China, 326 steerage passengers in excess of the number fixed by law in proportion to the space or tonnage of said vessel; that by reason thereof Fenwick, the master of said ship, became liable to a fine of $50 for each of said 326 passengers, amounting to $16,300, which amount, it is alleged, is made a lien by the laws of the United States on said vessel, her tackle, furniture, engines, and apparel. It is further alleged in the same count that prior to the promoting of said libel a criminal information was filed in the District Court of the United States for the District of California, charging Fenwick, the master, with the offense of unlawfully bringing from said Port of Hong Kong into the Port of San Francisco the said 326 passengers in excess of the number that he could lawfully bring on said vessel; that said Fenwick was duly arraigned on said information, and pleaded guilty to the offense of bringing on said vessel 223 steerage passengers in excess of the number that he could lawfully bring on the same; that thereupon said Fenwick was duly sentenced to pay a fine of $50 for each of said 223 passengers, amounting in all to the sum of $11,150. To this count McIntyre, the claimant of the ship, filed a peremptory exception, on the ground that the facts stated were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States.

The second count of the libel is for the recovery of the sum of $5,280, for an alleged violation of the provisions of section 4255 of the Revised Statutes. In this count it is alleged that on April 17, 1882, at Hong Kong, China, there were taken on board of said steamship Strathairly 1,056 steerage passengers for transportation to the Port of San Francisco, Cal.; that said 1,056 steerage passengers were by said vessel transported to and landed at said Port of San Francisco; that said vessel at the time said steerage passengers were so transported from Hong Kong to San Francisco did not have the number of berths required by law for the accommodation of said passengers, nor were said berths constructed in the manner required by law, by reason whereof the master of said ship and the owners thereof became liable to a penalty of $5 for each of said 1,056 passengers, amounting in all to $5,280, no part of which had been paid, and that the same constitutes a lien upon said vessel. To this count the claimant also excepted, (1) because the facts stated therein were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States; (2) because the ship Strathairly, being at the time a vessel propelled in whole or in part by steam, neither the master nor owners thereof are subject or liable to the penalty provided for by section 4255 of the Revised Statutes, and that no lien does or can attach on said vessel under section 4270 of the Revised Statutes.

The third count of the libel is for the recovery of the sum of $1,000 for the alleged violation of the provisions of section 4266 of the Revised Statutes, taken in connection with section 2774. In this count it is alleged that W. B. Fenwick, the master of said steamship, on April 17, 1882, took on board of said ship at Hong Kong, China, 1,056 steerage passengers, and transported them in said ship to the Port of San Francisco; that on arriving at said last named port the said master neglected and refused to deliver to the collector of customs at said Port of San Francisco a list of all the passengers taken on board of said vessel and brought in her to the Port of San Francisco; also that said Fenwick knowingly and willfully made out and delivered to said collector of customs a false list of said passengers, in which he reported that the whole number brought was 329, and no more, instead of 1,056, the number alleged to have been actually brought and landed, by reason of which said Fenwick became liable to a fine of $1,000, which, it is alleged, is also a lien upon said vessel. To this count the claimant excepted, on the ground that the facts stated were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States.

Mr. **Wm. A. Maury**, *Asst. Atty-Gen.*, for appellant.

Messrs. **W. W. Morrow** and *Milton Andros*, for claimant and appellee:

The fine denounced against the master of a vessel by section 4253, Revised Statutes U. S., for a violation of the provisions of that section, and of the provisions of section 4252 of said statutes, does not constitute a lien on the vessel, and cannot, therefore, be recovered by a proceeding *in rem*.

The provisions of sections 4255 and 4266, Revised Statutes, do not apply to vessels propelled in whole or in part by steam.

The Candace, 1 Low. 126; *U. S.* v. *The Ethan Allen*, 8 Am. Law Rev. 872; *Commonwealth* v. *Hartnett*, 3 Gray, 450, and cases there cited; *The Manhattan*, 2 Ben. 88; *The Devonshire*, 8 Sawy. 209.

Mr. Justice **Matthews** delivered the opinion of the court:

The first question for consideration is whether the fine imposed upon the master of a vessel by section 4253 of the Revised Statutes, for the violation of that and the preceding section is a lien upon the vessel itself, to be recovered by a proceeding *in rem*. Section 4252 of the Revised Statutes provides that "No master of any vessel owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place other than foreign contiguous territory of the United States, passengers contrary to the provisions of

this section, with intent to bring such passengers to the United States and leave such port or place, and bring such passengers, or any number thereof, within the jurisdiction of the United States." It then prescribes the number of passengers which may be lawfully carried by reference to the tonnage and space of the vessel. Section 4253 declares that whenever the master of any such vessel shall carry and bring within the jurisdiction of the United States any greater number of passengers than is allowed by section 4252 he shall be deemed guilty of a misdemeanor, and shall, for each passenger taken on board beyond such limit, be fined $50, and may also be imprisoned for not exceeding six months. Section 4270 is as follows:

"Sec. 4270. The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating those provisions, and such vessel shall be libeled therefor in any Circuit or District Court of the United States where such vessel shall arrive."

It is argued that the penalties referred to in section 4270 do not include the fine imposed by section 4258. There are other provisions following section 4252 and prior to section 4270, it is said, imposing penalties which are embraced by section 4270 exclusive of all others. Of these, the first is mentioned in section 4255, which particularly prescribes the number and construction of the berths for the use of passengers on any such vessel, and provides that for any violation of the section "the master of the vessel and the owners thereof shall severally be liable to a penalty of $5 for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart." This, it is argued, is a penalty *eo nomine*, for which not only the master, but the owners of the vessel are liable, and to be recovered, not in a criminal prosecution, but in a civil action, and is thus distinguished from the case of the fine imposed by section 4258.

Section 4259 also imposes a penalty of $200 upon the master and owner of any such vessel which shall not be provided with the house or houses over the passage ways, or with ventilators, or with cambooses or cooking ranges with the houses over them, required by previous sections, for each and every violation of or neglect to conform to each of these requirements, to be recovered by suit in any Circuit or District Court of the United States within the jurisdiction of which such vessel may arrive, or from which she may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or master of such vessel may be found.

So section 4263 provides for maintaining discipline and habits of cleanliness among the passengers for the preservation and promotion of their health by the master, who is required to cause the apartments occupied by such passengers to be kept at all times in a clean, healthy state; and the owners of every such vessel are required to construct the decks and all parts of the apartments so that they can be thoroughly cleansed, and to provide a safe and convenient privy or water-closet for the exclusive use of every 100 of such passengers. The master is also required to disinfect the quarters for the passengers. The section then further provides: "And for each neglect or violation of any of the provisions of this section the master and owner of any such vessel shall be severally liable to the United States in a penalty of fifty dollars, to be recovered in any circuit or district court within the jurisdiction of which such vessel may arrive, or from which she is about to depart, or at any place where the owner or master may be found."

The contention is that the penalties embraced by section 4270 are those, and those only, referred to under that name in sections 4255, 4259, and 4263, thus excluding from section 4270 the fines imposed upon the master by section 4258, as well as the fine imposed by section 4262. This last named section provides that every master of such vessel who willfully fails to furnish and distribute provisions in the quantity and cooked in the manner required by law shall be deemed guilty of a misdemeanor, and shall be fined not more than $1,000, and imprisoned for a term not exceeding one year; with the proviso that "The enforcement of this penalty, however, shall not affect the civil responsibility of the master and owners to such passengers as may have suffered from such default."

It is suggested that there is a line of distinction between the punishments provided by sections 4258 and 4262, which are confined to the master alone, for what seem to be violations of a personal duty charged upon him by the law, and in which it is assumed that the owners of the vessel do not participate, and those penalties imposed by the other sections upon the master and owners for faults of construction and management, where blame may be justly imputed to the owners as well as the master. This construction of the statute was adopted by *Judge* Hoffman in the United States District Court of California, in the case of *United States* v. *The Ethan Allen*, 8 Am. Law Rev. 372. Analyzing the Act of Congress of March 3, 1855, 10 Stat. at L. 720, entitled "An Act to Regulate the Carriage of Passengers in Steamships and Other Vessels," now carried into the Revised Statutes in the sections under consideration, he said: "It would seem, therefore, that Congress intended to distinguish between the 'fines' which on conviction of a misdemeanor the master might be sentenced to pay, and the 'penalties' which in a civil action are made recoverable from the owners as well as the master. The offenses for which the master is made criminally liable are willful violations of the law in which the owners have no complicity. The infractions of the Act for which the owners are made responsible in a civil suit relate to houses over passageways, to ventilators, cambooses or cooking ranges, water-closets, etc., and other arrangements for the comfort and health of the passengers, which it is the owners' duty to provide. For the omission to do so the owners and the vessel are justly made responsible." His conclusion was that these, and these alone, are the penalties which are made liens on the vessel.

The same view was taken by *Judge* Lowell in *The Candace*, 1 Low. 126, decided in 1867. He sums up his statement of the question, referring to the Act of March 3, 1855, 10 Stat. at L. 720, as follows: "When, therefore, I consider the kind of penalty mentioned in the first section,

which may be partly imprisonment; the person upon whom it is imposed, being the master only; the mode of its enforcement by a criminal trial and sentence; the absence of allusion to any responsibility of the owner or vessel; in all which respects it differs from the mere pecuniary civil penalties imposed by the other sections; and further, that the ordinary office of a lien is to be security for a debt or civil liability, and the great difficulty of applying it in fact in aid of the criminal responsibility of a third person, and find that there are in the statute many civil pecuniary forfeitures or penalties to which the 15th section giving these liens is properly and exactly applicable; and that to the only other criminal penalty mentioned in the Act it cannot possibly be applied before conviction of the master, because the amount is not fixed until then,—I am constrained to conclude that it does not give a lien upon the vessel for the fines which may be imposed upon him for a violation of the first section of the Act."

It is to be observed, however, that in the original Act of March 3, 1855, the first section of which corresponds with sections 4252 and 4253 of the Revised Statutes, the fine thereby imposed on the master is also spoken of as a penalty. The language is that "every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any Circuit or District Court of the United States, shall, for each passenger taken on board beyond the limit aforesaid, or the space aforesaid, be fined in the sum of fifty dollars, and may also be imprisoned, at the discretion of the judge before whom the penalty shall be recovered, not exceeding six months."

In section 4253 of the Revised Statutes the phrase in which the word "penalty" occurs in the original Act is omitted for the sake of condensation, but without any change in the sense. The phrase, however, is retained in section 4262, where the fine and imprisonment prescribed as a punishment for the misdemeanor of the master is spoken of as a penalty, the enforcement of which shall not affect the civil responsibility of the master and owners to the passengers who may have suffered by the fault. The word penalty is used in the law as including fines, which are pecuniary penalties. The language of section 4270 includes all that may be properly designated as penalties imposed by any of the previous provisions regulating the carriage of passengers in merchant vessels. It is the amount of these penalties which, being imposed by the foregoing provisions, are declared to be liens on the vessel violating those provisions; and in view of that section the vessel is considered and treated as itself violating those provisions, whether the act constituting the offense be the act of the master alone or that of the master and owners. In other words, this section of the statute does not point to any distinction such as that now insisted on, but seems intended to embrace as liens upon the vessel itself the amount of every penalty imposed by a previous section of the statute for every offense against its provisions.

The fact that the master is also liable, as a part of his punishment, to be imprisoned does not constitute any such incongruity as to make the construction now put upon section 4270 unreasonable. It is the fine that is referred to as the penalty, as is distinctly pointed out in the language of section 4270 when it speaks of the amount of the several penalties; that is to say, the pecuniary sum which may be awarded as a penalty. Neither is it an insurmountable inconvenience affecting this construction of the law that the extent of the lien declared by section 4270 cannot be ascertained until after a conviction of the master and the assessment of the amount of the fine imposed upon him. This is undoubtedly true in respect to section 4262, because there the fine is only made ultimately certain by the sentence of the court, to whom the discretion is confided of imposing any amount not in excess of $1,000. Neither is there anything in the nature of the master's offense, as described in sections 4252, 4253 and 4262, which should constitute the fines assessed under those sections exceptions out of the provision for a lien contained in section 4270. There is nothing in the nature of the case to exonerate the owner of the vessel from responsibility for the acts of the master in overcrowding the vessel with passengers contrary to law. By section 4260 and section 4261 the owner is expressly made responsible for the act of the master in not putting on board for the use of the passengers a sufficient supply of provisions and water; and the owner as well as the master is by section 4261 made expressly liable to the extent of $8 a day for each passenger put on short allowance in consequence of a failure of the master to supply the proper quantity and quality of provisions and water as required by law.

It seems to us, therefore, that the direct and express meaning of section 4270 is to make the vessel liable *in rem* as itself guilty of the offense for every pecuniary penalty that may be assessed for a violation of any of the previous provisions of the statute regulating the carriage of passengers in merchant vessels.

The second count of the libel is for the recovery of the penalty provided by section 4255. That section is as follows:

"No such vessel shall have more than two tiers of berths. The interval between the lowest part thereof and the deck or platform beneath shall not be less than nine inches; and the berths shall be well constructed, parallel with the sides of the vessel and separated from each other by partitions, as berths ordinarily are separated, and shall be at least six feet in length, and at least two feet in width, and each such berth shall be occupied by no more than one passenger; but double berths of twice the above width may be constructed, each berth to be occupied by no more and by no other than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own children under the age of eight years, or by two men, members of the same family. For any violation of this section, the master of the vessel, and the owners thereof, shall severally be liable to a penalty of five dollars for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart."

This section corresponds with section 2 of the Act of March 3, 1855. Section 10 of the same Act was as follows:

"That the provisions, requisitions, penalties and liens of this Act, relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to and between the ports, and in manner as in this Act named, and to such vessels and to the masters; and so much of the Act entitled 'An Act to Amend an Act Entitled an Act to Provide for the Better Security of the Lives of Passengers on Board of Vessels Propelled in Whole or in Part by Steam, and for Other Purposes,' approved August thirtieth, eighteen hundred and fifty-two, as conflicts with this Act, is hereby repealed; and the space appropriated to the use of steerage passengers in vessels so as above propelled and navigated is hereby subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive, or from which she shall be about to depart; and the same shall be examined and reported in the same manner and by the same officers by the next preceding section directed to examine and report."

The Act of August 30, 1852, referred to in this section, provided for the inspection of steam vessels and their equipment by inspectors appointed for that purpose, on whose favorable report a license was issued, without which it was unlawful for the vessel to engage in navigation. One object of the inspection was to determine whether the vessel had suitable accommodations for her crew and passengers; and in the certificate of inspection to be furnished by the inspectors to the collector of the district, they were required to state the number of staterooms, the number of berths therein, the number of other permanent berths for cabin passengers, the number of berths for deck or other passengers, the number of passengers of each class for whom she has suitable accommodations, and, in case of steamers sailing to or from any European port, or to or from any port on the Atlantic or Pacific, a distance of 1,000 miles or upwards, the number of each she is permitted to carry, and, in case of a steamer sailing to any port a distance of 500 miles or upwards, the number of deck passengers she is permitted to carry. The evident purpose of section 10 of the Act of March 3, 1855, was to make the provisions of that Act, relative to the inspection of vessels, applicable to all vessels propelled in whole or in part by steam, which were within the the provisions of the Act of August 30, 1852, so as to have but one system of inspection, in the particulars specified, applicable to vessels of every description. The Act of March 3, 1855, by its terms, did apply to all vessels, including steamers as well as sailing vessels, but not to vessels enrolled and licensed for the coasting trade; the latter were provided for by the Act of August 30, 1852; and the 10th section of the Act of March 3, 1855, was evidently introduced, as we have said, for the purpose of establishing uniformity in respect to regulations for the accommodation and safety of steerage passengers in all vessels engaged in the business of carrying such passengers, whether between ports in the United States or between them and foreign ports. This section, however, was omitted in the revision of the statutes, and that omission was supplied by the Act of February 27, 1877, 19 Stat. at L. 250, chapter 69, amending section 4264 of the Revised Statutes by adding thereto the substance of the provisions of the omitted section 10 of the Act of March 3, 1855, so as to restore the law in that particular to the condition in which it was under the last named Act. That amendment is in the following language: "The provisions, requisitions, penalties and liens enumerated in the several sections of this chapter relating to the space in vessels appropriated to the use of passengers are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to and between the ports and in manner as herein named, and to such vessels and to the masters thereof; and the space appropriated to the use of steerage passengers, in vessels as above propelled and navigated, is hereby made subject to the supervision and inspection of the collector of customs in any port in the United States at which any such vessel shall arrive or from which she shall be about to depart; and the same shall be examined and reported in the same manner and by the same officers directed in the preceding section to examine and report."

It is now argued that the only sections of this chapter relating to the space in vessels appropriated to the use of passengers are sections 4252, 4253, and 4254, which correspond with the first section of the Act of March 3, 1855. The reason assigned in support of this view seems to be that they are the only sections which refer expressly to spaces appropriated to the use of passengers. Section 4252 declares that the spaces appropriated for the use of such passengers, not occupied by stores or other goods, not the personal baggage of such passengers, shall be in certain proportions; that is to say, on the main and poop decks or platforms and in the deck houses, if there be any, one passenger for each 16 clear superficial feet of deck, if the height or distance between the decks or platforms shall not be less than six feet; and on the lower deck, not being an orlop deck, if any, one passenger for each 18 clear superficial feet, if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform, nor upon any deck where the height between decks is less than six feet. But on two-deck ships, where the height between decks is seven and one half feet or more, fourteen feet of superficial deck shall be the proportion required for each passenger. Section 4253 imposes the penalty upon the master for carrying any greater number of passengers than in the proportion to the space or tonnage prescribed in the preceding section. Section 4254 authorizes, for the safety or convenience of the vessel, portions of the cargo to be placed or stored in places appropriated to the use of passengers on certain conditions, but requires that the space thus occupied shall be deducted from "the space allowable for the use of passengers." It also authorizes the construction of a hospital "in the spaces appropriated to passengers" to be included "in the space allowable for passen-

gers," not to exceed 100 superficial feet of deck or platform. Then follows section 4255 above quoted, on which the second count of the libel is founded, which has reference to the construction of the berths to be occupied by the passengers. It prescribes the interval between the lowest part of any tier of berths and the deck or platform beneath to be not less than nine inches; that the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, and shall be at least six feet in length and two feet in width, and specifies how they shall and shall not be occupied by passengers. It is quite true that in section 4255 there is no express reference to spaces appropriated to the use of passengers, and that phrase does not occur in it; but nevertheless the section does plainly relate to the space in vessels appropriated to the use of passengers. It describes how the berths in which the passengers sleep shall be constructed, separated, and occupied. These berths are within the space which by the previous sections must be allowed for and allotted to the use of passengers; they constitute a part of that very space and are included in it. The language, therefore, of section 4264, as amended by the Act of February 27, 1877, 19 Stat. at L. 250, applies directly so as to subject vessels propelled in whole or in part by steam, and navigating from and to and between the ports therein named, to the provisions, requisitions, penalties, and liens included within section 4255 as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers.

It is true that the contrary construction of these sections of the Act was adopted by *Mr. Justice* Blatchford, then District Judge in the Southern District of New York, in the case of *The Manhattan*, 2 Ben. 88, whose decision was affirmed on appeal in the circuit court in October, 1868, by *Mr. Justice* Nelson, and that case was followed as an authority in the case of *The Devonshire*, 8 Sawy. 209, by *Judge* Deady in 1882. In the latter case the district judge seems to have been influenced in some degree by the consideration that the enactment by Congress of the omitted section 10 of the Act of March 3, 1855, as an amendment to section 4264 of the Revised Statutes by the Act of February 27, 1877, must be considered to have restored the section with the judicial construction which had been given to it in the case of *The Manhattan*. We do not, however, consider this circumstance as entitled to the weight given to it by him, and which we are asked in the argument by counsel to give in the present case. It is certainly not sufficient, in our judgment, to overcome what seems to us to be the clear meaning of the statute derived from its language and its reason. This view, indeed, is forcibly presented by the learned district judge in the case of *The Devonshire*, where he says, p. 213: "The argument of the district attorney in favor of the libel is that the provisions in section 2 are regulations relating to the 'space' appropriated to passengers, and therefore made applicable to steam vessels by the operation of section 10, because by them the 'space' between each berth, and that appropriated to each passenger therein, is prescribed; and when we consider that the evils intended to be prevented by section 2 are as likely to exist in the case of steerage passengers carried in steamships as those against which section 1 is intended to guard, it is not without force. There is quite as much need that a steerage passenger shall have the 'space' and privacy provided in section 2 when he lies down to sleep or is prostrated with sickness, as that he shall have the general moving and breathing 'space' between decks provided in section 1; and although the word 'space' is not used in section 2, still that is the subject of it, and its division and appropriation among passengers for the purpose of berths are thereby carefully and minutely regulated." We think these considerations are conclusive in support of the sufficiency of the second count.

The third count of the libel is for an alleged violation of section 4266 of the Revised Statutes. That section provides that the master of any vessel arriving in the United States from any foreign place whatever, at the same time that he delivers a manifest of the cargo or makes report or entry of the vessel pursuant to law, shall also deliver a report to the collector of the district in which such vessel shall arrive and a list of all the passengers taken on board of the vessel at any foreign port or place, verified by his oath, in the same manner as directed by law in relation to the manifest of the cargo. In that list he is required to designate particularly the age, sex and occupation of the passengers, respectively, the part of the vessel occupied by each during the voyage, the country to which they severally belong, and that of which it is their intention to become inhabitants, and whether any and what number have died on the voyage; and the refusal or neglect of the master to comply with the provisions of this section is subjected to the same penalties, disabilities, and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo. The penalties, disabilities, and forfeitures referred to in this section are those imposed by section 2774, which declares that every master who shall neglect or omit to make either of the reports and declarations thereby required shall for each offense be liable to a penalty of $1,000.

This section does not subject the vessel itself to any liability for this penalty, and we are not referred to any general provision of the statute imposing such a liability on the vessel, akin to that contained in section 3088 making the vessel liable whenever her owner or master is subject to a penalty for a violation of the revenue laws of the United States. It follows that the penalty imposed for a violation of section 4266 cannot be charged as a lien on the vessel, under the third count of the libel, unless that section is made applicable to vessels propelled in whole or in part by steam. This can be only on the supposition that this effect is given to it by the amendment to section 4264.

We find it impossible to adopt the construction that makes section 4266 one of those sections relating to the space in vessels appropriated to the use of passengers, which by the amendment to section 4264 are extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports and in manner as therein named, and to such vessels

and to the masters thereof. Doubtless one of its useful purposes was to enable the collector of the district to ascertain, from the verified list of passengers which it required to be furnished, whether the provisions of the statute had been complied with which limited the number of passengers according to the tonnage and space allowed in the vessel for steerage passengers; but we think it would be a strained construction of the Act for that reason to include the section under consideration in those made applicable to steam vessels, because they relate to the space in such vessels appropriated to the use of steerage passengers.

The only construction of the law which would subject the vessel to the lien of the penalty referred to in section 4266, by virtue of section 4270, would be that which made all the provisions of the chapter applicable to vessels propelled in whole or in part by steam, as well as to sailing vessels, on the ground that the language of the various sections makes no distinction as to vessels on account of their propelling power. It is certainly true that the language of all the sections is large enough to include steam vessels as well as sailing vessels; but to give that application to this legislation is to deprive of its whole effect the original section 10 of the Act of March 3, 1855, and the corresponding amendment introduced by the Act of February 27, 1877, to section 4264. That section extends and makes applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, navigating from, to, and between the ports and in the manner as in the Act named, and to such vessels and to the masters thereof, the provisions, requisitions, penalties, and liens of the Act relating to the space in vessels appropriated to the use of passengers. If without that section all the provisions of the Act were applicable to steam vessels, then the section itself would have no meaning. To give it any effect whatever it is necessary to suppose that it was the intention of Congress that no provisions of the Act of March 3, 1855, should apply to steam vessels, except those that were made applicable to them by section 10. By extending to them the particular provisions named in the section, the inference is unavoidable that all other provisions are thereby excluded from a similar application. This view is strengthened by the fact that the section having been omitted from the revision, it was restored by the Act of February 27, 1877. By omitting section 10 from the revision, it was probably the view of the revisors that the whole chapter should apply to steam vessels as well as sailing vessels. It seems to have been the intention of Congress to correct this view by restoring the original section 10 as an amendment to section 4264. We are, therefore, of opinion that section 4266 does not apply to vessels propelled in whole or in part by steam, and that the third count of the libel cannot be sustained.

Our conclusion, therefore, on the whole case is that the libel sets out a sufficient cause of action, and entitles the United States, upon proof of the facts, to recover under the first and second counts, but that it must be dismissed as to the third. Under the first count, that recovery must be limited to the amount adjudged as a penalty against the master by way of fine upon the criminal information against him. The penalty recoverable against the vessel, and which by section 4270 is made a lien upon it, is not an additional penalty, but is the same penalty which by section 4253 is to be adjudged against the master himself in the criminal prosecution for the misdemeanor, and payment on the part of either is satisfaction of the whole liability. It is the amount of that fine so assessed that is made a lien on the vessel. Under the second count it does not appear that any proceeding for the penalties therein sought to be recovered had been previously taken against the master. The difficulty of further proceeding under that count, however, is removed by a stipulation between the parties contained in the record. This stipulation provides that the liability, if any, of the master of the steamship, for the penalties provided for in sections 4255 and 4266 of the Revised Statutes, may be ascertained on the trial of the cause itself as fully and with the same force and effect as if the same were ascertained on trial of a proceeding against the master to recover the penalty, and a judgment therefor had been rendered against him; and all exceptions to the libel that the liability of the master, if any, had not been ascertained on a proceeding against him prior to the filing thereof were thereby waived.

For the reasons assigned, the decree of the Circuit Court is reversed, and the cause remanded, with directions to take further proceedings therein, in accordance with this opinion; and it is so ordered.

FRANCIS MUNSON, *Appt.*,

v.

MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK AND THE COMPTROLLER Thereof.

MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK AND THE COMPTROLLER Thereof, *Appts.*,

v.

FRANCIS MUNSON.

(See S. C. Reporter's ed. 601–605.)

Void patent.

The patent granted to Munson on April 2, 1867, for "new and useful improvements in preserving, filing and canceling bonds," etc., contains no patentable novelty, and does not involve any invention.

[Nos. 160, 161.]

Argued Feb. 2, 3, 1888. Decided Feb. 13, 1888.

CROSS APPEALS from a decree of the Circuit Court of the United States for the Southern District of New York, awarding plaintiff six cents damages, etc., in an action for the infringement of letters patent. *Reversed, and remanded, with directions to dismiss the bill.*

Reported below, 18 Blatchf. 237, 21 Blatchf. 342.

Statement by *Mr. Justice* **Gray**:

This was a bill in equity by Francis Munson against the Mayor, Aldermen and Commonal-

ty of the City of New York and the Comptroller of the city, for the infringement of letters patent granted to Munson on April 2, 1867, for "new and useful improvements in preserving, filing and canceling bonds, coupons, certificates of stock, etc." consisting, as described in the specification, "in providing a book or other register with pages corresponding in size, style and number with the bonds, coupons, certificates, etc., to be used, on which pages the said bonds, coupons, or other certificates, when paid, are pasted or otherwise attached, and thus preserved and canceled, as hereinafter more fully explained."

The specification then, after observing that bonds and coupons, when paid, are usually either filed away or destroyed, and that, before or after being paid, they are often lost or stolen, by which the community is constantly being defrauded more or less, proceeded as follows: "To prevent this, I have invented a system of preserving, filing and canceling such documents, which system will not only prevent such fraudulent practices, but also present at all times a full and perfect history or record of all transactions in relation to each and all of said documents. To accomplish this, I provide a book or set of books, having each page printed or ruled to correspond in size and style with the bond and its coupons, or other document, whatever it may be, with a heading showing the number, date when issued, to whom issued, when and where payable, amount, what issued for, rate of interest and when and where payable, together with such other facts as may be necessary to form a perfect record of the document." The pages are numbered consecutively with the numbers corresponding to the numbers on the bonds or other documents. When any of the coupons are presented and paid, they are canceled and then pasted or otherwise secured in their proper place upon the page, each place for them being numbered. When the bond itself is paid, it is likewise attached in the place on the page provided for it. If the holder should by any means be dispossessed of one or more of the coupons or bonds, upon presentation of the proper evidence he would be paid, but not having the coupon or bond to surrender, there would be entered in its place upon the page a record of the facts in the case, so that if at any future time said coupon or bond should be presented for payment by a person not entitled to it, the record of all the facts relating to it would be ready at hand, and could be referred to at once by examining the proper page. By this method of arranging them, the number is always an index, so that if it is desired at any time to ascertain any fact in relation to any particular bond or its coupons, it is only necessary to turn to the page having the same number. In case a large series of bonds or certificates are used, several books would be required, and in that case the pages of each succeeding book would commence with the number next following that of the last page of the preceding volume, so as to make the numbers of the pages continuous from the beginning of the first book to the ending of the last. It will, of course, be understood that each separate set or series of bonds, certificates of stock, or other similar documents, will require a set of books specially prepared for them to correspond with the peculiar character of the document, the system or general plan, however, being the same in all cases, the details only being varied to suit the circumstances of the case."

The patentee claimed as his invention: "1. The preserving, filing and verifying of bonds, coupons, certificates and all similar documents by the means and in the manner substantially as herein set forth. 2. The book or register, constructed and used as and for the purposes set forth."

The defenses set up in the answer were that the plaintiff was not the first and original inventor of the alleged improvement; that long before his alleged invention it was known to and used by William E. Warren and three other persons named, all residing in the City of New York; that the defendants had made no profits from its use; and that it was not patentable. The plaintiff filed a general replication.

By the evidence taken in the case it appeared that from 1872 there had been used, in the office of the Comptroller of the City of New York, books like those described in the plaintiff's patent, except that the coupons were pasted on each alternate page and the bond on the opposite page; and that as early as 1858 Warren devised and used books for preserving the coupons of a railroad company, in which all the coupons payable on the same date were pasted in succession in the order of the numbers of the bonds to which they belonged, in ruled spaces of the proper size, above which the numbers of the coupons and of the bonds had been previously written or printed, and with a description of the bonds and the date of payment of the coupons written at the beginning of each series of coupons payable at the same date, but the bonds themselves were not pasted in, except a single one at the beginning of each book.

Upon the pleadings and proofs the circuit court held that the plaintiff was the first and original inventor of the improvement, and that the patent was valid; and entered an interlocutory decree in his favor for an injunction and an account. 18 Blatchf. 287. The case was then referred to a master, who reported that upon the evidence taken before him (which need not be stated) the plaintiff was entitled to recover the sum of $6,202.40 as profits. Exceptions taken by the defendants to his report were sustained. 21 Blatchf. 342. A final decree was entered, awarding to the plaintiff the sum of six cents damages, and ordering that the costs before the interlocutory decree be paid by the defendant, and the costs since that decree by the plaintiff. Both parties appealed to this court.

Mr. **Royal S. Crane,** for Munson, complainant and appellant:

No competent proof was given or offered of the difference in labor between the complainant's and the Warren system. Therefore the master had to report upon the testimony as to the difference in labor between the complainant's and the *en masse* system.

This is the rule illustrated in *Sargent* v. *Yale Lock Mfg. Co.* 17 Blatchf. 249; *Serrell* v. *Collins*, 1 Fish. Pat. Cas. 289; *Smith* v. *Higgins*, 1 Fish. Pat. Cas. 537; *Wilbur* v. *Beecher*, 2 Blatchf. 132; *Mulford* v. *Pearce*, 14 Blatchf. 141;

S. C. 11 Off. Gaz. 741; *Cawood Patent*, 94 U. S. 695 (24: 288); *S. C.* 12 Off. Gaz. 709; *Mayor of N. Y.* v. *Ransom*, 64 U. S. 23 How. 487 (16: 515); more especially in *Mulford* v. *Pearce*, 13 Blatchf. 178; *Conover* v. *Mers*, 6 Fish. Pat. Cas. 506; *Conover* v. *Rouch*, 4 Fish. Pat. Cas. 12; *Conover* v. *Rapp*, 4 Fish. Pat. Cas. 57; *Brady* v. *Atlantic Works*, 15 Off. Gaz. 965; *Cox* v. *Griggs*, 2 Fish. Pat. Cas. 174.

Patents are so varied that there can be no fixed rule of damages, and each case must stand by itself.

Graham v. *Mason*, 1 Holmes, 88; *S. C.* 5 Fish. Pat. Cas. 290; 1 Off. Gaz. 609.

Actual damages are profits defendant has made.

Conover v. *Rapp*, 4 Fish. Pat. Cas. 57.

Damages are to be settled by evidence, not conjecture.

Carter v. *Baker*, 1 Sawy. 512; *S. C.* 4 Fish. Pat. Cas. 404; *Philp* v. *Nock*, 84 U. S. 17 Wall. 460 (21: 679).

Damages are what defendant has saved by use of patented improvements.

Black v. *Thorne*, 12 Blatchf. 20; *S. C.* 7 Off. Gaz. 176; *Burdell* v. *Denig*, 92 U. S. 719 (23: 765); *Philp* v. *Nock*, 84 U. S. 17 Wall. 462 (21: 679).

Damages must be proved and not guessed at.

Carter v. *Baker*, 4 Fish. Pat. Cas. 404; *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 620 (20: 860); *Hays* v. *Sulsor*, 1 Bond. 279; *Mowry* v. *Whitney*, 5 Fish. Pat. Cas. 494, 1 Off. Gaz. 492; *Providence Rubber Co.* v. *Goodyear*, 9 Wall. 788 (19:566); *Stephens* v. *Felt*, 2 Blatchf. 37; *Herring* v. *Gage*, 15 Blatchf. 124; *National C. B. Shoe Co.* v. *Terre Haute Car & Mfg. Co.* 19 Fed. Rep. 514; *Marsh* v. *Seymour*, 97 U. S. 360 (24: 967); *Bigelow Carpet Co.* v. *Dobson*, 10 Fed. Rep. 385.

Use by defendant is evidence of utility.

Seymour v. *Marsh*, 6 Fish. Pat. Cas. 115; *S. C.* 9 Phila. 380, and 2 Off. Gaz. 675; *Smith* v. *Glendale E. F. Co.* 1 Holmes, 340; *S. C.* 5 Off. Gaz. 429; *McCormick* v. *Manny*, 6 McLean, 539.

Interest was allowable from the date at which the master's report was in proper form for exception.

Turrill v. *Illinois Cent. R. Co.* 20 Fed. Rep. 912.

Messrs. **Frederic H. Betts** and *J. E. Hindon Hyde*, for the Mayor, etc., defendants and appellant:

The complainant's patent is invalid.

Ex parte Dixon, Law Dig. 155, § 8; *Ex parte Dick*, 2 Off. Gaz. 147; *Ex parte Orr*, 6 Off. Gaz. 77.

The complainant's device did not involve invention.

Pennsylvania R. R. Co. v. *Locomotive Engine Safety Truck Co.* 110 U. S. 490 (28:222); *Morris* v. *McMillin*, 112 U. S. 249 (28:704); *Blake* v. *San Francisco*, 113 U. S. 682 (28:1071); *Stephenson* v. *Brooklyn Crosstown R. R. Co.* 114 U. S. 154 (29:60); *Perris* v. *Hexamer*, 99 U. S. 674 (25:308); *Baker* v. *Selden*, 101 U. S. 99 (25: 841); *Boulton* v. *Bull*, 2 H. Bl. 463.

The object of the Act of Congress securing to authors the exclusive right to their writings was mainly for the promotion of science.

Const. art. 1, § 8; *Clayton* v. *Stone*, 2 Paine, 392; *Coffeen* v. *Brunton*, 4 McLean, 517; *Gray* v. *Russell*, 1 Story, 17; *Barfield* v. *Nicholson*, 2 Sim. & S. 1; *Emerson* v. *Davies*, 3 Story, 778; *Keene* v. *Wheatley*, 9 Am. L. Reg. 68.

The complainant's patent is anticipated.

Spill v. *Celluloid Mfg. Co.* 21 Fed. Rep. 634; *Thomson* v. *Wooster*, 114 U. S. 104 (29: 105); *Roemer* v. *Simon*, 95 U. S. 214 (24: 384); *Webster Loom Co.* v. *Higgins*, 105 U. S. 596 (26: 1183).

A comparison between the Munson system and the *en masse* system is wholly incompetent.

Garretson v. *Clark*, 111 U. S. 121 (28:371); *Dobson* v. *Bigelow Carpet Co.* 114 U. S. 445 (29: 179); *Reed* v. *Lawrence*, 29 Fed. Rep. 920; *Fay* v. *Allen*, 30 Fed. Rep. 447.

Mr. Justice **Gray** delivered the opinion of the court:

What the plaintiff, in different parts of his specification, calls his "improvement," his "system," and his "invention," consists in providing one or more blank books, resembling common scrap-books, of which each page will hold a bond and its coupons, and has a heading describing the bond, and all the pages are numbered and ruled into spaces, in which the bonds and the coupons, on being presented and paid, may be pasted in the order of their numbers—the bonds on the successive pages, and the coupons of each bond on the same page with it—or, when any bond or coupon is paid without being surrendered, memoranda concerning it may be made. The claim is for the so preserving, filing and verifying of the bonds and coupons, and for the book so constructed and used.

If upon the face of the specification this could be considered as an "art, machine, manufacture, or composition of matter," within the meaning of the patent laws (upon which we express no opinion), it is quite clear that, in the state of previous knowledge upon the subject, there was no patentable novelty in the plaintiff's scheme; inasmuch as the only difference between it and the earlier scheme of Warren was that in Warren's books there was no place for the bonds, and the coupons were grouped according to their dates of payment, instead of being grouped together with the bonds to which they respectively belonged. The providing of spaces for the bonds, and the change in the order of arrangement of the coupons, cannot, upon the most liberal construction of the patent laws, be held to involve any invention.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the bill; the original plaintiff to pay the costs in both courts.

LOUIS PHILLIPS ET AL., *Piffs. in Err.*,
v.
MOUND CITY LAND AND WATER ASSOCIATION ET AL.

(See S. C. Reporter's ed. 605-612.)

Federal question, what is not—state decision, when final.

1. Where the single question presented to the state court for its determination was, whether in fact there had been a partition of lands between tenants in common, and such court decided that the proof was insufficient to establish such parti-

tion, and that what had been done was not such as would bind the parties to the partition, held, that, in so deciding, the state court decided no question of federal law.

2. The decision of the state court as to whether such a partition was made is final, and not subject to review in this court.

[No. 490.]

Submitted Jan. 6, 1888. Decided Feb. 13, 1888.

IN ERROR to the Supreme Court of the State of California, to review a decree of partition among the owners of land. A motion to dismiss for want of jurisdiction, because no federal question was involved, was heard with the case on its merits. *Motion to dismiss granted.*

The facts are stated in the opinion.

Messrs. **George F. Edmunds** and **George H. Smith,** for plaintiffs in error:

The original grant could not be overthrown from the circumstance that in the partition proceedings some other land, not granted by the Mexican Government, had been included.

McCall v. *Carpenter*, 59 U. S. 18 How. 297 (15:389) and cases cited; *Parker* v. *Kane*, 63 U. S. 22 How. 1 (16:286); *Gay* v. *Parpart*, 106 U. S. 679 (27:256).

This is solely and purely a right and title derived from the Government of Mexico.

Maney v. *Porter*, 45 U. S. 4 How. 55 (11:873); *New Orleans* v. *DeArmas*, 34 U. S. 9 Pet. 224 (9:109); *Owings* v. *Norwood*, 9 U. S. 5 Cranch, 344 (3:120).

The public acts of public officers shall be presumed to be by legitimate authority.

U. S. v. *Arredondo*, 31 U. S. 6 Pet. 727 (8: 560); *Delassus* v. *U. S.* 34 U. S. 9 Pet. 134 (9: 78); *Strother* v. *Lucas*, 37 U. S. 12 Pet. 410 (9: 1137); *U. S.* v. *Peralta*, 60 U. S. 19 How. 347 (15: 680).

The juridical possession was conclusive as to the boundaries and extent of the land granted.

U. S. v. *Pico*, 72 U. S. 5 Wall. 539 (18:696); *Leese* v. *Clark*, 18 Cal. 574; *Waterman* v. *Smith*, 13 Cal. 410, 411; *DeArguello* v. *Greer*, 26 Cal. 628.

Where the juridical possession was delivered, what was previously a grant of quantity became a grant of a specific tract.

Graham v. *U. S.* 71 U. S. 4 Wall. 261 (18: 333).

Where one of the parties is evicted from his allotment, or from part of it, he will have the right to be compensated by the other parties.

Freem. Coten. & Part. § 533; *Sawyers* v. *Cator*, 8 Humph. 256; Rawle, Cov. Title, 4th ed. 478, 478; 1 Washb. Real Prop. 590, 432.

The object of the Acts for the confirmation of Mexican claims was to enable the government to distinguish the public land.

U. S. v. *Fossat*, 61 U. S. 20 How. 425 (15: 948).

The government has no interest in the contest between parties claiming *ex post facto* the grant.

U. S. v. *Sutter*, 62 U. S. 21 How. 170 (16:119); *Castro* v. *Hendricks*, 64 U. S. 23 How. 442 (16: 577).

The patent of the United States, issued in confirmation of a Mexican grant, inures to the benefit of, and the legal title vests in, the grantees of the confirmee by grants prior to the confirmation.

Steinbach v. *Stewart*, 78 U. S. 11 Wall. 574, 575 (20:58); *U. S.* v. *Sutter*, 62 U. S. 21 How. 182 (16:12?) and cases cited.

The title of the plaintiff rests directly for its validity upon the Treaty, the legislation of Congress to carry its treaty obligations into effect, and the confirmation and patent thereunder. It therefore comes directly under the provision of section 709 of the Revised Statutes.

Hickie v. *Starke*, 26 U. S. 1 Pet. 97 (7:68); *Matthews* v. *Zane*, 8 U. S. 4 Cranch, 382 (2:654); *Henderson* v. *Tennessee*, 51 U. S. 10 How. 328 (13: 439); *Berthold* v. *McDonald*, 63 U. S. 22 How. 384 (16:318); *Owings* v. *Norwood*, 9 U. S. 5 Cranch, 344 (3:120); *New Orleans* v. *DeArmas*, 34 U. S. 9 Pet. 224 (9:109).

We claim under Statutes of the United States providing for the confirmation of Mexican titles, and by confirmation and patent thereunder. The Treaty of Guadalupe Hidalgo (article VIII) expressly stipulates for the security of Mexican titles; and it was to carry this stipulation into effect that the legislation referred to was principally enacted.

Teschemacher v. *Thompson*, 18 Cal. 28; *U. S.* v. *Moreno*, 68 U. S. 1 Wall. 404 (17:635); *Estrada* v. *Murphy*, 19 Cal. 207; *Chouteau* v. *Marguerite*, 37 U. S. 12 Pet. 507 (9:1174); *Maney* v. *Porter*, 45 U. S. 4 How. 55 (11:873); *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586 (12:829); *Doe* v. *Eslava*, 50 U. S. 9 How. 445 (13: 209); *McDonogh* v. *Millaudon*, 44 U. S. 3 How. 693 (11:787); *Fremont* v. *U. S.* 58 U. S. 17 How. 554 (15:244); *Gill* v. *Oliver*, 52 U. S. 11 How. 545 (13:806); *Semple* v. *Hager*, 71 U. S. 4 Wall. 431 (18:402); *Romie* v. *Casanova*, 91 U. S. 379 (23: 374); *S. C.* 45 Cal. 131; *McStay* v. *Friedman*, 92 U. S. 728 (23:767); *Roth* v. *Ehman*, 107 U. S. 319 (27:499); *San Francisco* v. *Scott*, 111 U. S. 768 (28:593); *People* v. *Jackson*, 112 U. S. 283 (28:712).

Messrs. **A. T. Britton, A. B. Browne** and **W. H. Smith,** for defendants in error:

There is no federal question in the case, and therefore the motion to dismiss for want of jurisdiction should be granted.

The parties all claimed under patents from the United States which were admitted to be valid. That does not present a federal question.

Owings v. *Norwood*, 9 U. S. 5 Cranch, 344 (3: 120); *New Orleans* v. *DeArmas*, 34 U. S. 9 Pet. 224 (9:109); *Chouteau* v. *Marguerite*, 37 U. S. 12 Pet. 507 (9:1174); *Maney* v. *Porter*, 45 U. S. 4 How. 55 (11:873); *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586 (12:829); *Doe* v. *Eslava*, 50 U. S. 9 How. 421 (13:200); *U. S.* v. *King*, 44 U. S. 3 How. 773 (11:824); *Gill* v. *Oliver*, 52 U. S. 11 How. 529 (13:799); *Semple* v. *Hager*, 71 U. S. 4 Wall. 431 (18:402); *Romie* v. *Casanova*, 91 U. S. 379 (23: 374); *McStay* v. *Friedman*, 92 U. S. 723 (23:767); *Roth* v. *Ehman*, 107 U. S. 319 (27: 499); *San Francisco* v. *Scott*, 111 U. S. 768 (28: 593); *DeAlmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20:757); *Tarver* v. *Keach*, 82 U. S. 15 Wall. 67 (21:82); *New York L. Ins. Co.* v. *Hendren*, 92 U. S. 286 (23:709); *Dugger* v. *Bocock*, 104 U. S. 596 (26:846); *Allen* v. *McVeigh*, 107 U. S. 433 (27:572); *People* v. *Jackson*, 112 U. S. 283 (28:712).

The partition of 1846, if it had been made as alleged, would be no bar to the present suit.

Wade v. *Deray*, 50 Cal. 376.

The right which the Mexican Government reserved to control this survey passed, with all other public rights, to the United States.

Fremont v. *U. S.* 58 U. S. 17 How. 565 (15: 249); *U. S.* v. *Armijo*, 72 U. S. 5 Wall. 449 (18: 498).

In the Act of March 3, 1851, "third persons" referred to are those who are not claimants under the United States, but who hold independent of the United States.

Moore v. *Wilkinson*, 13 Cal. 488; *DeArguello* v. *Greer*, 26 Cal. 626.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This suit was brought for a partition of two adjacent tracts of land in the County of Los Angeles, known respectively as Rancho "San José" and "San José Addition." The facts are these:

In 1837 the Mexican Government granted to Ygnacio Palomares and Ricardo Vejar the rancho known as "San José." Afterwards, these grantees formed a partnership with Luis Arenas, and the Mexican Government granted to the three the rancho known as "San José Addition," which adjoined the other. Arenas also in some way acquired an undivided one third interest in "San José," and then conveyed whatever right he had in the two grants to Henry Dalton.

After this had been done, it is claimed that a partition was made under the authority of an appropriate Mexican tribunal, by which the share of each of three owners in common was set off to him in severalty, and possession taken accordingly. This all occurred before the Treaty of Guadalupe Hidalgo, which was proclaimed July 4, 1848. 9 Stat. at L. 922.

On the 29th of September 1852, Ygnacio Palomares presented his claim to the commissioners appointed under the Act of March 3, 1851, 9 Stat. at L. 631, chap. 41, to an undivided one third part of the two ranchos, and asked its confirmation. Henry Dalton, on the same day, presented his claim on account of the two grants, and asked for the confirmation of the specific tracts allotted to him in the alleged partition. On the 9th of October Vejar presented his claim and asked a similar confirmation to that prayed by Dalton. The commissioners confirmed the claims in accordance with the requests of Dalton and Vejar, so as to give each claimant the lands which had been set off to him in severalty by the partition. From these orders of the commissioners appeals were taken by the United States, under the provisions of the statute, to the district court, where decrees were rendered, by which it was ordered and adjudged "that said decision of said board of commissioners be, and the same hereby is, affirmed;" and the title of the appellees adjudged to be good and valid, each to one equal undivided third part of the two tracts, which were then described by metes and bounds.

In accordance with these several decrees of confirmation, patents were issued by the United States, that for "San José" being "unto Henry Dalton, Ygnacio Palomares, and Ricardo Vejar, and to their heirs," for "the tract of land known by the name of 'San José' embraced and described in the foregoing survey" (being that set out in the decree), "but with the stipulation that in virtue of the fifteenth section of the said Act," that of March 3, 1851, "neither the confirmation of this said claim, nor this patent, shall affect the interest of third persons; to have and to hold the said tract known by the name of San José, with the appurtenances, unto the said Henry Dalton, Ygnacio Palomares, and Ricardo Vejar, and to their heirs and assigns forever, with the stipulation aforesaid." The patent for "San José Addition" was in all respects the same except as to the description of the land.

At the hearing of the present suit it was contended that the patents thus issued inured to the benefit of the several grantees according to their respective interests as set off to them in severalty in the alleged partition made under Mexican authority before the Treaty; but the supreme court of the State decided that no such partition had in fact been made by any judgment of a competent Mexican tribunal, and that both the ranchos were "held and owned by the Mound City Land & Water Association, Louis Phillips, and Lugardo A. de Palomares," who had succeeded to the title of the original patentees, "as tenants in common, each owning an undivided third of said ranchos." It was then ordered that partition be made among the owners, "allotting to each one in severalty one third of the area of the two ranchos, quantity and quality considered, and so locating the said allotments as to give to each of the said persons the benefit of any improvements he may have placed on any part of said premises, so far as the same may be done without injury to the cotenants, and so as to include in said allotment to said Phillips" certain specified parcels; which it was found he had sold, "so far as the same may be done without injury to the cotenants."

To reverse that decree this writ of error was brought, the object of the plaintiffs in error being to defeat a new partition on the ground that the alleged Mexican partition was valid and binding on the present parties, and that they now hold in severalty what was then set off to their respective grantors and not as tenants in common of the whole tract.

The case was submitted at the present term on printed arguments, under Rule 20, but at a former term a motion was made by the defendants in error to dismiss for want of jurisdiction, because no federal question is involved. That motion was continued for hearing with the case on its merits and is now to be considered.

Both parties claim under the Mexican grants confirmed by the United States. The patents vested the legal title in the grantees. By an express provision of the Act of March 3, 1851 (§ 15), they are conclusive "between the United States and such claimants only," and do "not affect the interests of third parties."

The patents, like the original Mexican concessions, are to the grantees as tenants in common. That is not denied. But it is claimed that after the original concessions were made and before the Treaty, the title of the parties holding under them was changed from a tenancy in common, each holding an undivided one third interest in the whole of the tracts, to a divided interest, each holding in severalty for his one third part of the tract which had been allotted to him in the division. That this presents the real question in the case is shown by the assignments of error, which are in their effect no more than that the court erred in hold-

ing the alleged Mexican partition to be invalid, when in fact it was good and binding on the parties. The result of the motion to dismiss depends upon whether this is or is not a federal question.

Article VIII of the Treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject matter of the action, was free to act in the premises.

Here the United States have recognized the existence of the right of the original Mexican grantees to the land which has been patented, and by the patents invested them with any title which passed under the Treaty from the Mexican Government to that of the United States. As to this there is no controversy now. Neither is there any dispute about the construction of the patents or the decrees on which they rest. Indeed, it was substantially conceded in argument that a decree could only be given by the district court, "in view of the controversy disclosed by the petitions" for an undivided interest to each claimant, leaving it to be determined in some other way whether there had been a partition or not. The following is the language of counsel on that subject: "The effect of the decrees of the district court was * * * simply to leave the question of partition undetermined; that is to say, if, as claimed by Palomares, there was no partition, then the land was confirmed to the parties interested as cotenants; but if, as claimed by Vejar and Dalton, there was a partition, then upon well established principles it was in effect confirmed to them in segregated portions as allotted to them by the partition."

This is undoubtedly a fair statement of the effect of the decrees and of the patents; and the single question presented to the court below for determination was whether there had in fact been such a partition. To establish this fact proof was made of what had been done by and before the Mexican tribunal in that behalf, and the court held it was insufficient. In so doing it decided no question of federal law, but only that the legal effect of what had been done was not such as was required to bind the parties by the partition. In this particular the case stands precisely as it would, if, instead of a partition under the form of a judicial proceeding, one had been made by the voluntary conveyances of the parties after the original grants and before the Treaty. Had the effort been in this case to establish such a partition instead of one through judicial action, we can hardly believe it would be claimed that a federal question was presented by a decision that the conveyances which were put in evidence did not furnish the necessary proof. Yet that is substantially this case. A valid partition before the Treaty would have created rights which the United States would be bound to respect. That is not denied. Indeed, it is conceded that if a partition was in fact made, as is claimed, the patents as they now stand inure to the benefit of the parties according to their respective interests in severalty, and that a court of equity can give full effect to what was done by decreeing the necessary conveyances to perfect the legal titles. The only question is whether such a partition was made; and upon that the decision of the state court is final, and not subject to review. It "drew in question no Act of Congress, nor any authority exercised under the Constitution or laws of the United States, and therefore the decision of the state court could not be opposed either to the laws or to any authority exercised under the laws of the United States." This was said in *Kennedy* v. *Hunt*, 48 U. S. 7 How. 586, 593 [12: 829, 833] in reference to the construction which had been given to a Spanish title by a state court, and is equally applicable here.

It follows that the motion to dismiss must be granted, and it is so ordered.

UNITED STATES, *Appt.*,
v.
JUNG AH LUNG.

(See S. C. Reporter's ed. 621-639.)

Habeas corpus, *when proper—Act of May 6, 1882—allowing Chinese to land in the U. S.—Chinese Treaty—certificate of identification—when lost, evidence of.*

1. Where a subject of the Emperor of China was held in custody on a vessel in the Port of San Francisco and not permitted to enter the United States, held, that he was restrained of his liberty within the meaning of the Habeas Corpus Statute, and the case was a proper one for the issuing of a writ of *habeas corpus*.

2. The Act of May 6, 1882, entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese," as amended by the Act of July 5, 1884, does not affect the jurisdiction of the Courts of the United States to issue a writ of *habeas corpus*.

3. The authority to pass upon the question of allowing a subject of China to land in the United States is not exclusively confided, by the statute, to the collector of the port; but his action in the premises may be reviewed.

4. There is nothing in the 4th article of the Treaty with China which excludes judicial cognizance, or which confines the remedy of a subject of China, in a given case of hardship, to diplomatic action.

5. A subject of China who departed from the United States in 1883, and then received a certificate of identification under the Act of 1882, and returned to the United States in 1885, is not subject to the Act of 1884 in respect to the certificate; but his case is governed by the provisions of the Act of 1882. The provisions of the Act of 1884 in regard to the contents of the certificate are not retrospective.

6. The certificate given under the Act of 1882 to a Chinese laborer, as evidence of his right to go from and come to the United States, is not the only evidence permissible to establish his right to re-enter the United States; and it is competent for the district court to receive other evidence, when the certificate has been actually lost or stolen.

[No. 491.]

Submitted Jan. 9, 1888. Decided Feb. 13, 1888.

APPEAL from a judgment of the Circuit Court of the United States for the District of California, affirming the judgment of the District Court in a case of *habeas corpus* which ordered the discharge from custody of the person of the appellee. *Affirmed.*

Opinion below, 25 Fed. Rep. 141.

The facts are fully stated in the opinion.

Mr. **A. H. Garland,** *Atty-Gen.*, for appellant:

The finding and judgment should have been in favor of the United States and against the applicant.

There is no place upon which to rest this proceeding under what is known as the Habeas Corpus Act.

Rev. Stat. chap. 13, § 751 *et seq.*; *U. S.* v. *Tynen*, 78 U. S. 11 Wall. 88 (20: 153); *Arnson* v. *Murphy*, 109 U. S. 243 (27: 922); *Townsend* v. *Little*, 78 U. S. 11 Wall. 504 (27: 1012); Sedgw. Stat. & Const. Law, 81, note *a*; Bishop, Written Law, § 249, *et seq.*

The finding of the collector in this case cannot be reviewed.

Freem. Judg. § 531, note; *People* v. *Collins*, 19 Wend. 56; *Allen* v. *Blunt*, 3 Story, 742; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 83 (20: 486).

The jurisdiction, by the very terms of the law giving it, carries finality in the exercise of it.

U. S. v. *Union Pac. R. R. Co.* 91 U. S. 85 (28: 230).

Mr. **Thomas D. Riordan,** for appellee:

The *habeas corpus* writ extends to all cases of persons in custody in violation of a law or treaty of the United States.

U. S. Rev. Stat. § 753, 2d ed. 1878; 22 U. S. Stat. at L. 827.

Chinese born in the United States are citizens thereof, and are not subject to the provisions of said Act.

Re Look Tin Sing, 21 Fed. Rep. 905; *S. C.* 10 Sawy. 353.

There are four classes of Chinese persons who are entitled to come to and remain in the United States:

1. Chinese laborers who were residents of the United States on November 17, 1880, and who departed therefrom prior to May 6, 1882.

Chew Heong v. *U. S.* 112 U. S. 536 (28: 770).

2. Chinese laborers who departed after the passage of the Restriction Act, and who procured the certificate of identification required by section 4 thereof.

3. Chinese merchants, students, travelers, diplomats, etc., who produce the certificate of the Chinese Government required by section 6 of said Act.

4. Chinese born in the United States.

All persons imprisoned may apply for the writ. Every restraint upon a man's liberty is an imprisonment.

Hurd, Hab. Cor. 2d ed. 200; Church, Hab. Cor. § 272; *Lawson* v. *Buxines*, 3 Harr. (Del.) 416; *U. S.* v. *Benner*, 1 Bald. 239; *Johnson* v. *Tompkins*, 1 Baldw. 600; *Commonwealth* v. *Ridgway*, 2 Ashm. 248; *Re Chow Goo Pooi*, 25 Fed. Rep. 77; *S. C.* 9 Sawy. 606.

The decision of the district attorney is not final and conclusive.

Re Look Tin Sing, 10 Sawy. 353; *Re Ah Kee*, 10 Sawy. 337; *Re Ah Moy*, 10 Sawy. 345; *Re Kew Ock*, 10 Sawy. 351; *Re Chew Heong*, 10 Sawy. 361; *Chew Heong* v. *U. S.* 112 U. S. 537 (28: 770).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by the United States from a judgment of the Circuit Court of the United States for the District of California, affirming the judgment of the district court of that district, in a case of *habeas corpus*, which ordered the discharge from custody of the person in whose behalf the writ was sued out.

On the 28th of September, 1885, a petition was presented to the district court, alleging that Jung Ah Lung, a subject of the Emperor of China, was unlawfully restrained of his liberty by the master of a steamship in the Port of San Francisco, he having arrived in that vessel and not being allowed to land because it was contended that it was unlawful for him to do so under the provisions of the Acts of Congress on the subject.

On the filing of the petition, a writ of *habeas corpus* was issued by the district court to the master of the vessel, commanding him to produce the body of Jung Ah Lung before the court. This was done, and the master made return that he held Jung Ah Lung in his custody "by direction of the customs authorities of the Port of San Francisco, California, under the provisions of the Chinese Restriction Act."

On the 12th of October, 1885, by leave of the court, the United States Attorney for the district was allowed to file, on behalf of the United States, a special intervention and plea to the jurisdiction of the court. Two questions were raised by it: (1) that Jung Ah Lung was not so restrained of his liberty as to be entitled to the benefit of a writ of *habeas corpus;* (2) that the collector of the port had passed judgment on the matters of law and fact involved, and the same were *res judicata*. To this intervention Jung Ah Lung demurred, and the demurrer was sustained. The opinion of the court is reported in 25 Fed. Rep. 141. It considered the question of jurisdiction, and held that (1) the case was a proper one for the issuing of a writ of *habeas corpus;* (2) the collector was not clothed with exclusive jurisdiction in the premises. It gave leave to the district attorney to file an intervention to the merits, which he did, setting forth that Jung Ah Lung was lawfully refused permission to land in the United States, in compliance with the provisions of Acts of Congress, because he failed to produce to the collector the certificate of identification provided for by those Acts; and that he was not entitled to land in the United States. The issue thus joined was tried by the court.

There is a bill of exceptions which states that the counsel for Jung Ah Lung offered to prove that he was a Chinese laborer, residing in the United States on November 17, 1880, the date of the last treaty between the United States and the Emperor of China; that he resided in the United States continuously until October 24, 1888, when, being about to return to China, he received from the collector of San Francisco a certificate enabling him to re-enter the United States, in conformity with the Act of Congress of May 6, 1882, chap. 126, 22 Stat. at L. 58; that he departed for China, taking such certificate with him; that he remained in China until he embarked for San Francisco on August 25, 1885; that, prior thereto, and in June, 1885, he was deprived of said certificate by its being taken from him by robbery by

pirates, in China; that the books in the registration office of the custom house in San Francisco showed that the certificate was issued to him; that no one had presented it or entered upon it, and it was uncanceled; and that he conformed in every particular with the description kept in such registration office of the person to whom such certificate was issued. The district attorney objected to the introduction of this testimony, as incompetent, on the ground that the statute provided that the certificate should be the only evidence permissible to establish the right of a Chinese laborer to re-enter the United States, and that no secondary evidence of the loss and contents of the certificate could be received. The objection was overruled by the court, the district attorney excepted to the ruling, and the evidence was received.

The district court filed the following findings:

"Counsel for applicant proceeded to introduce testimony by which it appeared to the satisfaction of this court, and this court so finds: That Jung Ah Lung is a Chinese laborer, being one of the proprietors of a laundry situated at No. 1391 Second Avenue, New York City; that he was a resident of the United States on the 17th day of November, A. D. 1880, the date of the last treaty between the United States and the Empire of China, and that he resided continuously in the United States until on or about the 24th day of October, A. D. 1888, when he sailed for China on the steamer Rio de Janeiro; that, before sailing for China, he duly applied for and received from the collector of customs for the district of San Francisco a certificate of identification, stating his name, age, occupation, last place of residence, physical marks and peculiarities, and all facts necessary for his identification in conformity to the Act of Congress entitled 'An Act to Execute Certain Treaty Stipulations Relating to Chinese', approved May 6, 1882; that he departed on said steamer for China, having in his possession, and taking away with him, the said certificate; that, during the month of June, A. D. 1885, while on a voyage from his native village to the City of Canton, China, the junk upon which he was a passenger was attacked by pirates in waters notoriously infested with piratical craft, who deprived said Jung Ah Lung of said certificate entitling said applicant to re-enter the United States; that no one has presented said certificate at this port, and said certificate is outstanding and remains uncanceled on the books of the custom house for the district of San Francisco; that the applicant corresponds, in all respects, to the description, contained in the registration books of the custom house, of the person to whom the said certificate was issued, and that no doubt can be entertained that the applicant is the person to whom the said certificate was issued and delivered; that it was not suggested by the district attorney, nor contended by him, that the proof, if admissible, failed to establish, in the most satisfactory manner, the facts herein found by the court; and he claimed that the applicant should be remanded solely on the ground that the testimony offered by the applicant could not, under the provisions of the Acts of Congress known as the Restriction Acts, be received in evidence. Whereupon, the court, being of opinion that the said proofs were admissible and fully established the facts as claimed by the applicant, ordered that he be discharged."

The district attorney filed the following exceptions to the findings:

"1. That the court had no authority or jurisdiction to issue a writ in this case, as the applicant was not restrained of his liberty within the true intent and meaning of the Act of Congress known as the Habeas Corpus Act.

"2. That the court, on the return of said writ of *habeas corpus*, had no authority or jurisdiction to inquire into and decide upon the lawfulness of said alleged restraint, for the reason that the same had been decided to be lawful by the collector of the Port of San Francisco, or his deputy.

"3. For the reason hereinbefore set forth, the said testimony as to the issuance, loss, and contents of the certificate mentioned aforesaid, and the evidence of the fact that the applicant is the identical person to whom said certificate was issued, is inadmissible under the provisions of the said Restriction Acts, and that the applicant, having failed to produce his certificate, is not now entitled to enter the United States."

On the 5th of November, 1885, the district court entered a judgment discharging Jung Ah Lung from custody. The United States appealed to the circuit court from the judgment, and from the rulings objected to by the United States on the trial, and especially from the order sustaining the demurrer to the special intervention and plea to the jurisdiction, and from the rulings admitting other testimony than the certificate to establish the right of Jung Ah Lung to come into the United States.

The circuit court affirmed the judgment, as before stated, and from its judgment this appeal is taken.

It is contended for the United States that there was no jurisdiction in the district court to issue the writ in the first instance, because the party was not restrained of his liberty within the meaning of the Habeas Corpus Statute. It is urged that the only restraint of the party was that he was not permitted to enter the United States. But we are of opinion that the case was a proper one for the issuing of the writ. The party was in custody. The return of the master was that he held him in custody by direction of the customs authorities of the port, under the provisions of the Chinese Restriction Act. That was an Act of Congress.

He was, therefore, in custody under or by color of the authority of the United States, within the meaning of section 753 of the Revised Statutes. He was so held in custody on board of a vessel within the City and County of San Francisco. The case was one falling within the provisions of chapter 13 of title 13 of the Revised Statutes.

It is also urged that if the right to issue the writ existed otherwise, under the general provisions of the Revised Statutes, that right was taken away by the Chinese Restriction Act, which regulated the entire subject matter, and was necessarily exclusive. The Act of May 6, 1882, chap. 126, 22 Stat. at L. 58, entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese," as originally passed, and

as amended by the Act of July 5, 1884, chap. 220, 23 Stat. at L. 115, is set forth in the margin, the words in italics being introduced by the Act of 1884, while those in brackets were in the Act of 1882, and were stricken out by the Act of 1884.*

We see nothing in these Acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of *habeas corpus*. On the contrary, the implication of section 12 is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with. That section provides that "Any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came * * * after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled

*AN ACT TO EXECUTE CERTAIN TREATY STIPULATIONS RELATING TO CHINESE, APPROVED MAY 6, 1882, AS AMENDED JULY 5, 1884.

Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Sec. 1. That from and after the [expiration of ninety days next after the] passage of this Act, and until the expiration of ten years next after the passage of this Act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come *from any foreign port or place*, or, having so come [after the expiration of said ninety days,] to remain within the United States.

Sec. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land *or attempt to land*, or permit to be landed, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may [be also] *also be* imprisoned for a term not exceeding one year.

Sec. 3. That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this Act *is amendatory, nor shall said sections apply to Chinese laborers*, [and] who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this Act required of his being one of the laborers in this section mentioned; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: Provided, That all Chinese laborers brought on such vessel shall *not be permitted to land except in case of absolute necessity, and must* depart with the vessel on leaving port.

Sec. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of *the act to which* this Act *is amendatory*, and in order to furnish them with the proper evidence of their right to go from and come to the United States [of their free will and accord], as provided by the *said Act and the* Treaty between the United States and China dated November seventeen, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books to be kept for that purpose, in which shall be stated the *individual, family, and tribal* name *in full*, the age, occupation, *when and where followed*, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom house; and every such Chinese laborer so departing from the United States shall be entitled to, and shall receive, free of any charge or costs upon application therefor, from the collector, or his deputy, *in the name of said collector, and attested by said collector's seal of office*, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the *individual, family, and tribal* name *in full*, age, occupation, *when and where followed*, [last place of residence, personal description and facts of identification] of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure he shall deliver his certificate to the master of the vessel; and if such Chinese laborer shall fail to return to such vessel before her departure from port the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer, to whom the same is issued, to return to and reenter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter; *and said certificate shall be the only evidence permissible to establish his right of re-entry*; and upon [delivery] *delivering* of such certificate by such Chinese laborer to the collector of customs at the time of re-entry in the United States, said collector shall cause the same to be filed in the custom house and duly canceled.

Sec. 5. That any Chinese laborer mentioned in section four of this Act being in the United States, and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four of this Act to be issued to such Chinese laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said Chinese laborer desires to go to issue such certificate, free of charge or cost, upon application by such Chinese laborer, and to enter the same upon registry-books to be kept by him for the purpose, as provided for in section four of this Act.

Sec. 6. That in order to the faithful execution of [articles one and two of the treaty in] *the provisions of* this Act [before mentioned,] every Chinese person, other than a laborer, who may be entitled by said treaty [and] *or* this Act to come within the United States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese Government, *or of such other foreign government of which at the time such Chinese person shall be a subject*, in each case, [such identity] to be evidenced by a certificate issued [under the authority of said] *by such* government, which certificate shall be in the English language, [or (if not in the English language) accompanied by a translation into English, stating such right to come] *and shall show such permission, with the name of the permitted person in his or her proper signature*, and which certificate shall state the *individual, family, and tribal* name *in full*, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued*, and place of residence [in China] of the person to whom the certificate is issued and that such person is entitled [conformably to the Treaty in] *by* this Act [mentioned] to come within the United States. *If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this Act nor in said Treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, ped-*

to be or remain in the United States." So that, if it were to be claimed by the United States that Jung Ah Lung, if at any time he should be found here, was found unlawfully here, he could not be removed to the country from whence he came, unless he were brought before some justice, judge, or commissioner of a court of the United States, and were judicially found to be a person not lawfully entitled to be or remain here. This being so, the question of his title to be here can certainly be adjudicated by the proper court of the United States, upon the question of his being allowed to land.

It is also urged that the statute confides to the collector of the Port of San Francisco the authority to pass upon the question of allowing Jung Ah Lung to land in the United States, and provides no means of reviewing his action in the premises; that only executive action in enforcing the Treaty and the statutes is contemplated; and that there is no case in law or equity, growing out of the facts, to be inquired into by a judicial tribunal.

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diers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this Act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be visé by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate, *visé as aforesaid,* shall be prima facie evidence of the fact set forth therein, and shall be produced to the collector of customs, [or his deputy], of the port in the district in the United States at which the person named therein shall arrive, *and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

Sec. 7. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge any such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years.

Sec. 8. That the master of any vessel arriving in the United States from any foreign port or place shall, at the same time he delivers a manifest of the cargo, and if there be no cargo, then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matter required to be reported, and before landing, or permitting to land, any Chinese passengers, deliver and report to the collector of customs of the district in which such vessel shall have arrived a separate list of all Chinese passengers taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers (and if accredited officers of the Chinese *or of any other foreign* Government traveling on the business of that Government, or their servants, with a note of such facts) and the names and other particulars, as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any [willful] refusal or *willful* neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of the cargo.

Sec. 9. That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law.

Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this Act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.

Sec. 11. That any person who shall knowingly bring into, or cause to be brought into, the United States by land, or who shall [knowingly] aid or abet the same, or aid or abet the landing in the United States from any vessel of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year.

Sec. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this Act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, [by direction of the President of the United States], and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or to remain in the United States; *and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or a United States Marshal in reference to carrying out the provisions of this Act or the Act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this Act.*

Sec. 13. That this Act shall not apply to diplomatic and other officers of the Chinese, *or other* governments traveling upon the business of that government, whose credentials shall be taken as equivalent to the certificate in this Act mentioned, and shall exempt them and their body and household servants from the provisions of this Act as to other Chinese persons.

Sec. 14. That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this Act are hereby repealed.

Sec. 15. That *the provisions of this Act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and* the words "Chinese laborers," wherever used in this Act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

Sec. 16. *That any violation of any of the provisions of this Act or of the Act of which this is amendatory, the punishment of which is not otherwise herein provided for, shall be deemed a misdemeanor, and shall be punishable by fine not exceeding one thousand dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.*

Sec. 17. *That nothing contained in this Act shall be construed to affect any prosecution or other proceeding criminal or civil, begun under the Act of which this [is] amendatory; but such prosecution or other proceeding, criminal or civil, shall proceed as if this Act had not been passed.*

It is true that the 9th section of the Act provides that, before any Chinese passengers are landed from a vessel arriving in the United States from a foreign port, the collector of customs of the district in which the vessel arrives shall proceed to examine such passengers, comparing with the list and with the passengers the certificates issued under the Act, and that no passenger shall be allowed to land in the United States from such vessel in violation of law. But we regard this as only a provision for specifying the executive officer who is to perform the duties prescribed, and that no inference can be drawn from that or any other language in the Acts that any judicial cognizance which would otherwise exist is intended to be interfered with.

It is also urged that the Treaty itself contemplates only executive action, for the reason that the fourth article of the Treaty (22 Stat. at L. 827) provides that, if the legislation adopted by the United States to carry out the Treaty shall be "found to work hardship upon the subjects of China, the Chinese minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him." But there is nothing in this provision which excludes judicial cognizance, or which confines the remedy of a subject of China, in a given case of hardship, to diplomatic action.

The remaining question is as to the effect of the nonproduction of the certificate. It is contended for the United States that the actual production by Jung Ah Lung of the certificate issued to him was essential to enable him to land; that the statute does not provide for secondary evidence of its contents; and that it is of no consequence that he corresponds in all respects to the description, contained in the registration books at the custom house, of the person to whom the certificate was issued, for the reason that the statute does not say that such species of evidence can be resorted to.

Jung Ah Lung having departed from the United States on the 24th of October, 1888, and having then received the certificate of identification under the Act of 1882, his case is to be governed by the provisions of that Act, and not by the provisions of the Act of 1884. The certificate he received contained the matters provided for by the Act of 1882; and not those provided for by the Act of 1884. The registry books of the custom house contained, in regard to him, the particulars specified in the Act of 1882, and not those specified in the Act of 1884. The provisions of the Act of 1884, in the respects in which they differ from those of the Act of 1882, do not apply to him or to his certificate; and, if he had his certificate to present to the collector, he could not be required to present a certificate containing the additional particulars required by the amendments made by the Act of 1884 to the 4th section of the Act of 1882. The provisions of the Act of 1884, so far as they relate to the contents of the certificate to be issued, and of the certificate to be presented to the collector by the returning Chinese laborer arriving by a vessel, are not retrospective. This principle was determined in the case of *Chew Heong* v. *United States*, 112 U. S. 536 [28 : 770] where it was held that a Chinese laborer, who was residing in the United States at the date of the Treaty of November 17, 1880, and who departed by sea before the passage of the Act of 1882 and remained out of the United States until after the passage of the Act of 1884, was not required to produce any certificate to the collector, because otherwise his previously vested right to return would be injuriously affected. The same principle applies to the present case, in respect to the right of Jung Ah Lung to return without having received a certificate containing the additional particulars required by the amendatory Act of 1884.

In regard to the main question involved, section 4 of the Act of 1882 provides that, for the purpose of properly identifying Chinese laborers who were in the United States on the 17th of November, 1880, and in order to furnish them with the proper evidence of their right to go from and come to the United States of their free will and accord, as provided by the Treaty, the collector shall, on board of the departing vessel, make a list of the Chinese laborers who are about to sail, which shall be entered in registry books to be kept for the purpose, in which shall be stated the particulars specified by the section, and all facts necessary for the identification of each Chinese laborer, which books shall be safely kept in the custom house; and that each Chinese laborer shall receive from the collector, at the time such list is taken, a certificate signed by the collector and attested by his seal of office, which shall contain a statement of the particulars before mentioned, and facts of identification of himself, corresponding with the said list and registry in all particulars. The section then says: "The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States, upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter." It does not say that such certificate shall be the only evidence permissible to establish the right of reentry. It merely says that it shall be given for the purpose of properly identifying the laborer, and shall be proper evidence of his right to go from and come to the United States, and shall entitle him to return to and re-enter the United States, upon producing and delivering it to the collector of the district at which he shall seek to re-enter. It does not say that the Chinese laborer returning by a vessel shall not be permitted to enter the United States without producing the certificate. In this respect there is a marked difference between section 4 and section 12 of the same Act, in regard to a Chinese person entering the United States by land. Section 12 provides that no Chinese person shall be permitted to enter the United States by land without producing the certificate mentioned in section 4 of the Act. This distinction of language is very marked, and we think that, in the absence of like language in section 4, in regard to a Chinese laborer arriving by a vessel, it was competent for the district court to receive the evidence which it did, in the case of a certificate claimed to have been actually lost or stolen, and that its conclusion of law was justified by the facts which it found.

In regard to a suggestion made that a Chinese laborer who has lost his certificate, or from whom it has been stolen, may seek to re-enter

the United States, by a vessel, at some port other than that at which he received the certificate, and that there would be a practical difficulty in identifying him at such port, in the absence of the certificate, it is sufficient to say that this is not such a case; and that there would be no difficulty in producing in evidence the record of the custom house of the port of departure, or a copy of it, at any port of entry, so as to compare the particulars stated in it with the Chinese laborer, and thus establish his identity or want of identity.

The judgment of the Circuit Court is affirmed.

Mr. Justice **Harlan** dissenting:

Mr. Justice **Field**, *Mr. Justice* **Lamar**, and myself are unable to concur in the interpretation placed by the court upon the Act of May 6, 1882, passed by Congress in execution of the supplemental Treaty with China, concluded on the 17th of November, 1880.

By that Treaty the United States were at liberty, notwithstanding the stipulations of the original Treaty, to enact laws regulating, limiting, or suspending the coming of Chinese laborers to, or their residence in, the United States; such limitation or suspension to be reasonable in its character. It further provided that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now [November 17, 1880] in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored Nation."

The first section of the Act of May 6, 1882, suspends the coming of Chinese laborers to the United States from and after the expiration of ninety days next after that date, and until the expiration of ten years next after the passage of the Act; and makes it unlawful for *any* Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain in this country. The second section makes it an offense, punishable by fine and imprisonment, for any master of a vessel to knowingly bring *any* Chinese laborer within the United States on such vessel from any foreign port or place.

The third section exempts from the operation of the preceding sections only such Chinese laborers as were in this country on the 17th of November, 1880, or who shall have come into the same before the expiration of ninety days next after May 6, 1882," *and* who *shall produce* to such master before going on board such vessel, *and shall produce* to the collector of the port in the United States, at which such vessel shall arrive, *the evidence hereinafter in this Act required of* his being one of the laborers in this section mentioned."

The fourth section provides for registry books, to be kept by the collector of customs, in which shall be entered a list of all Chinese laborers departing on any vessel from his district, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of such laborers. Each Chinese laborer, so departing from the country, after the passage of the Act of 1882, was entitled to receive, free of charge, upon application therefor, at the time such list is taken, a certificate, showing the above facts, signed by the collector or his deputy, and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe. It is important to observe that this statute expressly declares that all this was to be done "*for the purpose of properly identifying Chinese laborers who were in the United States on the 17th of November, 1880*, or who shall have come into the same before the expiration of ninety days next after the passage of this Act, and in order to furnish them *with the proper evidence of their right to go from and come to the United States* of their free will and accord, as provided by the Treaty between the United States and China, dated November 17, 1880." Further: "The certificate herein provided for shall entitle the Chinese laborer, to whom the same is issued, to return to and re-enter the United States *upon producing and delivering the same* to the collector of customs of the district at which such Chinese laborer shall seek to re-enter, and upon delivery of such certificate by such Chinese laborer to the collector of customs at the time of re-entry into the United States, said collector shall cause the same to be filed in the custom-house and duly canceled."

The fifth section made provision for a similar certificate to a Chinese laborer of the class mentioned in the fourth section, and who desired to depart from this country "by land," to be given by the collector of customs of the district next adjoining the foreign country to which such laborer desires to go.

The twelfth section provides that "No Chinese person *shall be permitted* to enter the United States by land, *without producing* to the proper officer of customs *the certificate in this Act required* of Chinese persons seeking to land from a vessel," etc.

In view of these provisions we have been unable to reach any other conclusion than that Congress intended, by the Act of 1882, to prohibit the return to this country of any Chinese laborer who was here on the 17th of November, 1880, and who thereafter left the United States, taking with him the certificate prescribed by that Act, unless he produced such certificate at the time he sought to re-enter. It is not disputed that such was the intention of Congress with respect to Chinese persons seeking to enter the United States "by land." Indeed, dispute upon that point is precluded by the express prohibition, in the twelfth section, upon all Chinese persons being permitted to enter this country by land "without producing to the proper officer of customs the certificate in this Act required." But is there any ground to suppose that Congress intended to prescribe a different or a more stringent rule in relation to Chinese laborers entering by land than that prescribed in relation to Chinese laborers entering at one of the ports of the country? If it be said that the registry books kept at the port of departure furnish ample evidence for the identification of Chinese laborers, seeking to enter the country at that port, we answer: (1) that Congress saw fit to exclude from the country all Chinese laborers of the class to which appellee belongs, unless they produced to the

collector the certificate issued as evidence of their right to re-enter the United States; (2) that the rule prescribed is, by the very terms of the statute, uniform in its application to all Chinese laborers and to every port of the United States. The Chinese laborer, who received a certificate under the Act of 1882, was not bound to re-enter the United States at the port from which he sailed and at which he received that certificate. He could, as we have seen, re-enter by land or at any port of the United States, "upon producing and delivering" his certificate "to the collector of customs of the district at which such Chinese laborer shall seek to re-enter." Now, suppose the petitioner, Jung Ah Lung, had sought to re-enter the United States at the Port of New York. How could he have been identified at that port as a Chinese laborer, to whom a certificate had been issued by the collector of customs at San Francisco? The collector of customs at New York would have been without authority to accept affidavits in support of his claim of a right to re-enter. It is to be further observed that the Act of July 5, 1884, 23 Stat. at L. 115, provides that section four of the Act of 1882 shall be so amended as to read that "said certificate shall be the only evidence permissible to establish his right of re-entry." This did not declare a new rule, but indicates, in language clearer than that previously used, the intention of Congress in passing the Act of 1882.

If appellee's certificate was forcibly taken from him by a band of pirates, while he was absent, that is his misfortune. That fact ought not to defeat what was manifestly the intention of the legislative branch of the Government. Congress, in the Act of 1882, said, in respect to a Chinese laborer who was here when the Treaty of 1880 was made, and who afterwards left the country, that "the proper evidence" of his right to go and come from the United States was the certificate he received from the collector of customs, at the time of his departure, and that he should be entitled to re-enter "upon producing and delivering such certificate" to the collector of customs of the district at which he seeks to re-enter; while this court decides that he may re-enter the United States, without producing such certificate, and upon satisfactory evidence that he once had it, but was unable to produce it. As by the very terms of the Act, a Chinese laborer, who was here on November 17, 1880, is not excepted from the provision absolutely suspending the coming of all that class to this country for a given number of years, unless he produces to the collector the certificate issued to him, we cannot assent to the judgment of the court.

OCTOBER TERM, 1879.

*WILLIAM WOODFOLK ET AL., *Appts.*,
v.
JAMES A. SEDDON.

Attempt to delay creditors—execution sale on confessed judgment—tax sale.

*Reported here out of the regular order of date of decision,—not elsewhere reported.

1. An execution sale of a father's real estate to his son on a judgment by confession upon a note made by the father to the son, held fraudulent and void as against *bona fide* creditors of the father, it appearing from the facts that consideration for such note was fictitious.

2. Held also, that a subsequent purchase of the same property by the son at a delinquent tax sale amounted, in legal effect, to nothing more than payment of the taxes, and was void as being a part of the scheme to delay creditors.

[No. 943, October Term, 1879.]

Submitted Jan. 21, 1880. Decided March 2, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas. *Affirmed.*

In 1860, William W. Woodfolk, a citizen of and residing in the State of Tennessee, executed certain promissory notes to James A. Seddon, a citizen of Virginia, for an existing indebtedness. Seddon brought suit on these notes in Tennessee in 1868, and recovered judgment thereon against William W. Woodfolk on March 11, 1873; and in May, 1876, sued on this judgment, in Arkansas, by attachment, and levied on the lands mentioned in the present suit as the property of said William W. Woodfolk, and recovered judgment for $99,628 96 on October 25, 1876, which judgment was declared a lien on the lands attached.

In the mean time, in April, 1866, William W Woodfolk confessed judgment in Arkansas on his note in favor of his son, William Woodfolk, for $39,425.06, dated Jan. 1, 1866, and due one day after date; and the lands in suit were levied on and sold under execution on such judgment in October, 1866, and bought by William Woodfolk, who received the sheriff's deed therefor In June, 1866, these lands were sold by the tax collector for the tax of 1865, and bought by William Woodfolk, who received a tax deed in December, 1867. These deeds were recorded.

In November, 1876, Seddon brought this suit against William Woodfolk and William W. Woodfolk, and James Brown, tenant of the premises, setting up his judgment as a lien on the lands, and that the confession of judgment to William Woodfolk and the sale thereunder, and the tax sale, were fraudulent devices, contrived to hinder, delay and defraud the creditors of William W. Woodfolk, and praying that such judgment and deeds might be declared fraudulent and void, and that the lands might be subjected to his (Seddon's) judgment.

The defendants Woodfolk denied any intent to defraud creditors of William W. Woodfolk, and asserted that the note from him to William Woodfolk was given in good faith, and that the consideration for it was an actual indebtedness due from the father to the son, being made up of the following items: 1, gift of $5,500 from the grandfather of the son, to the latter, in 1855, which had been placed in the father's care; 2, wages at the rate of $1,500 per year from January 1, 1859, to May 12, 1863, for services rendered by the son to the father in performance of the following agreement, executed by them on May 12, 1863: "Whereas, William Woodfolk is ordered south of the federal lines by military authority, and whereas I, William W. Woodfolk, have on my farm in Jackson County about sixty negroes and a large stock of every description, together with some blooded stock in Kentucky, at

Alexander, and whereas, there is great danger of the negroes running away and all the stock being stolen, I have agreed to give to my son, William Woodfolk, all of my stock of every description in Jackson County, and at Alexander, and all the surplus produce on the farm, if he can get to Jackson County and will take care of my negroes, and keep them on the place and, if possible, from running away or being taken away. And whereas I, W. W. Woodfolk, employed my son, William Woodfolk, at a salary of fifteen hundred dollars a year, to assist me in my business, and he has been in my employ since the first day of January, 1859, up to the 12th day of May, 1863, it is now agreed between us that he is not to have any salary so long as he remains south of the federal lines." 3. The value of the property to which the son became entitled under said agreement, but which had been disposed of by his father and not accounted for; 4, money loaned and advanced by the son to the father. These various items were claimed to more than equal the amount of the note given by the father to the son.

The court below rendered a decree declaring the judgment confessed by defendant William W. Woodfolk, in favor of defendant William Woodfolk, and the execution sale thereon, and the subsequent tax sale, and subjecting the land covered thereby to the satisfaction of complainant's judgment, fraudulent and void as against the complainant creditor. Thereupon defendants appealed to this court.

Mr. **T. D. W. Yonley,** for appellants:

Complainant insists that this is not a real action, or in any sense an action for the recovery of real estate, but an action to subject it to the payment of a debt; and that the entry upon and possession of the land in controversy by William Woodfolk had nothing to do with starting the statute to running against the complainant's right to subject the land to the payment of his debt, and that no Statute of Limitations could begin to run against the complainant's right to do this, until he had recovered a judgment at law against William W. Woodfolk. That there are authorities to this effect is not denied, but there are others, of equal weight, which support an opposite view.

The Statute of Limitations will run in favor of a trustee in possession of real estate under a constructive or resulting trust, from the time he claims the trust property as his own.

Gebhard v. *Sattler*, 40 Iowa, 152; *Governor* v. *Woodworth*, 68 Ill. 254; *Haynes* v. *Swann*, 6 Heisk. 560.

In an action by a purchaser, under a judgment, execution and sheriff's sale, against a defendant in possession, under a deed from the judgment debtor, alleged to be fraudulent as against creditors, the Statute of Limitations begins to run from the date of the possession under the fraudulent deed.

Walker v. *Bacon*, 32 Mo. 144; *Prewett* v. *Buckingham*, 28 Miss. 92; *McLure* v. *Ashby*, 7 Rich. Eq. 430; *Cox* v. *Cox*, 6 Rich. Eq. 275; *Lott* v. *DeGraffenreid*, 10 Rich. Eq. 348; *Shannon* v. *White*, 6 Rich. Eq. 102; *Bank* v. *Ballard*, 12 Rich. L. 259; *Eigleberger* v. *Kibler*, 1 Hill, Ch. 120; *Brewer* v. *Kelly*, 24 La. Ann. 246; *Powell* v. *O'Neil*, Id. 522.

Mr. **A. H. Garland,** for appellee:

In the absence of express contract, the law will not imply a promise to pay for services rendered by a son living with his father.

Bump, Fraud. Conv. 229.

Under the well settled rule no evidence was needed on the part of complainant, but upon bill and answer he was entitled to a decree.

Marshall v. *Green*, 24 Ark. 410.

The intention of the parties to defraud creditors must be determined from their acts.

Dick v. *Grissom*, 1 Freem. Ch. 437; *Hendricks* v. *Robinson*, 2 Johns Ch. 300; *Robinson* v. *Stewart*, 10 N. Y. 189; *Clinton* v. *Estes*, 20 Ark. 245; *Hempstead* v. *Johnston*, 18 Ark. 141; *Galbreath* v. *Cook*, 30 Ark. 421; *Blair* v. *Alston*, 26 Ark. 41; *Humes* v. *Scruggs*, 94 U. S. 28 (24: 53); Bump, Fraud. Conv. 560–562, 565, 574, 581–587; *Rea* v. *Missouri*, 84 U. S. 17 Wall. 543 (21:709).

The relationship of the parties is to be considered.

Bump, Fraud. Conv. 31–59; Freem. Executions, 136.

If the transaction assume the form of a public sale, it is merely apparent, not real. There is in such case no distinction between a conveyance directly from the debtor and one from the sheriff or other public officer. In reality the conveyance is from the debtor through the sheriff or other public officer.

Bump, Fraud. Conv. 254–256; *Booth* v. *Bunce*, 33 N. Y. 156; Freem. Executions, 136, 140; Gantt's Dig. § 2954.

While in law such transfers are, as to creditors, mere nullities, yet, as between the parties to them, they are good, and will only be set aside at the suit of creditors.

Payne v. *Bruton*, 10 Ark. 58–60; Bump, Fraud. Conv. 436, 437, 451–458, 465–469, 482, 534.

As to creditors, the title is still in the grantor for the purpose of paying his debts, and the grantee holds the property as trustee for the benefit of the creditors.

Miller v. *Fraley*, 21 Ark. 34; *Thomason* v. *Neeley*, 50 Miss. 310; *Shaw* v. *Millsaps*, Id. 380 *Metropolitan Bank* v. *Durant*, 22 N. J. Eq. 35.

And creditors obtaining judgments against the grantor acquire liens on the lands fraudulently transferred.

Ringgold v. *Waggoner*, 14 Ark. 73; Bump, Fraud. Conv. 465, 466.

A creditor must establish his demand at law and obtain a lien upon the property before the fraudulent transfer interferes with his rights, or he has any title or right to claim relief in equity.

Clark v. *Anthony*, 31 Ark. 546; *Meux* v. *Anthony*, 11 Ark. 418–421; *Sale* v. *McLean*, 29 Ark. 621; *Terry* v. *Tubman*, 92 U. S. 161 (23: 539); *Terry* v. *Anderson*, 95 U. S. 636 (24:367); *Dodge* v. *Griswold*, 8 N. H. 425; Bump, Fraud. Conv. 515–517, 521–525; *Payne* v. *Sheldon*, 68 Barb. 169.

A court of equity has jurisdiction before or after sale under a judgment to set aside a transfer in fraud of creditors; before sale, to present an unincumbered title for sale, and after sale to remove clouds from title. But the better practice is to remove incumbrances before sale.

Sale v. *McLean*, 29 Ark. 621; *Gallman* v. *Perris*, 47 Miss. 131; *Pulliam* v. *Taylor*, 50 Miss. 551.

The Statutes of Limitations of seven, five and two years, as fixed by sections 4118, 4116, and 4117 of Gantt's Digest, and interposed by William Woodfolk, by the terms of the statutes themselves, only apply in suits for the recovery or possession of lands, and do not apply to suits of this kind.

Gantt's Dig. 745; *Chaplin* v. *Holmes*, 27 Ark. 416; *Wright* v. *Walker*, 30 Ark. 49; *Phelps* v. *Jackson*, 31 Ark. 275.

At law the statute will not run until right of entry or the right of action has accrued; so neither will it run in equity.

The Statutes of Limitation apply with equal force in courts of law and courts of equity in cases of concurrent jurisdiction, courts of equity acting in obedience rather than in analogy to the statutes.

Story, Eq. § 1520; *Adams* v. *Taylor*, 14 Ark. 67; *Wilson* v. *Anthony*, 19 Ark. 16; *Hancock* v. *Harper*, 6 C. & J. 158; *Knox* v. *Gye*, 4 Moak, Eng. Rep. 44.

A court of equity applies the rule of laches according to its own ideas of right and justice, every case being governed chiefly by its own circumstances, not refusing relief when the application is sustained by conscience, good faith, and reasonable diligence.

Story, Eq. § 1520; *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 811, 812 (24:826); *Wilson* v. *Anthony*, 19 Ark. 16; *Brown* v. *Buena Vista County*, 95 U. S. 160, 161 (24:423); Bump, Fraud. Conv. 547.

While courts of equity act in obedience and in analogy to the Statutes of Limitations in proper cases, they will interfere in many cases to prevent the bar of the statute where it would be inequitable or unjust, and will not permit the bar to be interposed against conscience.

Story, Eq. § 1521; *Henry County* v. *Winnebago Swamp Drainage Co.* 52 Ill. 299.

Mr. Chief Justice **Waite** delivered the opinion of the court:

After a careful consideration of this case, we are entirely satisfied that the consideration of the note executed by William W. Woodfolk to his son, William Woodfolk, Jr., which alone the title of the son to the property in controversy depends, was fictitious, and that the confession of judgment by the father in favor of the son, and the purchase of the property in controversy by the son under execution, were but parts of a scheme devised by the father and son through which it was hoped something might be saved from the wreck of the father's fortune at the expense of his *bona fide* creditors.

There is no dispute about the law applicable to these facts, and as it will serve no useful purpose to discuss the evidence in detail a further opinion on this point will not be delivered.

The purchase of the property at tax sale by the son was, as we think, under the circumstances, nothing more in legal effect than payment of the taxes, so far as the rights of this appellant are concerned. We cannot devest ourselves of the conviction that it was part and parcel of the scheme devised to hinder and delay creditors in the collection of their debts.

Decree affirmed.

END OF VOL. 124.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1887.

Vol. 125.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U S. SUPREME COURT,

OCTOBER TERM, 1887,

AND REPORTED HEREIN,

VOL. 125,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 125 U. S.	Title.	Here in.	Off. Rep. 125 U. S.	Title.	Here in.
1	Willamette Iron Bridge Co. v. Hatch	629	90	Davison v. Davis	635
	" "	630	91–93	" "	636
2–4	" "	630	93–95	" "	637
4–6	" "	631	95–98	" "	638
6–10	" "	632	98	Weir v. Morden	645
10–13	" "	633	98–101	" "	646
13–16	" "	634	101–103	" "	647
16–17	" "	635	103–104	" "	648
18–19	New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.	607	104–107	" "	649
			107–108	" "	650
19–22	" "	608	109	Tompkins v. Little Rock & Ft. Smith Railway	
22–25	" "	609			
25–27	" "	610		Williams v. Little Rock, M. R. & T. Railway	615
27–29	" "	611			
29–32	" "	612	109–111	" "	618
32–35	" "	613	111–114	" "	619
35–38	" "	614	114–117	" "	620
38–39	" "	615	117–120	" "	621
39	Kreiger v. Shelby R. R. Co.	675	120–122	" "	622
40–41	" " "	676	123–126	" "	623
41–44	" " "	677	126–127	" "	624
44–45	" " "	678	128	Hartranft v. Langfeld	672
46	Dale Tile Mfg. Co. v. Hyatt	683	128–130	" "	673
47–49	" " "	684	130–132	" "	674
49–51	" " "	685	133–136	" "	675
51–54	" " "	686	136–137	Tilghman v. Proctor	664
54	" " "	687	137–141	" "	665
54–56	Felix v. Schumwober	687	141–144	" "	666
56–59	" "	688	144–147	" "	667
59–60	" "	689	147–150	" "	668
60	Bank of Redemption v. Boston	689	150–153	" "	669
61–63	" "	691	153–156	" "	670
63–66	" "	692	156–158	" "	671
66–69	" "	693	158–161	" "	672
69–70	" "	694	161	Chicago v. Taylor	668
70–71	Arthur's Executors v. Butterfield	643	162–163	" "	669
71–74	" "	644	163–166	" "	640
74–77	" "	645	166–169	" "	641
77	Cunningham v. Norton	624	169–170	" "	642
77–81	" "	625	171	Cissel v. Dutch	642
81–84	" "	626	171–172	" "	643
84–87	" "	627	173–174	Potts v. United States	661
87–90	" "	628	174–176	" "	662
90	" "	629	176–177	United States v. Burchard	663

Off. Rep. 125 U. S.	Title.	Here in.
177–180	United States v. Burchard	663
180–181	" " "	664
181–182	Pembina Con. Silver Mining etc. Co. v. Pennsylvania	650
182–183	" "	651
183–186	" "	652
186–189	" "	653
189–190	" "	654
190–193	Maynard v. Hill	654
193–195	" "	655
203–204	" "	656
204–207	" "	657
207–210	" "	658
210–213	" "	659
213–215	" "	660
215–216	" "	661
217	Hoskin v. Fisher	759
218	" "	760
218–221	" "	761
221–224	" "	762
224	Friedenstein v. United States	736
225–227	" "	738
227–230	" "	739
230–233	" "	740
233–236	" "	741
236–239	" "	742
239–240	" "	743
240	Origet v. United States	743
241–244	" "	745
244–246	" "	746
246–247	" "	747
247	Southern Development Co. v. Silva	678
248	" " "	679
248–251	" " "	680
251–254	" " "	681
254–257	" " "	682
257–259	" " "	683
260	Hannibal & St. J. R. R. Co. v. Missouri River Packet Co.	731
261–262	" "	732
262–265	" "	733
265–268	" "	734
268–271	" "	735
271–273	" "	736
273	United States v. San Jacinto Tin Co.	747
274–277	" "	748
277–280	" "	749
280–283	" "	750
283–285	" "	751
285–288	" "	752
288–291	" "	753
291–294	" "	754
294–297	" "	755
297–300	" "	756
300–303	" "	757
303–306	" "	758
306–309	" "	759
309–314	Clement v. Packer	731
314–315	" "	722
315–318	" "	723
318–320	" "	724
320–322	" "	726
323–325	" "	727
325–328	" "	728
328–331	" "	729
331–334	" "	730
334–336	" "	731
337–338	Hartranft v. Sheppard	703
339	Missouri, ex rel. Walker, v. Walker	769
339	" " "	770

Off. Rep. 125 U. S.	Title.	Here in.
339–342	Missouri, ex rel. Walker, v. Walker	771
342–345	" " "	772
345	Spencer v. Merchant	763
346–349	" "	764
349–351	" "	765
351–353	" "	766
353–356	" "	767
356–358	" "	768
358–361	" "	769
361–365	Sage v. Memphis & Little Rock R. R. Co.	694
365–366	" "	695
366–368	" "	696
368–375	" "	697
375–378	" "	698
378–381	" "	699
381	" "	700
382	Wall v. Bissell	772
382–384	" "	773
384–386	" "	774
387–388	" "	775
388–391	" "	776
391–394	" "	777
394–396	" "	778
397	Williams v. Conger	779
398–401	" "	781
401–404	" "	782
404–407	" "	783
407–410	" "	784
410–413	" "	785
413–415	" "	786
415–418	" "	787
418–421	" "	788
421–424	" "	789
424–426	" "	790
426	Washington Ice Co. v. Webster	799
427–428	" " "	800
428–431	" " "	801
431–434	" " "	802
434–437	" " "	803
437–439	" " "	804
439–442	" " "	805
442–445	" " "	806
445–447	" " "	807
447	Yale Lock Mfg. Co. v. James	807
451	" " "	808
451–454	" " "	809
454–457	" " "	810
457–461	" " "	811
461–464	" " "	812
464	" " "	813
465–467	Bowman v. Chic. & N. W. R. Co.	700
467–470	" "	701
470–470	" "	703
470–479	" "	704
479–481	" "	705
481–484	" "	706
484–487	" "	707
487–490	" "	708
490–493	" "	709
493–496	" "	710
496–498	" "	711
498–501	" "	712
501–504	" "	713
504–507	" "	714
507–510	" "	715
510–513	" "	716
513–516	" "	717
516–519	" "	718
519–521	" "	719
521–524	" "	720

Off. Rep. 125 U. S.	Title.	Here in.
524	Bowman v. Chic. & N. W. R. Co.	791
525–526	Hartranft v. Oliver	813
527–529	" "	814
529–530	" "	815
530	Western Union Tel. Co. v. Attorney-General of Mass.	790
545–547	" " "	792
547–550	" " "	793
550–552	" " "	794
552–535	" " "	795
535	Ruslier v. Cheshire R. R. Co.	795
576–577	" "	796
577–580	" "	797
580–585	" "	798
585–595	" "	799
595	Bowerman v. Rogers	815
596–597	" "	816
597–598	" "	817
598	" "	818
601	Union Trust Co. v. Morrison	825
602–603	" "	827
603–606	" "	828
606–609	" "	829
607–610	" "	830
610–613	" "	831
614–615	DeWolf v. Hays	818
615–618	" "	819
618	" "	820
618	Doolan v. Carr	844
620–621	" "	845
621–624	" "	846
624–627	" "	847
627–630	" "	848
630–633	" "	849
633–636	" "	850
636–638	" "	851
638–641	" "	852
641–642	" "	853
642–644	Johnson v. Christian	820
645–646	" "	821
646–648	United States v. Baker	824
648–650	" "	825
650–651	Nutt v. United States	821
651–654	" "	822
654–656	" "	823
656–657	United States v. Strong	823
657–658	" "	824
658–660	St. Louis, Alton, & T. H. R. R. Co. v. Cleveland, C. C. & I. R. Co.	832
660–668	" "	833
667–669	" "	835
669–672	" "	836
672–675	" "	837
675–678	" "	838
678–680	" "	839
680	Dow v. Beidelman	841
686	" "	842
686–689	" "	843
689–692	" "	844
692	Bonahan v. Nebraska	854
698	Addington v. Burke	853
694	Shreveport v. Holmes " v. Crooks " v. Carter	854
695–696	East Tenn. Va. & Ga. R. R. Co. v. Southern Tel. Co.	853
696	" "	854
696–697	*In Re* Royall	855
698	Lyon v. Perin & Gaff. Mfg. Co.	839
698–700	" "	840
700–702	" "	841

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1887.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

NEW ORLEANS WATERWORKS COMPANY, *Plf. in Err.*,

v.

LOUISIANA SUGAR REFINING COMPANY ET AL.

(See S. C. Reporter's ed. 18-39.)

Opinion, when part of record—review of state judgments—violation of contract—statute of State—jurisdiction.

1. The opinion of the Supreme Court of Louisiana is considered by this court, on writs of error, as part of the record.
2. On a writ of error to the highest court of a State this court has no jurisdiction to review the judgment, unless a federal question has been decided by that court against the plaintiff in error.
3. This court has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative Act of a State has been upheld by the judgment sought to be reviewed.
4. Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of the law relating to the jurisdiction of this court.
5. But when the state court gives no effect to the subsequent state law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.

[No. 38.]

Argued Oct. 26, 27, 1887. Decided March 19, 1888.

IN ERROR to the Supreme Court of the State of Louisiana, to review a decree of that court affirming a judgment of the Civil District Court of New Orleans dismissing a suit brought to restrain the laying of water pipes by the defendant. *Dismissed for want of jurisdiction.*

Statement by *Mr. Justice* **Gray:**

This was a petition, filed March 30, 1883, in the Civil District Court for the Parish of New Orleans, by the New Orleans Waterworks Company against the Louisiana Sugar Refining Company and the City of New Orleans, to restrain the laying of water pipes from the factory of the Louisiana Sugar Refining Company through the Streets and thoroughfares of the city to the Mississippi River. The allegations of the petition are in substance as follows:

That the Legislature of Louisiana, by an Act of April 1, 1833, chartering the Commercial Bank of New Orleans, declared the chief object of that corporation to be "the conveying of water from the river into the City of New Orleans and its faubourgs, and into the houses of its inhabitants;" and enacted that it should "have forever the exclusive privilege, from and after the passing of this Act, of supplying the City and inhabitants of New Orleans and its faubourgs, with water from the River Mississippi, by means of pipes or conduits," and the right to construct the necessary works for that purpose; and provided that its works, rights and privileges might be purchased by the City of New Orleans at any time after thirty-five years from the passage of the Act.

That in 1869 the City of New Orleans purchased the same accordingly, and took charge of and used the works for the purpose of supplying the city and its inhabitants with water.

That the Act of the Legislature of Louisiana of March 31, 1877, incorporating the plaintiff, contained the following provisions:

Sec. 2. "That immediately after the organization of the said Waterworks Company, as hereinafter provided, it shall be required to issue to the City of New Orleans stock to the amount of six hundred and six thousand six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of waterworks bonds which said city may have taken up heretofore and extinguished by payment, exchange or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of waterworks bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this Act."

Sec. 5. "That the said Waterworks Company shall own and possess the privileges acquired by the City of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this Act the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi River, or any other stream or river, by means of pipes and conduits, and for erecting or constructing any necessary works or engines, or machines for that purpose;" and

have authority "to lay and place any number of conduits or pipes or aqueducts, and to cleanse and repair the same, through or over any of the lands or streets of the City of New Orleans; *Provided*, The same shall not be an obstruction to commerce or free circulation."

Sec. 11. "That the City of New Orleans shall be allowed to use water from the pipes and plugs of said Company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions."

Sec. 17. That "At the expiration of fifty years from the organization of the Company, the city shall have the right to buy the works, conduits, pipes, etc., of the Company, at a valuation to be fixed by five experts;" "but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the Company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter."

Sec. 18. "That nothing in this Act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use."

That on April 9, 1878, the city transferred the waterworks and franchises aforesaid to the plaintiff.

That "Since said transfer the petitioner has faithfully discharged the trust imposed on it, and complied with all its obligations; that, by virtue of the aforesaid exclusive privilege thus conferred upon it by the aforesaid charters, statutes and acts of transfer, the City of New Orleans cannot grant to anyone the privilege of laying pipes to the river to convey water within her limits, without a flagrant violation of the aforesaid contracts and a breach of warranty, with the exception, however, of such privilege or facility as said city may think it expedient to extend riparian owners of property lying contiguous to said river."

That the City of New Orleans granted permission to the Louisiana Sugar Refining Company, a corporation domiciled in the Parish of Orleans, to lay pipes from its factory to the Mississippi River, as appeared by the following ordinance, adopted by the city council on March 13, and approved by the mayor on March 15, 1883:

"An Ordinance Providing for the Erection of All Necessary Machinery, Boilers and Engines, and Laying of Water and Sewerage Pipes in Connection with the Louisiana Sugar Refining Company's Works.

"Be it ordained that permission be, and is hereby, granted to the Louisiana Sugar Refining Company to erect all necessary machinery, boilers and engines in their factory in course of construction in the square bounded by Front, Clay, Bienville and Custom-House Streets, and to lay water and sewerage pipes from said factory to the Mississippi River, according to lines and grades for same to be furnished by the city surveyor; *Provided*, That all excavations and street crossings, paving, etc., broken up shall be replaced, repaired and relaid to the entire satisfaction of the commissioner of public works; revocable at the pleasure of the council."

That "Under said permission the said Louisiana Sugar Refining Company has broken the grounds along and across the streets and thoroughfares of the said city in the direction of the said river from its aforesaid factory, and will, unless restrained by the equitable writ of injunction, complete said works, pipes and conduits, and proceed to draw therewith water from the Mississippi River, in violation of the exclusive privileges aforesaid of the petitioner, and to its great damage and injury;" and "that said Louisiana Sugar Refining Company has no riparian rights in the premises, and its property is not contiguous to said river."

The answer of the City of New Orleans denies all the allegations of the petition.

The answer of the Louisiana Sugar Refining Company also denies all those allegations, except that it admits that by the ordinance aforesaid "The City of New Orleans granted to it license and permission to lay water and sewerage pipes from its factory to the Mississippi River; and that it has availed itself of the license therein granted, strictly in accordance with the ordinance aforesaid;" and "admits that it is the owner of certain property within the square bounded by Front, Clay, Bienville and Custom-House Streets, in the City of New Orleans, and avers that said property is what is known as batture property, and that the rights, ways and privileges of the City of New Orleans were transferred by the title given by the said City of New Orleans to its vendors;" and "avers that said property fronts on a public street and the quay, a public place, and that it is contiguous and adjacent to the Mississippi River, and that the respondent has riparian rights to draw water therefrom for its own use and manufacturing purposes, and to convey and discharge its water therein;" "denies that the plaintiff corporation has any exclusive privilege and right to draw water from the Mississippi River by conduits and pipes, or otherwise, which could or would impair the use by this respondent and every other person of the said water for its own and their supply;" avers "that, if there be any such pretended exclusive privilege and right, it is null and void, as in derogation of common right and of law;" "denies that it has supplied or is now supplying or intends hereafter to supply the City of New Orleans or any of its inhabitants with water, or to carry off and discharge any waste, except its own; and expressly avers that the pipes laid are for its own exclusive use, and that it draws water from said river only for its own use and manufacturing purposes connected with its said factory;" and further avers "that the exclusive rights and privileges claimed by the plaintiff under its charter would constitute a monopoly, and are therefore null and void."

Upon a trial by jury, it appeared that the material provisions of the aforesaid Statutes of Louisiana were as above set forth; and the evidence supported all the allegations of fact in the petition, except that the acts of the Louisiana Sugar Refining Company, and the situation of its factory in relation to the river, were proved to be as follows: The Company was constructing a factory on its land, bounded

by Front, Clay, Bienville and Custom-House Streets, and had begun to lay water and sewerage pipes, exclusively for the use of its factory, and according to lines and grades furnished by the city surveyor, from its factory straight to the river, across Front Street, and thence across a broad quay or levee, owned by the city, and open to the public, except that some large sugar sheds occupied by lessees of the city stood upon it, and that the tracks of the Louisville, Nashville and Mobile Railroad were laid across it.

The plaintiff asked the court to instruct the jury: "1. That the word 'contiguous,' as used in section 18 of the charter of the plaintiff company, means riparian, or on the edge of the river. 2. That the City of New Orleans has no right to grant permission to any person or corporation whose property is not contiguous to the river to lay pipes or conduits to the Mississippi River to draw water therefrom through said pipes or conduits for manufacturing or other purposes." The court refused to give either of said instructions, "on the ground that the jury were judges both of the law and the facts of the case," and allowed a bill of exceptions. The jury returned a verdict for the defendants, and the court, with the verdict and the evidence before it, gave judgment for the defendants, dismissing the suit.

The plaintiff appealed to the Supreme Court of Louisiana, which affirmed the judgment; and in its opinion recapitulated the substance of the provisions of the Statutes of Louisiana, above quoted, the conveyances from the Commercial Bank to the City of New Orleans in 1868 and from the city to the plaintiff in 1877, and the ordinance, passed by the city council in 1883, granting to the Louisiana Sugar Refining Company authority to lay pipes from its factory to the Mississippi River, and stated the question to be decided and the grounds of its decision as follows:

"The question which arises, under such state of facts, is simply, Whether the City of New Orleans had the right to grant the authority. If the city had such a right, the defendant Company has a right to exercise it.

"In order to determine that question, it is essential, first, to ascertain what is the nature and extent of the privilege originally conferred by the State upon the Commercial Bank, and which passed to the City of New Orleans, by whom it was afterwards transferred to the defendant [plaintiff] Company, organized, as it was, by a charter which is explicit as to its prerogatives and responsibilities."

"The right conferred by the Legislature in 1883, and confirmed in 1877, was not to draw water from the river, nor was it to lay pipes and conduits on the lands and streets of the City of New Orleans. It was the *exclusive* privilege of supplying the city and its inhabitants with water drawn from the river by those means, the object in view being, on account of benefits derived by the city, the *exclusion* of all others, corporations and individuals, from making a similar supply, in other words, from selling and vending water.

"The Commercial Bank, in common with all the inhabitants of the city, possessed, independent of any legislative grant or concession, the right to draw water from the river for its own purposes, and to supply the city and its inhabitants with it; but it did not, any more than any of the inhabitants of the city, have the right of laying the pipes and conduits necessary to convey the water through or over any of the lands or streets of the city; and to do so it required special authority, either directly from the State, or from its functionary, the city herself. The right which it did not possess, and which no other inhabitant possessed, was the exclusive privilege of supplying the city and its inhabitants forever, or a limited time, by means of pipes and conduits laid through the public soil.

"The moment that privilege was conferred by the State on the Corporation, to supply the city and its inhabitants with water from the river, through pipes and conduits which it was authorized to lay through and over any of the lands or streets of the city, all pre-existing, as well as all subsequently arising rights, which could have otherwise been exercised, ceased to be available; and competition for such supply became an absolute legal impossibility.

"The right to that exclusive privilege, under the present Constitution, is contested by the defendant; but it is entirely out of place to consider whether it exists or not, as, under the pleadings and the facts, the question of competition is not at all at issue.

"The City of New Orleans does not claim to have conferred on the defendant Company, and that Company does not claim to have received from the city, the right or privilege of supplying the city and its inhabitants with water by means of pipes, conduits and hydrants.

"The city and the defendant Company claim only that the former had a right to grant, and the latter has that to enjoy, the permission of laying pipes and conduits from the river to its factory, for the sole purpose of supplying itself with water for its own purposes, and for no other.

"It cannot be doubted for an instant that, as the city has, under general laws and by her charter, which emanates directly from the Sovereign, the exclusive control and regulation of her public lands, quays, streets and avenues, she had the right of permitting the defendant Company to lay pipes and conduits across the quay and through the streets, from the river to within its factory limits, for the purpose of supplying itself with the water needed for its objects. Rev. Civ. Code, arts. 450, 453, 455, 457; *Brown* v. *Duplessis*, 14 La. Ann. 854; *Board of Liquidation* v. *New Orleans*, 32 La. Ann. 915.

"It is true that section 18 of the charter of 1877 expressly protects riparian or contiguous proprietors against a possible effect of the *exclusive* privilege granted; but the provision there found is not to be construed as one conferring a privilege or right which otherwise would have had no existence. It is indisputable, that such riparian or contiguous owners would, independently of the declarations in section 18, have enjoyed that right, which could, under no contingency, have thus been abridged.

"They had clearly, not only the privilege, in common with all others, to draw the running water from the river for domestic purposes *ad lavandum et potendum*, but also, on principle,

that, without the need of a previous permission, of laying pipes from the river to their premises, to draw the water necessary for their use. The State and her functionaries—political corporations—however have the right, in the exercise of the police power, of regulating the enjoyment of that right, denying or permitting it, according as public security and good may or may not demand.

"If section 18 was designed for any practical object, it could only have been to secure to the contiguous owners, beyond the possibility of a doubt, their indisputable rights, subjecting them, however, to the control of the municipal authorities, as the improvident or careless exercise of such rights across the river bank and through the public street of a populous metropolis might be attended with great calamitous consequences, inflicting incalculable wrong and injury." 35 La. Ann. 1111.

A writ of error from this court was allowed by the Chief Justice of the Supreme Court of Louisiana upon the plaintiff's petition representing "that said plaintiff set up its charter as a contract between it and said City of New Orleans and the State of Louisiana; and that the ordinance of said city in favor of said defendant, the Louisiana Sugar Refining Company, was a violation of said contract, which was protected by the Constitution of the United States; and said supreme court in its decree maintained the legality of said ordinance, and decreed it to be no violation of said contract."

Mr. **J. R. Beckwith,** for plaintiff in error:

The character and construction of the contract in the charter of the New Orleans Water Works Company has been settled by this court in *Water Works Co.* v. *Rivers*, 115 U. S. 674 (29:525), and that construction approved and confirmed in *St. Tammany Water Works Co.* v. *N. O. Water Works Co.* 120 U. S. 64 (30: 563).

To constitute a riparian owner, the title deeds must grant an actual front on the river.

Cotton Press Case, 18 La. 237; *Livingston* v. *Heerman*, 9 Mart. O. S. 656; *Cochran* v. *Fort*, 7 Mart. N. S. 627; *Oambre* v. *Kohn*, 8 Mart. N. S. 576.

A title conveying property in a square in a city bounded by streets named grants no riparian rights.

Winter v. *New Orleans*, 26 La. Ann. 310.

"Contiguous" is defined to be "adjacent in actual close contact, touching, near."

Arkell v. *Commerce Ins. Co.* 69 N. Y. 192.

Mr. **S. T. Wallis,** for defendants in error:

"Contiguous" implies actual contact. In the absence of express definition, the meaning of particular words in a statute "is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used."

U. S. v. *Kirby*, 74 U. S. 7 Wall. 486, 487 (19: 280); *Razedale* v. *Seip*, 32 La. Ann. 435; *Arkell* v. *Commerce Ins. Co.* 69 N. Y. 194; *Sparhawk* v. *Salem*, 1 Allen, 30; *Guild* v. *Chicago*, 82 Ill. 472; *Rex* v. *Hall*, 1 Barn. & C. 136.

Riparian rights are strictly "property," and cannot be taken for the public use or good without just compensation.

Yates v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19:984); *Sandwich* v. *Great Northern R. R. Co.* L. R. 10 Ch. Div. 707, 711.

A riparian manufacturer may take all the water that is requisite for the purpose of his business.

Embrey v. *Owen*, 6 Exch. 353, 368; *Miner* v. *Gilmour*, 12 Moore's P. C. 131, and cases collected in Goddard on Easements, Barrett's ed. 297, 301, and in Gould on Waters, §§ 205, 206.

A riparian boundary does not pass, if there be, outside of the given river line, a strip of alluvion of sufficient height and magnitude between the shore line and the actual water. Such alluvion gives the vendor riparian ownership as against the vendee, and subsequent accretions belong to him. He has the title *ad medium filum*, though he may have only a thread on the shore.

Cotton Press Case, 18 La. 237; *Livingston* v. *Heerman*, 9 Mart. O. S. 656; *Cochran* v. *Fort*, 7 Mart. N. S. 622.

In statutory grants nothing is to be taken as conceded except what is given in unmistakable terms, or by an implication equally clear.

N. Western Fertilizing Co. v. *Hyde Park*, 97 U. S. 659, 666 (24:1036, 1038); *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 420 (9:773); *Rice* v. *Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 358, 380 (17:147, 153); 1 Dill. Mun. Corp. § 89; Sedgw. Const. Constr. 2d ed. 291; 1 Morawetz, Priv. Corp. § 323.

The Statutes of Louisiana are subject, like all others, to the ordinary rules of interpretation.

Viterbo v. *Friedlander*, 120 U. S. 724 (30: 781).

The reservation in the 18th section is intrusted to the municipal council. It is not permissible to predicate, judicially, of such a discretion that it will be abused.

Spring Valley Water Works v. *Schottler*, 110 U. S. 354 (28:178).

The judicial tribunals may and will annul city ordinances, for oppression, unreasonableness, or injustice, when applied to by parties who are injured.

1 Dill. Mun. Corp. (1881), §§ 319, 321; Wood, Nuisances, § 441, note 1; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19:984); *Baltimore* v. *Radecke*, 49 Md. 217.

Mr. Justice **Gray** delivered the opinion of the court:

The plaintiff in its original petition relied on a charter from the Legislature of Louisiana, which granted to it the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Mississippi River, but provided that the city council should not be thereby prevented from granting to any person "contiguous to the river" the privilege of laying pipes to the river for his own use. The only matter complained of by the plaintiff, as impairing the obligation of the contract contained in its charter, was an ordinance of the city council granting to the Louisiana Sugar Refining Company permission to lay pipes from the river to its factory, which the plaintiff contended was not contiguous to the river.

The Louisiana Sugar Refining Company in its answer alleged that its factory was contiguous to the river, that it had the right as a ripa-

rian proprietor to draw water from the river for its own use, that its pipes were being laid for its own use only, that the plaintiff had no exclusive privilege that would impair such use of the water by the defendant Company, and that the rights and privileges claimed by the plaintiff would constitute a monopoly and be therefore null and void.

The evidence showed that the pipes of the defendant Company were being laid exclusively for the use of its factory, and that no private ownership intervened between it and the river, but only a public street, and a broad quay or levee, owned by the city and open to the public, except that some large sugar sheds occupied by lessees of the city, stood upon it, and that the tracks of a railroad were laid across it.

The grounds upon which the Supreme Court of Louisiana gave judgment for the defendant appear by its opinion, which, under the practice of that State, is strictly part of the record, and has always been so considered by this court on writs of error, as well under the Judiciary Act of 1789, which provided that "no other error shall be assigned or regarded as a ground of reversal than such as appears on the face of the record," as under the later Acts, in which that provision is omitted. Acts Sept. 24, 1789, chap. 20, § 25, 1 Stat. at L. 86; February 5, 1867, chap. 28, § 2, 14 Stat. at L. 386; Rev. Stat. § 709; *Almonester* v. *Kenton*, 50 U. S. 9 How. 1, 9 [13:21, 24]; *Grand Gulf R. Co.* v. *Marshall*, 53 U. S. 12 How. 165 [13:938]; *Cousin* v. *Labatut*, 60 U. S. 19 How. 202 [15: 601]; *Delmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661, 668, 667 [20:757-759]; *Crossley* v. *New Orleans*, 106 U. S. 105 [27: 667]; *Crescent City Co.* v. *Butchers Union Co.* 120 U. S. 141, 146 [30:614, 616].

That opinion, as printed in 35 La. Ann. 1111, and in the record before us, shows that the grounds of the judgment were: that the right conferred by the Legislature of the State upon the Commercial Bank by its charter in 1838, and confirmed to the plaintiff by its charter in 1877, was the exclusive privilege of supplying the city and its inhabitants with water by means of pipes and conduits through the streets and lands of the city; that by the general law of Louisiana, independently of anything in those statutes, riparian or contiguous proprietors had the right of laying pipes to the river to draw the water necessary for their own use, subject to the authority of the State and the city, in the exercise of the police power, to regulate this right, as the public security and the public good might require; that section 18 of the plaintiff's charter had no other object than to secure, beyond the possibility of doubt, this right of the contiguous owners and the control of the municipal authorities; and that the city was authorized to permit the defendant Company to lay pipes across the quay and through the streets from the river to its factory, for the purpose of supplying it with water for its own use.

The Constitution of Louisiana of 1879 does provide, in article 258, that "The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished." But the opinion of the Supreme Court of the State shows that it thought it unnecessary and "entirely out of place" to consider the effect of that provision upon the exclusive privilege of the plaintiff; and it was not suggested, either in the petition for the writ of error, or in the assignment of errors, or in any of the briefs filed in this court, that any effect was given by the judgment of the state court to that provision of the Constitution of the State.

The only grounds on which the plaintiff in error attacks the judgment of the state court are that the court erred in its construction of the contract between the State and the plaintiff, contained in the plaintiff's charter; and in not adjudging that the ordinance of the city council, granting to the defendant Company permission to lay pipes from its factory to the river, was void because it impaired the obligation of that contract.

The arguments at the bar were principally directed to the question whether upon the facts proved the factory of the defendant Company was contiguous to the river. But that is not a question which this court upon this record is authorized to consider.

This being a writ of error to the highest court of a State, a federal question must have been decided by that court against the plaintiff in error; else this court has no jurisdiction to review the judgment. As was said by *Mr. Justice* Story, fifty years ago, upon a full review of the earlier decisions: "It is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment," and "it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case." *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368, 398 [9:458, 470]. The rule so laid down has been often affirmed, and constantly acted on. *Grand Gulf R. Co.* v. *Marshall*, 53 U. S. 12 How. 165, 167 [13:938, 939]; *Bridge Proprietors* v. *Hoboken Co.* 68 U. S. 1 Wall. 116, 143 [17:571, 576]; *Steines* v. *Franklin County*, 81 U. S. 14 Wall. 15, 21 [20:846, 848]. In *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257, 263 [20:635, 637], *Mr. Justice* Bradley declared the rule to be well settled that "Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one." And in many recent cases, under section 709 of the Revised Statutes, this court, speaking by the Chief Justice, has reasserted the rule that to give it jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that "its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without de-

ciding it." *Brown* v. *Atwell*, 92 U. S. 327 [23: 511]; *Citizens Bank* v. *Board of Liquidation*, 98 U. S. 140 [25:114]; *Chouteau* v. *Gibson*, 111 U. S. 200 [28:400]; *Adams County* v. *Burlington & M. R. Co.* 112 U. S. 123 [28:678]; *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 [29: 118].

In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative Act of the State has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by *Mr. Justice* Miller. "It must be the Constitution or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the State, in the matter in which the conflict is supposed to exist, or the case for this court does not arise." *Missouri & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177, 181 [18:881, 882]. "We are not authorized by the Judiciary Act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox* v. *Exchange Bank*, 79 U. S. 12 Wall. 379, 383 [20:414, 415].

As later decisions have shown, it is not strictly and literally true that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the Legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law.

In *Williams* v. *Bruffy*, 96 U. S. 176, 183 [24: 716, 717], it was said by *Mr. Justice* Field, delivering judgment, "Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of the clause cited relating to the jurisdiction of this court" (Rev. Stat. § 709); and it was therefore held that a statute of the so called Confederate States, if enforced by one of the States as its law, was within the prohibition of the Constitution.

So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the Legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *U. S.* v. *New Orleans*, 98 U. S. 381, 392 [25:225]; *Meriwether* v. *Garrett*, 102 U. S. 472 [26:197]. Accordingly, where the city council of Charleston, upon which the Legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council; and when the ordinances were passed under the supposed authority of the legislative Act, their provisions became the law of the State. *Murray* v. *Charleston*, 96 U. S. 432, 440 [24:760, 761]. See also *Home Ins. Co.* v. *City Council of Augusta*, 93 U. S. 116 [23:825].

But the ordinance now in question involved no exercise of legislative power. The Legislature, in the charter granted to the plaintiff, provided that nothing therein should "be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use." The Legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the Legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. *N. O., M. & T. R. Co.* v. *Ellerman*, 105 U. S. 166, 172 [26:1015, 1017]; *Day* v. *Green*, 4 Cush. 433, 438. The permission granted by the city council to the defendant Company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the State. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States.

The cases of *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674 [29:525], and *St. Tammany Water Works Co.* v. *New Orleans Water Works Co.* 120 U. S. 64 [30:563], on which the plaintiff relied in support of its bill, were essentially different from the case at bar. In each of those cases, the validity of the article of the Consti-

tution of 1879 abolishing monopolies was drawn in question by the bill, and relied on by the defendants. Rivers did not contend that his property was contiguous to the river. The St. Tammany Water Works Company had been incorporated since the New Orleans Water Works Company, under a general statute of the State, for the purpose of supplying the whole city and its inhabitants with water. And both those cases were appeals from the Circuit Court of the United States, upon which this court was not restricted to the consideration of federal questions decided below, but had jurisdiction to determine the whole case.

The difference in the extent of the jurisdiction of this court on writ of error to the highest court of a State, and on appeal from a Circuit Court of the United States—as affected by the ground of the decision of the court below—is illustrated by the cases of contracts payable in Confederate currency, or made in consideration of loans of Confederate currency, during the war of the rebellion, and by the cases of promissory notes given before that war for the price of persons sold as slaves.

In *Thorington* v. *Smith*, 75 U. S. 8 Wall. 1 [19:361], this court, reversing a judgment of the Circuit Court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the Circuit Courts of the United States. *Planters Bank* v. *Union Bank*, 83 U. S. 16 Wall. 483, 497 [21: 473, 479]; *Confederate Note Case*, 86 U. S. 19 Wall. 548 [22:196]; *Wilmington & W. R. Co.* v. *King*, 91 U. S. 3 [23:186]; *Cook* v. *Lillo*, 103 U. S. 792 [26:460]. Yet in *Bethel* v. *Demaret*, 77 U. S. 10 Wall. 537 [19:1007], where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the Supreme Court of Louisiana, on the ground that the notes and mortgage were nullities, because the Confederate currency, which constituted the consideration, was illegal by the general law of the State, this court dismissed the writ of error, because no statute of the State was drawn in question. And in *Bank of West Tennessee* v. *Citizens Bank of Louisiana*, 80 U. S. 13 Wall. 482 [20:514]; *S. C.* 81 U. S. 14 Wall. 9 [20:514], where the Supreme Court of Louisiana, affirming a judgment rendered by an inferior court of the State before the adoption of article 127 of the State Constitution of 1868, by which "all agreements, the consideration of which was Confederate money, notes or bonds, are null and void, and shall not be enforced by the courts of this State," dismissed a suit to recover money payable in Confederate notes, basing its judgment both upon that article of the Constitution and upon adjudications in that State before its adoption, this court, speaking by *Mr. Justice* Swayne, dismissed a writ of error, and said: "The result in this case would have been necessarily the same if the Constitution had not contained the provision in question. This brings the case within the authority of *Bethel* v. *Demaret*," above cited. In another case at the same term, the disposition by this court of the case of *Bank of West Tennessee* v. *Citizens Bank of Louisiana* was thus explained by *Mr. Justice* Miller: "As it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control, and was sufficient to support the judgment, because another reason was given which, if it had been the only one, we could review and might reverse." *Delmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661, 666 [20: 757, 759]. In *Delmas* v. *Insurance Co.*, just cited, where the judgment of the Louisiana court was put wholly upon that article of the Constitution, this court therefore took jurisdiction, and reversed the judgment, but said that where a decision of the highest court of a State, "whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review." And in *Tarver* v. *Keach*, 82 U. S. 15 Wall. 67 [21:82], as well as in *Dugger* v. *Bocock*, 104 U. S. 596, 601 [26:846, 848], the proposition thus stated was affirmed, and was acted on by dismissing a writ of error to a state court. So in *Stevenson* v. *Williams*, 86 U. S. 19 Wall. 572 [22:162], where a judgment of the Supreme Court of Louisiana, annulling a judgment of a lower court, on the ground that the promissory notes on which it was rendered had been given for a loan of Confederate money, was brought here by writ of error, this court, speaking by *Mr. Justice* Field, after disposing of a distinct federal question, and observing that the aforesaid ground would not be deemed, in a federal court, sufficient to set aside the judgment, said: "But the ruling of the state court, in these particulars, however erroneous, is not subject to review by us. It presents no federal question for our examination. It conflicts with no part of the Constitution, laws or treaties of the United States. Had the state court refused to uphold the judgment because of the provision in the Constitution of the State, subsequently adopted, prohibiting the enforcement of contracts founded upon Confederate money, a federal question would have been presented. That provision, however, does not appear to have caused the ruling." 86 U. S. 19 Wall. 576, 577 [22:163, 164]. Those cases clearly establish that, on a writ of error to a state court, this court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the State Constitution; but that if it was based on the previous law of the State, this court had no jurisdiction to review it, although the view taken by the state court was adverse to the view taken by this court in earlier and later cases coming up from a Circuit Court of the United States.

In actions brought upon promissory notes given for the purchase of slaves before the war, the same distinction has been maintained. The Constitutions adopted in 1868, by the States of Arkansas, Georgia and Louisiana, respectively, provided that the courts of the State should not enforce any contract for the purchase or sale of slaves. In *Osborn* v. *Nicholson*, 80 U. S. 13 Wall. 654 [20:689], a judgment rendered for the defendant by the Circuit Court of the United States for the District of Arkansas, in an ac-

tion on a promissory note for the purchase of a slave, was reversed, because this court was of opinion that the contract was valid at the time when it was made, and therefore its obligation was impaired by the subsequent Constitution. For like reasons, this court, in *White* v. *Hart*, 80 U. S. 13 Wall. 646 [20:685], reversed a similar judgment rendered by the Supreme Court of the State of Georgia, and based upon the provision of its Constitution. But in *Palmer* v. *Marston*, 81 U. S. 14 Wall. 10 [20:826], where the Supreme Court of Louisiana, in a similar action, had placed its judgment for the defendant upon the law of the State, as established and acted upon before the adoption of the Constitution of 1868 and since adhered to, and had declined to pass upon the question whether the provision of that Constitution was valid or invalid as an Act of Legislation and in relation to the article of the Constitution of the United States against impairing the obligation of contracts, because it was unnecessary and could have no practical influence upon the result, this court dismissed a writ of error, for want of jurisdiction, saying: "It thus appears that the provision of the State Constitution upon the subject of slave contracts was in no wise drawn in question. The decision was governed by the settled principles of the jurisprudence of the State. In such cases this court has no power of review." "Substantially the same question arose in *Bank of West Tennessee* v. *Citizens Bank of Louisiana* [*supra*], heretofore decided. The writ of error was dismissed for want of jurisdiction. The same disposition must be made in this case."

These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon a judgment of the highest court of a State, giving effect to a statute of the State, drawn in question as affecting the obligation of a previous contract, this court, exercising its paramount authority of determining whether the statute upheld by the state court did impair the obligation of the previous contract, is not concluded by the opinion of the state court as to the validity or the construction of that contract, even if contained in a statute of the State, but determines for itself what that contract was. Leading cases of that class are *Bridge Proprietors* v. *Hoboken Co.* 68 U. S. 1 Wall. 116 [17: 571], in which the state court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract, previously made by the State with the proprietors of a bridge, that no other bridge should be built across the river; and cases in which the state court affirmed the validity of a statute, imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. *Pigua Branch of State Bank* v. *Knoop*, 57 U. S. 16 How. 369 [14: 977]; *Ohio Life Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 416 [14: 997]; *Mechanics & Traders Bank* v. *Debolt*, 59 U. S. 18 How. 380 [15: 458]; *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 [17: 173]; *New Jersey* v. *Yard*, 95 U. S. 104 [24: 352]; *Memphis & C. R. Co.* v. *Gaines*, 97 U. S. 697, 709 [24: 1091, 1094]; *University* v. *People*, 99 U. S. 309 [25: 387]; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244 [27: 922]; *Memphis Gas Light Co.* v. *Shelby County*, 109 U. S. 398 [27: 976]; *Vicksburg S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 [29: 770]. In each of those cases, the state court upheld a right claimed under the later statute, and could not have made the decision that it did without upholding that right; and thus gave effect to the law of the State drawn in question as impairing the obligation of a contract.

The distinction between the two classes of cases—those in which the state court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract—as affecting the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 81 U. S. 14 Wall. 23 [20: 850]. That was a writ of error to the Supreme Judicial Court of Maine, in which a foreclosure, under a Statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. *Mr. Justice* Miller, in delivering judgment, after stating that it did appear that the question whether the Statute of 1857 impaired the obligation of the mortgage contract "was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract," said: "If this were all of the case, we should undoubtedly be bound in this court to inquire whether the Act of 1857 did, as construed by that court, impair the obligation of the contract. *Bridge Proprietors* v. *Hoboken Co.* 68 U. S. 1 Wall. 116 [17: 571]. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the Statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence. Now, if the state court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the Supreme Court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest, even if it had been in error as to the effect of the Act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. *Rector* v. *Ashley*, 73 U. S. 6 Wall. 142 [18: 733]; *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 [20: 635]; *Steines* v. *Franklin County*, 81 U. S. 14 Wall. 15 [20: 846]. The writ of error must therefore be dismissed for want of jurisdiction." *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 81 U. S. 14 Wall. 25, 26 [20: 851].

The result of the authorities, applying to cases of contracts the settled rules, that in or-

der to give this court jurisdiction of a writ of error to a state court, a federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the state court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, it may on that ground affirm the judgment. So, when the state court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.

In the present case, the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the general law of the State, and upon the construction and effect of the charter from the Legislature to the plaintiff Company, and of the license from the city council to the defendant Company, and in no degree upon the Constitution or any law of the State subsequent to the plaintiff's charter. The case cannot be distinguished in principle from the cases above cited, in which writs of error to state courts have been dismissed for want of jurisdiction. As was said in *Bank of West Tennessee* v. *Citizens Bank of Louisiana*, 80 U. S. 13 Wall. 432 [20: 514], above cited, "The result in this case would have been necessarily the same if the Constitution had not contained the provision in question."

Writ of error dismissed for want of jurisdiction.

WILLIAM H. TOMPKINS, *Appt.*,
v.
LITTLE ROCK AND FORT SMITH RAILWAY ET AL.

WILLIAM S. WILLIAMS, *Appt.*,
v.
LITTLE ROCK, MISSISSIPPI RIVER AND TEXAS RAILWAY ET AL.

(See S. C. Reporter's ed. 109-127.)

State aid bonds—when create no lien on railroad.

1. Where state bonds, issued to aid a railroad, are void as being in violation of the State Constitution, the acceptance and use of the bonds by the railroad company does not create a lien in favor of the State upon the income of the road for the amount of the bonds, of which a purchaser of the bonds can avail himself as against a subsequent purchaser of the road.

2. A new company, organized by purchasers of such road on mortgage foreclosure, took the road free of incumbrance in favor of the State, and neither the State nor its bondholders are entitled to a sequestration of the income arising therefrom in its hands.

[Nos. 70, 71.]

Argued Jan. 17, 18, 1888. Decided March 19, 1888.

APPEALS from judgments of the Circuit Court of the United States for the Eastern District of Arkansas, dismissing actions to subject the income of defendants' railroads to the payment of the interest due on state aid bonds. *Affirmed.*

Reported below, 18 Fed. Rep. 344, 21 Fed. Rep. 370.

The facts are fully stated in the opinion.

Messrs. **John R. Dos Passos,** *U. M. Rose,* **John McClure,** and *A. H. Garland,* for appellants:

The Act of the General Assembly of the State of Arkansas, of July 21, 1868, created an equitable or statutory lien or charge in favor of the State, upon the income and revenue of the roads.

Eames v. *Johnson*, 4 Allen, 383; Const. art. 10, § 2; *Fletcher* v. *Oliver*, 25 Ark. 295; 1 Desty, Taxation, § 1; *Heine* v. *Levee Comrs.* 86 U. S. 19 Wall. 655 (22:223); *Tompkins* v. *Little Rock & F. S. R. Co.* 15 Fed. Rep. 6; *Coats* v. *Hill*, 41 Ark. 149.

The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached.

2 Story, Eq. Jur. 12th ed. § 1217; *Neate* v. *Marlborough*, 3 Mylne & C. 407, 415; *Price* v. *Palmer*, 23 Hun, 504; *Perry* v. *Board of Missions*, 3 Cent. Rep. 62, 102 N. Y. 99.

The right to foreclose is incident to a mortgage.

Hull v. *Sullivan R. Co.* C. C. U. S. per Curtis, *J.*, 11th Monthly Law Rep. N. S. 138–144.

A lien given by a statute may be enforced in a court of equity, although no mode for its enforcement is given by the statute.

2 Desty, Taxation, 784, and cases cited.

Where the parties came to an agreement as to the produce of land, equity will specifically enforce the agreement against the party who makes it and all persons with notice.

Ketchum v. *St. Louis*, 101 U. S. 306 (25:999); *Legard* v. *Hodges*, 3 Bro. Ch. 531–538; *Ex Parte Wills*, 1 Ves. Jr. 162; *S. C.* 2 Cox, Eq. 233; *Abbott* v. *Stratten*, 3 Jones & La T. 603; *Smith* v. *Patton*, 12 W. Va. 541; *Smith Company* v. *McGuinness*, 14 R. I. 59; *Roach* v. *Ahern*, 17 N. Y. Week. Dig. 188.

A lien is a right to possess and retain property until some charge attaching to it is paid or discharged.

1 Story, Eq. Jur. § 506; Bisph. Prin. Eq. § 351.

The generality of the language creating the lien forms no objection to its validity.

Wilson v. *Boyce*, 92 U. S. 325 (23:610); *Payne* v. *Wilson*, 74 N. Y. 348.

An equitable mortgage may be constituted by any writing from which the intention to mortgage may be gathered.

Wilson v. *Boyce*, 2 Dill. 589; *State* v. *Rusk*, 28 Wis. 636; *State* v. *LaGrange & M. R. Co.* 4 Humph. 488; *McGraw* v. *Memphis & O. R. Co.* 5 Cold. 434; *Whitehead* v. *Vineyard*, 50 Mo. 30.

A long and uninterrupted practice under the statute is good evidence of its construction.

McKeen v. *Delancy*, 9 U. S. 5 Cranch, 22 (3:25); *Union Ins. Co.* v. *Hoge*, 62 U. S. 21 How. 35 (16:61); *Plummer* v. *Plummer*, 37 Miss. 185; *Atty-Gen.* v. *Bank of Cape Fear*, 5 Ired. (N. C.) Eq. 71; *Bailey* v. *Rolfe*, 16 N. H. 247.

The bondholders can avail themselves of the lien.

The fact that the contract is embodied or arises out of a statute does not alter the condition of the parties.

Furman v. *Nichol*, 75 U. S. 8 Wall. 44 (19:370); *Keith* v. *Clark*, 97 U. S. 471 (24:1077); *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 (13:383); *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14:704).

A legislative proposition acted on by a corporation or natural person forms a contract.

Farrington v. *Tennessee*, 95 U. S. 679 (24:558).

If it can be gathered from a subsequent statute, *in pari materia*, what meaning the Legislature attached to the words of a former Act, this will amount to a legislative declaration of its meaning and will govern the construction of the first statute.

U. S. v. *Freeman*, 44 U. S. 3 How. 556 (11:724).

The State of Arkansas could not levy a tax to pay the state aid bonds.

Cheney v. *Jones*, 14 Fla. 587.

The security given by the Railroad Companies to the State is a trust fund for the payment of the debt, and the bondholder has an equitable right to have it thus applied.

Hampton v. *Phipps*, 108 U. S. 260 (27:719); Sheld. Subrogation, § 163; *Kelly* v. *Alabama & C. R. Co.* 58 Ala. 448; *Colt* v. *Barnes*, 64 Ala. 108; *Knighton* v. *Curry*, 62 Ala. 405; *Young* v. *Montgomery & E. R. Co.* 2 Woods, 606.

The complainants can be subrogated to the rights of the State.

1 Story, Eq. Jur. 327, 499, 499a, 638; *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119; *Hand* v. *Savannah & C. R. Co.* 12 S. C. 314; *Kelly* v. *Alabama & C. R. Co.*, *Knighton* v. *Curry*, and *Colt* v. *Barnes*, *supra*.

The lien took effect immediately upon the awards being made.

Flournoy v. *Jeffersonville*, 17 Ind. 169; *Murdock* v. *Woodson*, 2 Dill. 204; *State* v. *McKay*, 43 Mo. 599; *Ackerman* v. *Hunsicker*, 21 Hun, 53; *Brinkmeyer* v. *Browneller*, 55 Ind. 487; *Nelson* v. *Iowa E. R. Co.* 8 American R. Rep. 82; 1 Jones, Mort. §§ 370, 373, 378, 379; *Lawrence* v. *Tucker*, 64 U. S. 23 How. 14 (16:474).

The amount of the intended advances may be indefinite.

Witcwiski v. *Everman*, 51 Miss. 841; *Lovelace* v. *Webb*, 62 Ala. 271; 1 Jones, Mort. 367.

The mortgagee is entitled to the security.

Jones, Mort. § 364; *Maffitt* v. *Rynd*, 69 Pa. 380.

A mortgage for future advances is obligatory.

Shirras v. *Caig*, 11 U. S. 7 Cranch, 34 (3:260); *Ackerman* v. *Hunsicker*, 85 N. Y. 43, where all of the cases are examined. *U. S.* v. *Hooe*, 7 U. S. 3 Cranch, 78 (2:370).

A mortgage of indemnity to a surety is a lien from the time of its execution.

Krutsinger v. *Brown*, 72 Ind. 466; 1 Jones, Mort. § 383.

The Statutes of July 21, 1868, and April 10, 1869, constituted notice to all persons of the lien of the state aid bondholders.

Ketchum v. *St. Louis*, 101 U. S. 306 (25:999); *Hand* v. *Savannah & C. R. Co.* 12 S. C. 314; *Memphis & L. R. Co.* v. *State*, 37 Ark. 642; *Colt* v. *Barnes*, 64 Ala. 108; *Young* v. *Montgomery & E. R. Co.* 2 Woods, 611; *Kelly* v. *Alabama & C. R. Co.* 58 Ala. 498; *Shaw* v. *Little Rock & F. S. R. Co.* 100 U. S. 605 (25:757); *Miller* v. *Rutland & W. R. Co.* 36 Vt. 452.

The state aid bonds issued under the Act of July 21, 1868, were created by the consent of the people of Arkansas, in accordance with the Constitution of that State.

Smith v. *Janesville*, 26 Wis. 291; *Louisville & N. R. Co.* v. *County Ct. of Davidson*, 1 Sneed, 637; *Hammond* v. *Haines*, 25 Md. 541; *Williams* v. *Cammack*, 27 Miss. 209; *Gillespie* v. *Palmer*, 20 Wis. 544; *State* v. *Noyes*, 10 Fost. (N. H.) 292; *Bull* v. *Read*, 13 Gratt. 78; *Johnson* v. *Rich*, 9 Barb. 680; *People* v. *Reynolds*, 10 Ill. 1; *Robinson* v. *Bidwell*, 22 Cal. 379.

The practical construction given to a statute by the public officers of the State, and acted upon by the people is decisive in case of doubt.

Union Ins. Co. v. *Hoge*, 62 U. S. 21 How. 35 (16:61); *Solomon* v. *Cartersville*, 41 Ga. 157; *Plummer* v. *Plummer*, 37 Miss. 185; *Ex Parte Selma & G. R. Co.* 45 Ala. 696.

The decision in *Arkansas* v. *Little Rock, M. R. & T. R. Co.*, 31 Ark. 701, is not binding upon and should not be followed by this court.

Even if those bonds were issued under a law not passed in accordance with the Constitution, the company which had received and negotiated them, and was in the possession of the proceeds derived from that sale, could not be heard in any court to set up such a defense.

Florida Cent. R. Co. v. *Schutte*, 103 U. S. 118 (26: 327); *Ferguson* v. *Landram*, 1 Bush (Ky.), 548; *S. C.* 5 Bush (Ky.), 235; *Jannison* v. *Griswold*, 2 Mo. App. 150; *S. C.* 6 Mo. App. 407; *Burlington* v. *Gilbert*, 31 Iowa, 356; *Bidwell* v. *Pittsburg*, 85 Pa. 418; *Metz* v. *Detroit*, 18 Mich. 495; *People* v. *Murray*, 5 Hill, 472; *Tash* v. *Adams*, 10 Cush. 252; Big. Estop. 509.

Decisions of the state courts will not be followed by the federal courts, unless the very point is involved.

Carroll v. *Carroll*, 57 U. S. 16 How. 275; (14:936); *Tompkins* v. *Little Rock & F. S. R. Co.* 15 Fed. Rep. 6.

Federal courts do not follow the decisions of state tribunals on questions of "general law."

Olcott v. *Fond du Lac County*, 83 U. S. 16 Wall. 628 (21: 382).

Nor will the decisions of state courts be followed in cases involving commercial securities.

Swift v. *Tyson*, 41 U. S. 16 Pet. 1 (10:865); *Watson* v. *Tarpley*, 59 U. S. 18 How. 517, (15:509); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 (17 :298); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175 (17:520); *Buts* v. *Muscatine*, 75 U. S. 8 Wall. 575 (19:490); *Olcott* v. *Fond du Lac County*, 83 U. S. 16 Wall. 678 (21:382); *Pine*

Grove v. *Talcott*, 86 U. S. 19 Wall. 667 (22:227); *Venice* v. *Murdock*, 92 U. S. 494 (23:583); *Johnson County* v. *Thayer*, 94 U. S. 631 (24:133); *Cass County* v. *Johnston*, 95 U. S. 362 (24:416); *Fairfield* v. *Gallatin County*, 100 U. S. 47, (25:544); *Oates* v. *First Nat. Bank*, 100 U. S. 239 (25:580); *Florida Cent. R. Co.* v. *Schutte*, 103 U. S. 118 (26:327).

The decision of the Supreme Court of Arkansas is not binding, because it was not rendered until after the state aid bonds had been issued to the railroads and by them negotiated.

Rowan v. *Runnels*, 46 U. S. 5 How. 134 (12:85); *Pine Grove* v. *Talcott*, *supra*; *Christian Union* v. *Yount*, 101 U. S. 357 (25:890); *Douglass* v. *Pike County*, 101 U. S. 687 (25:971); *Thompson* v. *Perrine*, 103 U. S. 806, 811 (26:612, 615.)

The Little Rock and Fort Smith Railroad Company was, and the appellees, being privies, are, estopped from questioning the validity of the state aid bonds.

Jamison v. *Griswold*, 2 Mo. App. 150; *S. C.* 6 Mo. App. 405; *Ferguson* v. *Landram*, 5 Bush (Ky.), 230; *S. C.* 1 Bush, 548; *Van Hook* v. *Whitlock*, 26 Wend. 43; *Lee* v. *Tillotson*, 24 Wend. 337; *People* v. *Murray*, 5 Hill, 468; *Burlington* v. *Gilbert*, 31 Iowa, 356; *B. C. R. & M. R. Co.* v. *Stewart*, 39 Iowa, 267.

The Act of Arkansas of May 29, 1874, is void.

Tompkins v. *Little Rock & F. S. R. Co.* 15 Fed. Rep. 6; *Farrington* v. *Tennessee*, 95 U. S. 679 (24: 558.)

The affirmative defenses to the bill constitute no answer in law or equity to the relief demanded in these suits.

Trenton Bkg. Co. v. *Duncan*, 86 N. Y. 221.

Construction mortgages embrace after acquired or after constructed property.

Shepley v. *Atlantic & St. L. R. Co.* 55 Me. 395; *Shaw* v. *Norfolk County R. Co.* 5 Gray, 162; *Phillips* v. *Winslow*, 18 B. Mon. 431; *Ellis* v. *Boston, H. etc. R. Co.* 107 Mass. 1; *Jessup* v. *Bridge*, 11 Iowa, 572; *Dunham* v. *Isett*, 15 Iowa, 284; *Seymour* v. *Canandaigua & N. F. R. Co.* 25 Barb. 284; *Willink* v. *Morris Canal & Bkg. Co.* 4 N. J. Eq. 377.

***Messrs.* C. W. Huntington, and John F. Dillon,** for appellees:

Assuming the Act of July 21, 1868, to be valid, no lien was created by the Act or by the Act of April 10, 1869.

Florida Cent. R. Co. v. *Schutte*, 103 U. S. 140 (26:385); *Fletcher* v. *Oliver*, 25 Ark. 295; *Worthen* v. *Badgett*, 32 Ark. 539.

An assignment of earnings, in order to be effectual, must necessarily carry with it an equitable lien on the property from which the earnings are to be derived.

Watson v. *Wellington*, 1 Russ. & M. 602; *Yeates* v. *Groves*, 1 Ves. Jr. 280; *Lett* v. *Morris*, 4 Sim. 607; *Wright* v. *Ellison*, 68 U. S. 1 Wall. 23 (17: 557); *Legard* v. *Hodges*, 1 Ves. Jr. 478; *Adams* v. *Boston, H. & E. R. Co.* 1 Holmes, C. C. 30; 2 Story, Eq. Jur. § 1249; *Mornington* v. *Keane*, 2 De Gex & J. 292; *Pinch* v. *Anthony*, 8 Allen, 536; *Re Strand Co.* 3 De Gex, J. & S. 147.

In order to raise a trust, certain particular lands, moneys or funds must be appropriated.

Mornington v. *Keane*, 2 De Gex & J. 292 (overruling *Roundell* v. *Breary*, 2 Vern. 482; and *Wellesley* v. *Wellesley*, 4 Mylne & C. 561; *S. C.* 10 Sim. 256); 2 Story, Eq. Jur. §§ 1231 a, 1249; *Finch* v. *Winchelsea*, 1 P. Wms. 282; *Fremoult* v. *Dedire*, 1 P. Wms. 429; *Jackson* v. *Jackson*, 4 Bro. Ch. 462; *Coventry* v. *Coventry*, 2 P. Wms. 222; *Falkner* v. *O'Brien*, 2 Ball & B. 228; *Williams* v. *Lucas*, 2 Cox, 160.

Though a mortgage in express terms pledge the tolls, profits, and income of the company, yet, until possession of the mortgaged premises is actually taken, the earnings thus specifically pledged belong to the company, and may, upon proper proceedings, be seized and applied to the payment of an unsatisfied judgment creditor, in preference to the payment of the interest on the mortgage bonds.

American Bridge Co. v. *Heidelbach*, 94 U. S. 798 (24:144); *Fosdick* v. *Schall*, 99 U. S. 253 (25:342); *Gilman* v. *Illinois & M. Tel. Co.* 91 U. S. 603 (23:405); *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *Perkins* v. *Deptford Pier Co.* 13 Sim. 277, 281; *Garrett* v. *May*, 19 Md. 177; *Cincinnati* v. *Morgan*, 70 U. S. 3 Wall. 275 (18:146).

The Acts of July 21, 1868, and April 10, 1869, are to be construed in connection with the former State Aid Act of March 18, 1867.

Ellis v. *Paige*, 1 Pick. 45; *Rex.* v. *Loxdale*, 1 Burr. 447; *Dickenson* v. *Fletcher*, L. R. 9 C. P. 8; *Queen* v. *Price*, L. R. 6 Q. B. 411; *Ex Parte Copeland*, 2 De Gex, M. & G. 914; *American Bridge Co.* v. *Heidelbach*, *supra*.

The liens created by the mortgage deeds under which the appellees respectively derive their titles are paramount and superior, in point of time as well as of equity, to any liens which can be asserted in behalf of the appellants.

Ackerman v. *Hunsicker*, 21 Hun, 53; *Brinkmeyer* v. *Brownell*, 55 Ind. 487; *Boswell* v. *Goodwin*, 31 Conn. 74; *S. C.* 3 Am. L. Reg. N. S. 79; *Nelson* v. *Iowa E. R. Co.* 8 Am. R. Rep. 82; 1 Jones, Mort. §§ 370, 373, 378; *Flournoy* v. *Jeffersonville*, 17 Ind. 169.

If any lien was created by either of the Acts, such lien was for the sole and exclusive benefit of the State.

Tennessee Bond Cases, 114 U. S. 663 (29:281); *Chamberlain* v. *St. Paul & S. C. R. Co.* 92 U. S. 299 (23:715).

Said alleged Act of July 21, 1868, never became a valid law of the State of Arkansas.

Floyd Acceptances, 74 U. S. 7 Wall. 666 (19: 169); Cooley, Const. Lim. 156, and cases cited; *Arkansas* v. *Little Rock, M. R. & T. R. Co.* 31 Ark. 701; *Marsh* v. *Fulton County*, 77 U. S. 10 Wall. 676 (19:1040); *Allen* v. *Louisiana*, 103 U. S. 83 (26:318).

The decision of the Supreme Court of Arkansas, as to the unconstitutionality of the Act of July 21, 1868, is binding and conclusive upon this court, as a rule of decision.

Elmwood v. *Marcy*, 92 U. S. 289 (23:710); *East Oakland* v. *Skinner*, 94 U. S. 255 (24:125); *Norton* v. *Shelby County*, 118 U. S. 425 (30:178); *Olcott* v. *Fond du Lac County*, 83 U. S. 16 Wall. 678 (21:382); *Florida Cent. R. Co.* v. *Schutte*, 103 U. S. 118 (26:327); *Fairfield* v. *Gallatin County*, 100 U. S. 47 (25:544); *Boyd* v. *Alabama*, 94 U. S. 645 (24: 302); *Moores* v. *Citizens Nat. Bank*, 104 U. S. 625 (26: 870); *Claiborne County* v. *Brooks*, 111 U. S. 401, 410 (28:471, 474).

If the Act of July 21, 1868, is unconstitutional, and the bonds issued thereunder null and void, the appellants are not entitled to re-

lief under the decision in the case of *Florida Cent. R. Co.* v. *Schutte*, 103 U. S. 118 (26:327). *Holland* v. *Florida*, 15 Fla. 455; *Florida* v. *Florida Cent. R. Co.* 15 Fla. 690; *Otis* v. *Cullum*, 92 U. S. 447 (23:496); *Loan Association* v. *Topeka*, 87 U. S. 20 Wall. 655 (22:455).

The defendant Corporations hold the legal titles to their respective roads and properties as *bona fide* purchasers thereof for value, and without notice of the liens now asserted by the appellants.

Brant v. *Virginia Coal Co.* 93 U. S. 326 (23: 927); *Curtis* v. *Leavitt*, 15 N. Y. 194; *Johnson County* v. *Thayer*, 94 U. S. 631 (24:133).

The fact that the purchasers were bondholders of the old companies, and that the purchases were made under an agreement which they had entered into with each other prior to the sale, is wholly immaterial.

Smith v. *Chicago & N. W. R. Co.* 18 Wis. 17; *Gilman* v. *Sheboygan & F. R. Co.* 37 Wis. 317; *Com.* v. *Central Pass. R. Co.* 52 Pa. 507; *Morgan Co.* v. *Thomas*, 76 Ill. 120; *Stewart's Appeal*, 72 Pa. 291.

Notice to, or the knowlege of, a stockholder, or even a director, as to certain facts, is not notice to the corporation.

Commercial Bank v. *Cunningham*, 24 Pick. 270; *Washington Bank* v. *Lewis*, 22 Pick. 24; *Housatonic Bank* v. *Martin*, 1 Met. 294; *Custer* v. *Tompkins County Bank*, 9 Pa. 27; *Bank of Pittsburgh* v. *Whitehead*, 10 Watts, 397; *Re Carew's Estate Act*, 31 Beav. 39.

The appellants are estopped by their own laches from setting up a lien against the roads and properties of the defendant Corporations, and from asserting the equitable right of subrogation.

Smith v. *Clay*, 2 Amb. 645; *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 811 (24:326); *Wilson* v. *Anthony*, 19 Ark. 16; *Adams* v. *Taylor*, 14 Ark. 62; *Johnson* v. *Johnson*, 5 Ala. 90; *Ferson* v. *Sanger*, 2 Ware, 256; *Fisher* v. *Boody*, 1 Curt. 219; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 141; 2 Story, Eq. § 1520; *Veazie* v. *Williams*, 8 Story, 611; *Tash* v. *Adams*, 10 Cush. 252; *Fuller* v. *Melrose*, 1 Allen, 166; Story, Eq. § 1520 and note 8.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These cases may properly be considered together. The material facts are these:

The Little Rock and Fort Smith Railroad Company was incorporated by the State of Arkansas, January 22, 1855, to build and operate a railroad in that State from Little Rock, by the way of Van Buren, to Fort Smith. The Mississippi, Ouachita and Red River Railroad Company was also incorporated by the State on the same day, to build and operate a railroad from the Mississippi River near Gaines' Landing, through or near Camden, to some point on the Red River, at or near Fulton, and thence to the boundary line between Arkansas and Texas. The Little Rock, Pine Bluff and New Orleans Railroad Company was organized November 23, 1868, under the general railroad law of Arkansas, passed July 23, 1868, to build and operate another railroad from Little Rock, through or near Pine Bluff and Monticello, to the state line, with a branch from Pine Bluff to Eunice.

On the 21st of July, 1868, the General Assembly passed "an Act to aid in the construction of railroads." By this Act the State, "for the purpose of securing such lines of railroad in this State as the interests of the people may from time to time require," pledged itself "to issue to each railroad company or corporation, which shall become entitled thereto, the bonds of this State, in the sum of one thousand dollars each, payable in thirty years from the date thereof, with coupons thereto attached, for the payment of interest on the same in the City of New York, semi-annually, at the rate of seven per cent per annum, in the sum of fifteen thousand dollars in bonds for each mile of railroad which has not received a land grant from the United States, and ten thousand dollars in bonds for each mile of railroad which has received a land grant from the United States, on account of which such bonds shall be due and issuable, as provided." To get the aid application was required to be made to the board of railroad commissioners for "the loan of state credit herein provided for, and its approval by that board obtained.

The bonds were to be under the seal of the State, and attested by the Secretary of State, and they, or the avails thereof, were to be used "solely for the purpose of providing for the ironing, equipping, building, and completing said road." They were to be issued only as each ten miles or more of the road was prepared for the iron rails.

Sections 7 and 8, which are principally relied on as the ground of recovery, are as follows:

"Sec. 7. *Be it further enacted*, That the Legislature shall from time to time impose upon each railroad company, to which bonds shall have been issued, a tax equal to the amount of the annual interest upon such bonds then outstanding and unpaid, which tax may be paid in money or in the past due coupons of the State at par, and after the expiration of five years from the completion of said road the Legislature shall impose an additional special tax of two and one half per cent per annum upon the whole amount of state aid granted to such company, payable in money or in the bonds and coupons of the State at par; and, if in money, the same shall be invested by the Treasurer of the State in the bonds of the State at their current market value. The taxation in this section provided to continue until the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the State: *Provided*, That nothing herein contained shall be so construed as to deprive any company, securing the loan of the bonds of the State herein provided for, from paying the whole amount due from such company to the State at any time in the bonds of the State loaned in aid of railroads or the coupons thereon, or in money.

"Sec. 8. *Be it further enacted*, That in the case said company shall fail to pay the taxes imposed by the preceding section, at the time the same become due and for sixty days thereafter, it shall be the duty of the Treasurer of the State, by writ of sequestration, to seize and take possession of the income and revenues of said company until the amount of said defaults

shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its proper officers."

In this statute the tax provided for in section 7 was to be imposed by the Legislature from time to time, but on the 10th of April, 1869, another Act was passed, "to provide for paying the interest of the bonds to aid in the construction of railroads," by which it was enacted that the interest on all bonds issued under the Act of 1868 should be made payable on the first day of April and the first day of October in each year, and it was made the duty of "the auditor of public accounts, on or before the first day of June in each year", to "certify to the treasurer the amount of bonds issued to each railroad company, the amount of semi-annual interest that will accrue thereon—that is to say, the amount of interest the State will have to pay on the first day of October of that year, on the bonds issued to each of said railroad companies—and the amount of tax required from each of said railroad companies to pay the same, which tax shall be deemed due and payable on the thirtieth day of June of that year." Similar provision was also made for the interest falling due in April. Upon the receipt of a certificate from the auditor, it was made the duty of the treasurer to "cause notice to be served upon each railroad company, on or before the twentieth day of June," or the twentieth day of December, as the case might be, "in each year, specifying the amount of tax to be paid, which amount shall be the interest on said bonds for the said period, and demanding payment of the same into the treasury" at the appointed time. If default occurred in the payment of the tax, and it continued for sixty days, it was made the duty of the treasurer, "through the attorney-general, to make and file a petition, under the seal of the treasurer's office, in the Pulaski Chancery Court, setting forth the amount due and the fact of such default, praying the issue of the writ of sequestration contemplated in said Act, and the appointment of a receiver, to be named in said petition, to receive in his behalf the revenue and income of said company, for the purpose specified in said Act, which writ shall issue upon the filing of the petition for the same." Upon the issue of the writ so ordered, the receiver therein named was required to "take possession of all the income and revenues of the defaulting company, with authority to demand and receive all moneys coming to the same from the operation of such road;" and it was further made "the duty of all officers of said company to return all moneys to him, for receiving which he may require the submission of all necessary books, papers, and accounts to him, and may examine any and all persons under oath; and any person making false returns, or failing to pay over moneys, shall be deemed guilty of a misdemeanor, and any person swearing falsely shall be declared guilty of perjury." Section 5 of this Act was as follows:

"Sec. 5. That such receiver shall give such bond as the treasurer may require, shall be removable at the pleasure of the treasurer, and a successor appointed, to be approved by the chancellor. He shall, at the end of each month, make full report and return to the treasurer of all moneys received by him, with his estimate of the necessary cost of operating said road, which on the approval and order of said treasurer, shall be paid out of the money so returned, the surplus or net proceeds to be applied in the discharge of the tax due and unpaid; and shall so continue until such amount in default shall be paid, with the reasonable cost of sequestration, to be taxed and certified by the chancellor, when the treasurer shall account with said company and withdraw said receiver from the management of its affairs."

The Little Rock and Fort Smith Railroad Company received a land grant from the United States, and on the 28th of April, 1869, its application to the State for "the benefits of" the Act of July 21, 1868, was granted as a "loan of state credit." Afterwards, beginning April 2, 1870, state bonds to the amount of one million dollars were issued to the company, as its road was built, in the following form:

"No.—— No.——

"$1,000. United States of America. $1,000.

"It is hereby certified that the State of Arkansas is indebted unto the Little Rock and Fort Smith Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, redeemable at the City of New York thirty years from date hereof, with interest at the rate of seven per cent per annum, payable semi-annually, in the City of New York, on the first day of April and October in each year, on the presentation of the proper coupons hereto annexed. The faith and credit of the State are hereby solemnly and irrevocably pledged for the payment of the interest and redemption of the principal of this bond. Issued in pursuance of an Act of the General Assembly of the State of Arkansas, approved July 21, 1868, entitled "An Act to Aid in the Construction of Railroads," the said Act having been submitted to and duly ratified by the people of the State, at the general election held November 8, 1868.

"In witness whereof, the Governor of the State has signed this bond, the State Treasurer has countersigned the same, and the seal of the State has been affixed at the City of Little Rock, Arkansas, this first day of April, 1870.

[Seal.] "Powell Clayton, Governor,
"R. J. T. White, Secretary of State,
"Henry Page, Treasurer,
"J. R. Berry, Auditor."

Each of said bonds at the time of their issue had sixty interest coupons thereto attached, numbered from one to sixty inclusive, and which, with the exception of the time of payment and number thereon, are as follows, to wit:

$35.00. $35.00.

"The Treasurer of the State of Arkansas will pay to bearer thirty-five dollars, in the City of New York, on the first day of October, 1870, being semi-annual interest due on bond No.——.

"L. R. & F. S. R. R. J. R. Berry, Auditor."

On the 22d of December, 1869, the railroad company executed a mortgage on its railroad and the income thereof to Henry W. Paine and Samuel T. Dana, to secure a proposed issue of bonds to the amount of $3,500,000, and on the 20th of June, 1870, another mortgage to the

same parties on its land grant to secure another proposed issue of $5,000,000.

Interest was paid on the state bonds up to and including April 1, 1873. Default having been made in the payment of interest upon the bonds issued under the railroad mortgage, a suit was begun by the trustees, May 12, 1874, for the foreclosure. To this suit the State was not a party, but in the bill the fact that state aid had been granted to the company was set forth, and the prayer was for a sale "subject to the lien of the State of Arkansas, if Your Honor shall find and decree that any lien existed in favor of said State prior to the lien created by said deed of mortgage." Upon this bill a decree was rendered *pro confesso*, directing a sale of the mortgaged property, but making no decision and giving no directions as to the suggestion of a lien in favor of the State. Under this decree the property was bought by a committee of the bondholders for a nominal sum, and they organized a new corporation under the laws of Arkansas by the name of the Little Rock and Fort Smith Railway, to take the title, the original bondholders, or such of them as elected to come in, being the stockholders. Afterwards the property purchased was conveyed to the new Corporation.

On the 15th of March, 1869, state aid was awarded to the Little Rock, Pine Bluff and New Orleans Railroad Company under the Act of July 21, 1868, to the amount of $1,200,000, and on the 25th of June, 1870, to the Mississippi, Ouachita and Red River Railroad Company to the amount of $600,000. On the 20th of April, 1870, the Little Rock, Pine Bluff and New Orleans Company mortgaged its railroad and income to Benjamin A. Farnham and David B. Sickles to secure an issue of $1,200,000 of bonds, and on the 3d of May, 1870, the Mississippi, Ouachita and Red River Railroad Company mortgaged its road and income to the same trustees to secure another issue of bonds, amounting to $2,040,000. In October, 1873, these companies were consolidated into one corporation, under the name of the Texas, Mississippi and Northwestern Railroad Company. Default having been made in the payment of interest on these bonds, suits were begun by the trustees, March 15, 1875, to foreclose the mortgages under which the two roads were sold by order of the court, and afterwards conveyances made to the Little Rock, Mississippi and Texas Railway. The proceedings in these suits were substantially the same as in that against the Little Rock and Fort Smith Railroad Company.

No interest was paid on the state bonds after April, 1873, and at its May Term, 1877, the Supreme Court of the State decided that the bonds were void, because issued in violation of one of the provisions of the Constitution of the State. *Arkansas* v. *Little Rock, M. R. & T. R. Co.* 31 Ark. 701. On the 29th of May, 1874, the Legislature repealed the Act of April 10, 1869, being the Act above mentioned, "to provide for paying the interest on bonds issued to aid in the construction of railroads."

William H. Tompkins is the owner of 2,286 coupons cut from the bonds of the State issued to the Little Rock and Fort Smith Railroad Company, which his mother bought in open market in 1870, without notice, and which she gave to him on his coming of age in 1875 or 1876, and he, on the 15th of March, 1882, began the suit against the Little Rock and Fort Smith Railway, in which he appears here as appellant, in the Circuit Court of the United States for the Eastern District of Arkansas, "on behalf of himself and all holders of bonds issued by the State" to the Little Rock and Fort Smith Railroad Company, the object of which is to subject the earnings of the railroad formerly owned by the Little Rock and Fort Smith Railroad Company to the payment of the interest due on the state aid bonds, and to require the new or reorganized Company to account for the earnings since the road has been in its possession, and apply the amount due in the same way.

William S. Williams is the owner of bonds issued to the Little Rock, Pine Bluff and New Orleans Railroad Company to the amount of $67,000, and of bonds issued to the Mississippi, Ouachita and Red River Railroad Company to the amount of $24,000, on all of which coupons No. 6 and thereafter remain unpaid. These bonds, with the coupons attached, he bought in open market at the current price, after the decision in *Arkansas* v. *Little Rock, Mississippi River and Texas Railway*, above referred to, but without notice of any want of power or defect in the issue of the bonds other than is shown on their face. The suit in which he is here as appellant was brought in the same court, in the same way as that of Tompkins, on the 29th of January, 1883, against the Little Rock, Mississippi and Texas Railway to obtain substantially the same relief. Both bills were dismissed after hearing, and from decrees to that effect these appeals were taken. Two opinions were filed in the court below, one by the presiding justice in favor of the decree, and reported in 18 Federal Reporter, 344, and the other by the District Judge against it, and reported in 21 Federal Reporter, 370.

The liability of the present Companies, or the roads in their hands, for the payment of the state bonds depends entirely on the operation and effect of the Acts of July 21, 1868, and April 10, 1869, under which the bonds were issued, and they, being *in pari materia*, are to be construed together. The position taken in argument, as stated in the brief of counsel, is that the acceptance of the bonds by the several companies created "an equitable or statutory lien or charge in favor of the State, upon the income and revenue of the roads, to the extent necessary to meet the interest and principal upon the bonds as they accrued and became due," and that "the bondholders can avail themselves of the lien." This lien on the income and revenue, it is further claimed, is in law and in fact a charge on the roads themselves, which attached as soon as the awards of aid by the board of railroad commissioners were made to the several original companies, and can be enforced against subsequent incumbrancers or purchasers until the debt of the company to the State is paid in full.

It cannot be denied that the bonds were issued as "a loan of state credit," and that the original companies were bound to hold the State harmless from all liability on the amounts taken by them respectively. This might be done by paying to the State at the times speci-

fied the taxes imposed under the law, either in money or in the bonds and coupons of the State at par, or by paying at any time the whole amount of principal and accrued interest then unpaid, in money or in the bonds of the State loaned in aid of railroads or the coupons thereon. Such is the express provision of section 7 of the Act of 1868. The bonds were bonds of the State, "pure and simple." They carried on their face no express obligation of the Railroad Company to the holder. The promise made by the Company on the acceptance of the bonds was to pay the State, not the bondholder. The failure of the Company to meet its obligations to the State did not operate in any manner to relieve the State from its liability on the bonds. The debt of the State still remained, and was the only debt the bonds expressed on their face. The debt of the Company was to the State for the bond, not to the bondholder on the bond. Payment to the State discharged the obligation of the Company.

What we have thus far said relates to the bonds considered as a valid and constitutional obligation of the State. If they were invalid, and relief was sought on that account against the Company selling them, the liability would be, not on the bonds, but for the money had and received on their sale. That certainly would be the debt of the original company alone, and in no way binding on a purchaser of its property. In *Florida Cent. R. Co.* v. *Schutte*, 103 U. S. 118 [26: 327], the object was to enforce the statutory mortgage the company actually gave the State as security for the issue of the bonds, not to recover the money received for them. There can be no liability of the new Companies in these cases, therefore, unless the acceptance of the bonds by the old companies created the lien which is now contended for on the railroads or their income. In the *Schutte Case* there was the lien, and it was enforced. The question now is, whether a lien was created in these cases which, under the rule in that case, will inure to the benefit of the bondholders.

If we understand the argument for the appellants correctly, it is that because the requisition which is to be made on the Company to meet the installments of interest as they mature, and to provide a fund to pay the principal when it falls due, is called in the statute *a tax*, which may in case of default be collected by a sequestration of the income and revenue of the Company, it necessarily implies a lien on the property from which the income and revenue is to be derived, as security for the payment of the debt; and that this view of the case is strengthened by the further provision for "a discharge of all claims and liens on the road" when the payment is made, which would be unnecessary if it was not intended that a lien on the road should be, and was in fact, created in favor of the State.

It is true that the requisition provided for is called a tax in the statute, but that does not make it a tax in the ordinary sense of that term. By statute in Arkansas, "all property, whether real or personal," except such as shall be "expressly exempted," is "subject to taxation," and must "be entered on the list of taxable property for that purpose." Gantt's Dig. § 5048. Each owner is required to list his own property (§ 5066), and, when valued in the way provided by law, the county clerk is "to make out * * * a complete list or schedule of the taxable property in his county, and the value thereof," placing each separate lot or tract of real property opposite the name of its owner. The aggregate value of the personal property of each owner is also to be set opposite his name. § 5133. This being done, the clerk is to enter the amount of taxes imposed upon each parcel of property, and deliver the list to the proper officer for collection. §§ 5137, 5139. It is then provided by section 5153 that "The lien of the State for the taxes levied for all purposes in each year shall attach to all real and personal property on the first Friday after the first Monday in October in each year, and shall continue until such taxes, with any penalty that may accrue thereon, shall be paid." Taxes upon personal property, if not paid by the owner, may be collected by distraint. § 5173. Taxes on land, not voluntarily paid, are to be collected by a sale of the property. §§ 5185–5188.

Such taxes are undoubtedly liens on the property taxed, for they are in express terms made charges thereon, and there is something directly pointed out to which a lien may attach. The lien is not on the property of the owner generally, but only on that upon or against which the tax is charged. Taxes are also levied and collected in Arkansas for privileges (§§ 5050–5054), but these are not liens on the property of him to whom the privilege is granted. He may be prevented from exercising the privilege until the tax is paid, but the tax is certainly no lien on his property until a seizure has actually been made under some appropriate form of proceeding for its collection, or something else done in that behalf.

In the present case the tax provided for is not on the property of the Company, and it has none of the qualities of a tax for revenue. It is in reality nothing but a way of fixing the amount due at a particular time from the Company to the State on account of the loan of credit under the statute, and demanding its payment. The object is to collect a debt due, not to require a contribution from the Company for the public necessities. The obligation to pay grows out of a private contract between the State and the Company, not out of the political relations between a Sovereign and his people. The rights of the respective parties depend on the terms of the agreement they have entered into, not on the reciprocal duties between a State in its public capacity and its citizens. An exaction by the State under such circumstances and for such purposes is not made a lien on the property of the person who is to pay the money by simply calling it a tax. To create a charge there must be something more than the mere giving of a name to the requisition that is made. In short, the statute which authorizes the requisition must in express terms or by reasonable implication establish a lien. That has been done in Arkansas so far as taxes for revenue are concerned. The question to be determined is whether the same thing has been done in respect to the liability of railroad companies to the State under the statutes now in question.

Certainly no such lien has been created in

express terms. A provision for the "discharge from all claims or liens" does not of itself establish a lien. If the lien does not exist without, such a provision will not create one. The provision may be used in aid of construction if there is doubt, but not as an affirmative grant of a positive right.

Is there anything, then, in the rest of the statute from which the creation of a lien may be reasonably implied? Before the loan could be obtained it was necessary for the company to make a statement to the board of railroad commissioners, setting forth its charter and organization, a map of its line, and the progress made in construction, its financial condition and resources, and for it to furnish such other information as the case might require. The board was also to inspect the road from time to time, and to indicate to the Governor how the aid was being used and applied. If improperly used, the Governor was authorized to withhold all or any part of the bonds, and to take such other steps as he might deem proper, to the end that the bonds should not be squandered. Any action of that kind on the part of the governor was to be reported to the General Assembly, which was empowered to take such steps as might be necessary to protect the interests of the State. If the company failed to complete its road within the time limited by the statute, it was to forfeit its charter and franchises to the State. In all this we see no intention of establishing a lien on the road as security for the loan which was actually made. A right to forfeit a charter and its franchises for not completing that which had been begun does not necessarily imply a prohibition against a sale or incumbrance of property acquired before a forfeiture was in fact enforced. The taking away of the franchises may, under some circumstances, affect the value of the property in the hands of a purchaser, but it cannot ordinarily deprive him of his title. A forfeiture of the charter does not necessarily transfer the road built under it to the State, or give the State any rights therein.

The whole matter therefore depends, so far as the Act of 1868 is concerned, on the operation and effect of section 8, which provides that if the company fails to pay "the taxes imposed" by section 7, "it shall be the duty of the Treasurer of State, by writ of sequestration, to seize and take possession of the income and revenues of said company until the amount of said defaults shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its officers." The Act of 1869 provides the machinery for obtaining this writ of sequestration and carrying it into effect, through a receiver to be appointed by the Pulaski Chancery Court. This receiver is authorized to demand and receive all moneys coming to the company from the operation of the road. To accomplish this it was made the duty of the officers of the company to return all moneys to him, with power on his part to require the submission to his inspection of books, papers, and accounts, and to examine persons under oath. Operating expenses were to be paid by the receiver, on the approval of the Treasurer of State, out of the moneys turned over to him, and only the surplus or net proceeds applied in discharge of the tax. When the tax was satisfied the treasurer was required to "account with said company, and withdraw said receiver from the management of its affairs."

This, it is contended, "created and designated a fund from which the bonds were to be paid, and in case of default named a person who should seize that fund and apply it to the payment of the interest and the principal of the bonds." Such being the case, it is argued, on the supposed authority of *Ketchum* v. *St. Louis*, 101 U. S. 306 [25: 999], that the statute created a lien on the entire income and revenue of the company for the payment of the debt; and as the company relied exclusively on its road for its income and revenue, this lien extended to the road itself as the thing out of which the earnings must necessarily come, and that, too, notwithstanding the road has passed into other hands.

We do not understand that the case relied on warrants any such conclusion. Its facts were peculiar. The Pacific Railroad was mortgaged to the State of Missouri to secure a loan of state aid bonds amounting to $7,000,000. It was unfinished and more money was needed for its completion. Authority was then given the company by the State to issue more bonds for that purpose, to be secured by a first mortgage on a part of the line, which should be superior in lien to that already existing in favor of the State as security for the original loan. Under this legislation a fund commissioner was appointed, who had acquired, by authority of the statute, for the security of the State, "complete control of the earnings and income arising from the property." In this condition of affairs the State was invaded by armed forces during the late civil war; and while the invasion continued much of the property belonging to the company, including bridges, depots, machine shops and track, was destroyed. To raise the money to repair these damages and put the road again in a condition for use, the company applied to the County of St. Louis for a loan of $700,000 of county bonds. In aid of this application the Legislature of Missouri passed a statute authorizing the county to issue the bonds, "under such conditions as may be agreed upon between the said county court and the board of directors of the Pacific Railroad Company," and directing that "the fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of the said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by said Pacific Railroad." This Act was accepted by the railroad company, and the bonds were loaned by the county to the company, under a special arrangement in accordance with its provisions. The fund commissioner had at the time full control of the earnings and income under the provisions of the previous statute. What was done under these circumstances was held to be "not a simple, naked covenant to pay out of a particular fund; but the Act, being accepted by the parties interested, operated

as an equitable assignment of a fixed portion of the fund—an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner, or some other person, could respect without liability to the debtor for so doing. It was an arrangement based on a valuable consideration, which neither the State nor the company, nor both, nor parties claiming under either, with notice, could disregard without the assent of the county, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in the accomplishment of which all the parties to the arrangement were directly interested." In other words, it was a specific appropriation by statute of a fixed and definite portion of the future earnings of the railroad to a particular purpose, with an express statutory provision for a custodian of the earnings as they accrued, whose duty it should be to apply this specified portion in this specified way. No further action of the company was required. The law made it the duty of the custodian of the earnings of the road, whoever he might be, to use this definite amount thereof in this definite way and in no other way whatever, so long as the debt remained. The effect of this was to charge the road as a road, into whosesoever hands it might come, with the payment of this amount of money each month out of its current earnings. If the earnings came into the hands of the person or corporation owning the road for the time being, and the payments were not made as the law required, then some other custodian of the earnings—some other trustee—could be appointed by the proper judicial tribunal, who would obey the law in that behalf.

In the present case, however, there is no specific appropriation of the earnings of the road. The Company is required to pay what is called the tax to enable the State to meet the semi-annual installments of interests on the state bonds and provide a fund for the redemption of the principal whenever it falls due. No specific amount of the earnings of the road is specially set apart by law for that purpose. There is no provision for a custodian of the earnings, whose duty it shall be to pay to the State out of the earnings as they accrue any definite amount on the days named. The tax is to be paid by the Company on certain specified days, but there is no statutory appropriation of earnings for that purpose. If the Company fails to meet the tax as it falls due, "the income and revenues of the said Company" may be sequestered. Under the operation of this sequestration the receiver to be appointed may "take possession of all the income and revenue of said defaulting company, with authority to demand and receive all moneys coming to the same from the operation of such road;" but this falls very far short of a specific appropriation of the earnings of the road as they accrue, so that they can be demanded under the statute as earnings of the road without sequestration. Under the law which was the subject of consideration in *Ketchum's Case*, there was no need of sequestration, because the part of the earnings of the road to be reached was always in equity the property of the county, and the remedy applied was only such as was necessary to enable the county to reduce its own property to its own possession. Here, however, the writ of sequestration is given as a means of enabling the State to collect a debt, not to recover possession of its property. True, in the process of sequestration the State is authorized, through its receiver, to demand and receive the moneys coming to the company from the operation of the road; but this is for the purpose of enabling the State to subject that particular kind of property belonging to the company to the payment of its debt, not to get possession of anything which actually belonged to the State irrespective of its rights under the sequestration proceedings. It is true, also, that in executing its writ of sequestration, the State could, through its receiver, direct the officers of the company as to the disposition of the current earnings of the road, and thus to a certain extent assume the management of the company's affairs. This was not, however, for the purpose of enabling the State to get possession of its own property, but of compelling the company to apply its property to the payment of its debts. Certainly, if A owes B a debt, and agrees that if the debt is not paid at maturity B may apply to a proper judicial tribunal for a receiver to collect the rents of a certain building which he then owned, and apply them on the debt until it is discharged in full, it would not be claimed that B had acquired a lien on the building, or even on the rents, until he had at least commenced proceedings to subject the rents under the agreement. The agreement alone did not make the rents the property of B, or charge the building as security for their payment to him. The rents belonged to A until default in the payment of the debt, and until B took steps to reduce them to possession. If in the mean time the building should be sold by A there would be no rents which B could subject under his agreement, because it was only rents due to A himself that he could give B the right to collect. In *Ketchum's Case* the earnings of the road to the extent that they had been specifically appropriated to the County of St. Louis never did belong to the company after the bonds were accepted, and the grant of the earnings was in equity a grant of such an interest in the road as was necessary to produce the earnings. Hence, a conveyance of the road afterwards to one with notice was necessarily subject to the prior equitable charge on the road which had been created in favor of the county. But here there was never any grant of earnings, and consequently there was never any grant of an equity in the road. The case stands precisely as it would if, instead of a writ of sequestration, it had been agreed that the Pulaski Chancery Court might, on application of the Treasurer of State, issue an ordinary writ of *fieri facias* to subject the property of the Company to the payment of the amount which was then due. No one could properly claim that in such a case any lien in favor of the State existed which would prevent an alienation of its property by the Company before steps were taken to get the execution. The writ of sequestration actually provided for was to issue as an appropriate form of execution to subject any "income and revenue" which the Company

then had to the payment of its debt then due, and in the income and revenue of the company that might be thus subjected was included "all moneys coming to the same from the operation of such road," that is to say, the road in aid of the construction of which the loan of credit was made. But if there were then no moneys coming, or which could be rightfully made to come, to the company from the operation of the road, then there was nothing of that kind of property which could be subjected to the writ. And they neither could come, nor be made to come, to the company unless the original company to which the loan was made and by which the obligation was incurred either owned the road itself or had passed it to another, coupled with a condition that its earnings should be subject to the writ, or something equivalent.

We agree with counsel for the appellants, that if, on an examination of the statutes, read in the light of the circumstances which surrounded the Legislature at the time of their enactment, it appeared to have been the intention to charge the road of the company as a road with a liability for the repayment of the loan to be made, it would be the duty of a court of equity to do everything in its power which was necessary to enforce that charge. And it may also be true that the courts ought to construe the statutes liberally, with a view to the establishment of such a charge as against the company itself or those claiming under it, because, if the charge was actually created by the statutes, those dealing with the company were bound to take notice of it. But after a careful consideration of the statutes, and construing them liberally in favor of the State, we have been unable to find that any such intention did in fact exist. There was a plain and simple way in which such a lien could be created, and that was by providing in express terms for it. That way had been adopted by the State in a statute passed March 18, 1867, and it was the way usually adopted by other States when granting similar aid to their own companies. The wide departure which Arkansas made in this statute from the accustomed form of proceeding, both at home and elsewhere, is strongly indicative of an intention to waive security any further than it was embraced in the reserved power of sequestration. The Constitution of the State gave authority to issue bonds in aid of such works of internal improvement if assented to by the people. If the people gave their consent, then the bonds when issued became a debt of the State, and there was power in the General Assembly, under the Constitution of 1868, to levy taxes for their payment, if necessary.

This disposes of the cases and renders it unnecessary to consider any of the other questions discussed at the bar or in the briefs. In our opinion the new Companies took the roads free of incumbrance in favor of the State; and neither the State nor its bondholders are entitled to a sequestration of the income and revenue arising therefrom in their hands.

The decree of the Circuit Court in each of these cases is consequently affirmed.

Mr. Justice **Blatchford** did not sit in these cases or take any part in their decision.

J. D. CUNNINGHAM, Assignee of S. W. WALLACE, *Plff. in Err.*,

v.

A. B. NORTON ET AL.

(See S. C. Reporter's ed. 77-90.)

Texas Assignment Law—assignment, when valid —description—insolvency.

1. Under the Texas Law of March 24, 1879, an assignment for the benefit of creditors, which directs the assignee to pay to the assignor the surplus remaining after paying consenting creditors in full, does not vitiate the assignment. The law provides that nonconsenting creditors may garnishee the assignee for such surplus.

2. A stipulation in such assignment which is not contrary to the statute does not affect the validity of the assignment, so long as the main purpose is accomplished of appropriating the whole of the debtor's property to the payment of his debts.

3. A general description in the assignment of the property assigned is sufficient.

4. When a person is unable to pay his debts, he is insolvent.

[No. 74.]

Argued Nov. 17, 1887. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment for the defendants sustaining a demurrer in an action by an assignee for levying upon the assigned property. *Reversed.*

The facts are fully stated in the opinion.

Mr. **W. Hallett Phillips,** for plaintiff in error:

An assignment may be made for the benefit of the accepting creditors only.

Keating v. *Vaughn*, 61 Tex. 518; *Piggott* v. *Schram*, 64 Tex. 447; *Livermore* v. *Jenckes*, 62 U. S. 21 How. 124 (16: 55).

A reservation to the assignor of the dividends of such creditors as should refuse to become parties to it was valid.

Austin v. *Johnson*, 7 Humph. 191; *Rahn* v. *M'Elrath*, 6 Watts, 151; *Hindman* v. *Dill*, 11 Ala. 689; *Conkling* v. *Carson*, 11 Ill. 510.

The plaintiffs in attachment having elected to make themselves defendants to the suit, the plaintiff could well pray a judgment against them all.

Thorn Wire Hedge Co. v. *Fuller*, 122 U. S. 535 (30: 1235).

Messrs. E. John Ellis, John Johns, **D. A. McKnight** and *M. L. Crawford*, for defendants in error:

This assignment is not made for the benefit of creditors.

Keating v. *Vaughn*, 61 Tex. 528; *Goodrich* v. *Downs*, 6 Hill, 438; *Jaffray* v. *McGehee*, 107 U. S. 365 (27: 497); *Grover* v. *Wakeman*, 11 Wend. 187*; Burr. Assign. § 352; *Keller* v. *Smalley*, 63 Tex. 516; *Mullan* v. *U. S.* 118 U. S. 277 (30: 172).

An assignment not made according to the requirements of the statute is void.

Hardmann v. *Bowen*, 39 N. Y. 196; *Britton* v. *Lorenz*, 45 N. Y. 51; *Montfort* v. *Montfort*, 24 Hun, 120; *Rennie* v. *Bean*, Id. 123; *Henderson* v. *Pierce*, 7 West. Rep. 261; *Keevil* v. *Donaldson*, 20 Kan. 165; *Redpath* v. *Tutewiler*, 7 West. Rep. 269; Burr. Assign. § 343.

The assignment was void.

Linn v. *Wright*, 18 Tex. 337; *Caton* v. *Mosely*, 25 Tex. 377.

*See note in L. ed.

The assignment is not in compliance with the Act of 1879.

Howerton v. *Holt*, 28 Tex. 51; *Keating* v. *Vaughn*, 61 Tex. 519; *Jaffray* v. *McGehee*, 107 U. S. 631 (27: 495); *Schoolfield* v. *Johnson*, 11 Fed. Rep. 297; *Bartlett* v. *Teah*, 1 McCrary, 176; *Burgess* v. *Seligman*, 107 U. S. 21 (27: 361); Burr. Assign. 4th ed. §§ 209, 343; *Barney* v. *Griffin*, 2 N. Y. 365; *Goodrich* v. *Downs*, 6 Hill, 438; Perry, Tr. § 592; *Lawrence* v. *Norton*, 15 Fed. Rep. 853; *Austin* v. *Bell*, 20 Johns. 442; *Muller* v. *Norton*, 19 Fed. Rep. 719; *Keevil* v. *Donaldson*, 20 Kan. 168; *French* v. *Edwards*, 80 U. S. 13 Wall. 506 (20: 702); *Re Lathrop*, 5 Nat. Bank. Reg. 44.

Mr. Justice **Bradley** delivered the opinion of the court:

This action is in the nature of an action of trespass, brought by an assignee for the benefit of creditors against the Marshal of the United States for the Northern District of Texas, for seizing, levying on and converting certain goods of one Wallace, which had been assigned to the plaintiff. The seizure by the marshal was made under an attachment issued out of the circuit court, at the suit of Naumberg, Kraus, Lauer & Co., who are also defendants in the present action. The plaintiff, in his petition, sets out his ownership, as derived under a deed of assignment, a copy of which is attached, and is in the words and figures following, to wit:

"The State of Texas, Kaufman County:

"*This Indenture*, made the 24th day of October, A. D. 1881, between S. W. Wallace, of the first part, I. G. Lawrence, of the second part, and the several creditors of the party of the first part who shall hereafter accede to these presents, of the third part, *witnesseth:* That whereas, the party of the first part is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full, and he is desirous to convey all his property for the benefit of his creditors:

"Now, the party of the first part, in consideration of the premises and of one dollar paid to him by the party of the second part, hereby grants, bargains, sells, assigns and conveys unto the party of the second part and his heirs and assigns all his lands, tenements, hereditaments, goods, chattels, property and choses in action of every name, nature and description, wheresoever the same may be, except such property as may be by the Constitution and laws of the State exempt from forced sale; to have and to hold the said premises unto the said party of the second part, his heirs and assigns, but in trust and confidence to sell and dispose of said real and personal estate, and to collect said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract, taking a part for the whole where the trustee shall deem it expedient so to do, then in trust to dispose of the proceeds of said property in the manner following, viz.:

"First. To pay the costs and charges of these presents and the expenses of executing the trusts herein declared, together with all taxes which are a charge upon any of said property.

"Second. To distribute and pay the remainder of the said proceeds to and among all the parties of the third part who will accept thereof in full satisfaction of their claims against said party of the first part, ratably in proportion to their respective debts.

"Third. To pay over any surplus, after paying all the parties of the third part who shall accede hereto as aforesaid, in full, to the party of the first part, his executors, administrators or assigns; and the party of the first part hereby constitutes and appoints the party of the second part his attorney irrevocable, with power of substitution, authorizing him, in the name of the party of the first part or otherwise, as the case may require, to do any and all acts, matters and things to carry into effect the true intent and meaning of these presents which the party of the first part might do if personally present; and the party of the second part, hereby accepting these trusts, covenants to and with each of the other parties hereto to execute the same faithfully; and the party of the first part hereby covenants with the said trustee, from time to time and at all times when requested, to give him all the information in his power respecting the assigned property, and to execute and deliver all such instruments of further assurance as the party of the second part shall be advised by counsel to be necessary in order to carry into full effect the true intent and meaning of these presents; and the parties of the third part, by acceding hereto and by accepting the benefits herein conferred, hereby and thereby agree to and with the said party of the first part to release him from any and all claim or claims, debt or debts, demand or demands, of whatever nature, which they respectively have and hold against him; and this assignment is made for the benefit of such of the parties of the third part only as will consent to accept their proportional share of said estate of the said party of the first part and discharge him from their repective claims.

"Witness our hands this 24th day of October, A. D. 1881.

"(Signed) "S. W. WALLACE.
"I. G. LAWRENCE."

The defendants filed an exception to the petition, in the nature of a demurrer, assigning therefor the following reasons, to wit:

1. Because the paper appended thereto and called an assignment or deed of assignment is not such in fact and does not on its face purport to convey to the creditors of S. W. Wallace, the grantor, all of his estate not exempt from forced sale for the benefit of his creditors.

2. Said deed is, only purports to be, for the benefit of such creditors as will accept it and release the said Wallace from his debts due to them, reserving to said Wallace all of the estate not used in the payment of said accepting creditors, and directing the plaintiff Lawrence to pay to him all that part of the estate not appropriated by the accepting creditors.

3. Said deed shows on its face that it was and is not an assignment under the statute, and that the trust was to be administered out of the court.

4. It is not shown or assigned that any creditors have accepted such assignment.

5. The petition shows that the creditors at whose suit the attachment was levied, to wit,

Naumburg, Kraus, Lauer & Co., were and are nonresidents of the State of Texas, and that they reside in New York.

6. Said deed does not show that said Wallace was insolvent or in contemplation of insolvency.

7. Said deed shows that the property pretended to be conveyed was to be disposed of by agents appointed by said Wallace or by his authority, and that Lawrence was but an agent and not a grantee.

This demurrer being sustained, the petitioner had leave to amend, and did so by an averment that after the execution of the assignment, and within the time allowed by law, the following named creditors of Wallace had come in and accepted under the same; to wit, Holt, Rivers & Corley, $108.40 [and 21 others named], the total amount of whose claims aggregated over $14,000; and it was averred that the indebtedness so proven up against Wallace was largely in excess of the assets that came to the plaintiff's hands, including the property attached by the marshal.

The demurrer was still sustained, notwithstanding the amendment, and judgment was rendered for the defendants; to reverse which this writ of error was brought.

The assignment in question was made under a law of the State of Texas passed on the 24th of March, 1879, immediately after the repeal of the National Bankrupt Law, and evidently intended to take the place of that law, as well for the benefit of creditors as that of insolvent debtors. Its main object seems to have been to secure a speedy appropriation of all the property of an insolvent debtor, willing to make an assignment, to the payment of his debts, so far as it might be adequate for that purpose. As an encouragement to the making of such assignments, the law provides that if the debtor so desires, he may make his assignment for the benefit of such creditors as will accept their proportional share of his estate and discharge him from their respective claims. And the whole statute is evidently framed with a view to make the proceedings as simple as possible, and to obviate technical objections to their validity.

The principal provisions of the Act, bearing upon the questions raised in this case, are as follows, to wit:

Section 1 declares that "Every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided for, a distribution of all his real and personal estate, other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and however made or expressed shall have the effect aforesaid, and shall be construed to pass all such estate whether specified or not."

Section 2 requires an inventory to be annexed containing a list of all the creditors of the debtor, with their residence, the amount due to each, and the consideration thereof, and whether any judgment or security exists therefor, and an inventory of all the debtor's estate, with an affidavit of the truth thereof; but it is declared in section 10 that no assignment shall be declared fraudulent or void for want of any inventory or list; but it may be required by the assignee.

Section 3 enacts as follows: "Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate and discharge him from their respective claims; and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be and stand discharged from all further liability to such consenting creditors, on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor a release therefrom."

Section 4 provides for notice of his appointment to be given by the assignee.

Section 5. "The creditors of the assignor consenting to such assignment shall make known to the assignee their consent in writing, within four months after publication of the notice provided in the preceding section; and no creditor not assenting shall receive or take any benefit under the assignment; *Provided, however*, that any creditor who had no actual notice of such assignment may make known his assent at any time before any distribution of assets, under the assignment, has been made."

Section 8. "Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands after the payment of consenting creditors the amount of their debts, and the costs and expenses of executing the assignment."

Section 9 provides that property conveyed in contemplation of an assignment with intent to defeat, delay or defraud creditors, or to give preferences, shall pass to the assignee notwithstanding such transfer without affecting the validity of the assignment.

Section 16 declares that, "Whenever any assignee shall have fully performed the duties of his trust, and desires to be finally discharged therefrom, he may make a report of his proceedings under the assignment, showing the money and assets that have come into his hands, and how the same have been disbursed and disposed of, the truth of which shall be verified by his affidavit; and such report shall thereupon be filed and recorded in the office of the county clerk of the county in which the assignment is recorded, and no action shall be brought against such assignee by reason of anything done by him under the assignment, as shown by his report, unless the same be brought within twelve months from the time of the filing thereof, as aforesaid; and any moneys or funds on hand shall be deposited in the district court subject to be paid out upon the decree of said court."

The assignment in the present case was made under the third section of the Act, namely, for the benefit of such creditors of the debtor as would consent to accept their proportional share of his estate, and discharge him from their claims; and the principal objection made to it is that it directs the assignee to pay over to the assignor any surplus remaining after paying all the consenting creditors in full, instead of paying such surplus into court, as required by the 16th section of the Act. It is contended that this not only violates the law, but is a reservation for the benefit of the debtor, tending to delay and hinder those creditors who do not accede to the terms of the assignment, in the

collection of their debts. We do not see the force of the latter part of the objection, namely, that the stipulation referred to tends to delay and hinder creditors. The law itself, in section 8, takes care that the remedy of nonconsenting creditors shall not be suspended for a moment. By that section it is provided that any such creditor may garnishee the assignee for any excess of the estate remaining in his hands after the payment of the consenting creditors, and the costs. Of course, the stipulation in the assignment that the balance should be paid to the assignor was intended and understood to be subject to this right of garnishment. Such a qualification of the stipulation would be a condition in law. We do not see, therefore, how it can be said that the terms of the assignment were intended to delay and hinder creditors. The surplus referred to in the stipulation must, by intendment of law, have been only such surplus as might remain after satisfying the garnisheeing, as well as the consenting, creditors.

But conceding that, as to the surplus still remaining, the stipulation in the deed is not in conformity with the requirement of the 16th section, the question still remains whether the stipulation only is to be regarded as void, or whether the whole deed is void by reason of the stipulation. And the answer to this question depends upon the general policy of the statute. Is it intended to restrain assignments, or to aid and encourage them? If restraint is the object the regulations prescribed may, according to a well settled course of decisions in the state and federal courts, be regarded as conditions precedent, necessary to be observed in order to render an assignment valid. If aid and encouragement is intended to be given to assignments, in the interest of creditors as well as debtors, as a substitute for the Bankrupt Act, the courts may well disregard incidental variations from the law, as void under its operation, and sustain the assignment itself if it contains the main thing—the transfer of the entire property of the debtor for the benefit of his creditors—and carry it out in accordance with the law for the purposes intended. A careful examination of the Act convinces us that its policy is to favor assignments, and to give them such construction that they may stand rather than fall; and this, in the interest of creditors, quite as much if not more than in that of debtors. It will be noted that some of its express features look in that direction; and the whole Act taken together corroborates this view. And such is the light in which it is viewed by the Supreme Court of Texas.

In the case of *Blum* v. *Welborne*, 58 Tex. 157, decided in December, 1882, it was held that when an assignment for the benefit of creditors is made under the statute, the rights of the creditors attach to it, and no act of the assignor or of the assignee, or of both, at the time the assignment is made, or preceding it, but in contemplation of it, done with intent to defeat, delay or defraud creditors, will authorize a creditor to treat the assignment as void, or justify his attachment of the assigned property to the prejudice of the other creditors. In that case, as in this, the assignment was made under the third section of the Act, for the benefit of such creditors as would accept their dividends in satisfaction of their claims. One of the nonconsenting creditors attached the property assigned. The assignee having died, a substituted assignee sued the attaching creditors for damages. They pleaded that the debtor fraudulently disposed of a large amount of goods to his assignee, immediately before the assignment, with intent to hinder, delay and defraud the creditors. This plea was overruled on the ground above mentioned. The court said: "The manifest purpose of the Act was to provide a mode by which such debtors as were contemplated thereby might make assignments of their property, simple in form, and yet effective to pass all of their property, real and personal, to an assignee for the benefit of creditors, except such as might be exempt from forced sale. It further manifests an intention to make such assignments effective without reference to the form of the deed of assignment, provided it evidences an intention to pass to the assignee all the property of the debtor subject to forced sale, for the purpose of distribution among creditors, and is executed in substantial compliance with the requirements of the Act. It also evidences an intention to avoid much of the difficulty heretofore met with by the courts, in determining whether assignments were valid or not, and to supply, by the law itself, much in which the deed of assignment might be deficient under the rules applicable to ordinary assignments." The court then proceeds to the particular case, and in view of the provisions of the first and ninth sections of the Act declares that "The assignment passed all the property of the debtor except that exempt; as well that in his possession or owned by him at the time the assignment was made, as that which he may have fraudulently attempted to convey; and neither the fraud of the assignor, nor of the assignee, could annul the assignment, in which all creditors might have an interest. When the assignment is completed, the rights of the creditors attach to it." Again, "No act of the assignee, nor of the assignor, after the assignment is made, or preceding it, but in contemplation of it, however fraudulent the act may be, shall devest the right of the creditors to have the trust estate administered for their benefit in accordance with the spirit of the statute; and the Act itself provides means by which such administration may be enforced in default of the faithful performance of his trust by the assignee. To permit one or more of the creditors, whenever in their opinion the estate was not all delivered to the assignee, or when the assignee might, in their opinion, be acting in violation of his duty, to disregard the assignment and seize and have sold the trust estate, or any part of it for the satisfaction of such dissatisfied creditors, would contravene the very purpose of the law, which was intended to provide for the equitable distribution of the proceeds of the estate of an insolvent or failing debtor."

In another case, decided at the same time, *Donoho* v. *Fish*, 58 Tex. 164, where the whole property of the debtor was not assigned, as where two partners made an assignment of their partnership property only (and not their individual property), for the benefit of such creditors only as would accept their proportional share thereof, under the third section of the Act,

it was held that such an assignment failed to comply with the fundamental requisite of the Act, that all the debtor's property, not exempt from forced sale, must be assigned; and, therefore, that it was void as against attaching creditors. The same views, however, were expressed by the court, as in the previous case, as to the liberal construction which would be placed upon an assignment which purported to convey all the property of the debtors, however defective it might be in form.

In the case of *Keating* v. *Vaughn*, 61 Tex. 518, decided in May, 1884, the very point now under consideration came before the court, and it was held that the stipulation that the assignee should pay the surplus to the assignor, after the consenting creditors were paid in full, did not vitiate the deed of assignment. The court says:

"Under the statute it is unimportant whether the assignor, by the assignment, reserves to himself any surplus which may remain after payment of consenting creditors; for the statute itself regulates that matter, independent of what the terms of the deed may be in this respect, if the assignment be, as is this, under the third section of the Act which, with some of the following sections, refers to assignments made for the benefit of consenting creditors only. Under such an assignment strictly, other creditors than those consenting to the release of the debtor do not take at all, but the eighth section of the Act provides that nonconsenting creditors may garnishee the assignee for any excess of such estate remaining in his hands after the payment to the consenting creditors of their debts and the costs and expenses of executing the assignment.

"If nonconsenting creditors should not pursue that course, in case of an excess, the 16th section of the Act, when the trust has been executed and the assignee desires to be discharged therefrom, provides that the excess shall be paid into the district court, subject to be paid out upon the decree of that court which would no doubt be so made as to protect nonconsenting creditors who might show themselves entitled thereto, and take the necessary steps to fix a legal claim on the fund, in so far as the fund would go; if, however, no claim to such a fund was made by any creditor, the court after the lapse of a reasonable time would certainly direct the excess to be delivered to the assignor. Thus the statute regulates the whole matter, and must control if there be any conflict between its provisions and the deed. If the property passes to the assignee for the benefit of creditors generally, or for the benefit of consenting creditors alone, no provision which the assignee can make in the deed can interfere with the distribution of the estate as the statute requires."

It is suggested by the defendants' counsel that this decision was made in view of an amendatory statute passed in April, 1883, which declares "that no fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment, or to deprive the creditors consenting thereto from the benefits thereof; but any such fraudulent act, intent or purpose on the part of the assignee shall be a sufficient cause for his removal, as being an unsuitable person to perform the trust; and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforcement of his rights under such assignments, or for the protection of his interests in the assigned property." It is contended that this provision renders null and void stipulations like the one in question, so that the deed of assignment may have the effect and operation intended by the Statute of 1879, notwithstanding such stipulation; and that the decision in *Keating* v. *Vaughn* was based on the amendment. But this cannot be true, inasmuch as the assignment in that case was made on the 9th of May, 1883, and the amendment did not go into effect until the 12th of July of that year. It carries out, however, the policy which we have supposed to pervade the Act of 1879, of securing to the creditors of an insolvent debtor, making an assignment, a speedy and just appropriation of all his property to the payment of his debts.

In the case of *Schoolher* v. *Hutchins*, 66 Tex. 324, the most recent reported case on the subject, the deed of assignment (which was also executed before the amendment of 1883 took effect) authorized the assignee to sell the property at public or private sale, to employ the assignors to aid in the disposition of the property, with such compensation as he might deem proper, and to do various other things which the defendants contended were not lawful. But the court said: "If the deed of assignment attempted to confer powers which, under the law, an assignee could not legally exercise in the execution of the trust, this would not be a sufficient reason for holding an assignment invalid. When an assignment is made under the statute the rights of creditors vest, and they can compel the assignee to exercise the powers which the law expressly, or by implication, confers upon him, as can they restrain him if he attempts to exercise powers which the law does not confer upon him."

This view of the proceeding, as being wholly governed and controlled by law, and regarding as null and inoperative stipulations and powers in the deed contrary to, or not in conformity with, the provisions of the statute, and not as affecting the validity of the deed itself, so long as the main purpose is accomplished, of appropriating the whole of the debtor's property to the payment of his debts, seems to us so in harmony with the spirit and purpose of the Act, that we do not hesitate to adopt it. We have given careful attention to the opinion of the circuit court in the present case, but have failed to be convinced by it, and feel constrained to express our concurrence in the line of decisions of the Supreme Court of Texas.

One or two other points are made in the briefs of counsel against the validity of the deed, which require but a brief notice. They are substantially met by the considerations already adverted to.

First: It is objected that the deed does not convey all the debtor's estate, not exempt from forced sale, for the benefit of his creditors. It is a sufficient answer to say that it does in terms convey "all his lands, tenements, hereditaments goods, chattels, property and choses in action of every name, nature and description, wheresoever the same may be, except such property

as may be by the Constitution and laws of the State exempt from forced sale." According to the decisions of the Supreme Court of Texas, this general description is sufficient, under the Statute of 1879, to convey all the debtor's property. *Blum* v. *Welborne*, 58 Tex. 157, 161. The first section of the Act declares that the assignment, however expressed, shall be construed to pass all the debtor's real and personal estate, whether specified therein or not.

Secondly: It is objected that the deed of assignment does not, on its face, show that the assignor was insolvent, or in contemplation of insolvency. The obvious answer is that if this is a necessary requirement, the deed does state that the assignor "is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full." When a person is unable to pay his debts, he is understood to be insolvent. It is difficult to give a more accurate definition of insolvency. The objection is without foundation.

We do not observe any other objection which it is necessary specially to notice.

The judgment of the Circuit Court is reversed and the cause remanded, with instructions to proceed therein according to law.

WILLAMETTE IRON BRIDGE COMPANY, *Appt.*,
v.
Z. J. HATCH ET AL.

(See S. C. Reporter's ed. 1-17.)

Bill of review—bridge over navigable river, when not an offense against U. S. laws—Act admitting Oregon—police power—injunction.

1. On a pure bill of review, nothing will avail for a reversal of the decree but errors of law apparent on the record.
2. The erection of a bridge over the Willamette River at Portland was not a violation of the Act of Congress admitting Oregon as a State.
3. Obstructions and nuisances in navigable streams within the States are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such, but they are not offenses against United States laws which do not exist.
4. The Act of Congress above mentioned does not refer to physical obstructions, but to political regulations which would hamper the freedom of commerce.
5. Congress cannot be deemed to have assumed police power over a navigable river in consequence of having expended money in improving its navigation.
6. A suit for a perpetual injunction against the building of a bridge over a navigable river in a case where Congress has not passed any law which prohibits such building, is not a suit arising under any law of the United States.

[No. 80.]

Argued Nov. 23, 29, 1887. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Oregon, dismissing a bill of review filed to reverse a decree for an injunction against the building of a bridge. *Decree on the bill of review reversed and the record remanded, with instructions to reverse the decree in the original suit and to dismiss the bill filed therein.*

Opinion below, 19 Fed. Rep. 347.

The facts are fully stated in the opinion.

Messrs. **John Mullan** and *Rufus Mallory*, for appellant:

After a final decree has been passed and enrolled, a bill of review may be brought within a reasonable time to reverse it.

2 Daniells, Ch. Pl. & Pr. 1630; *Dexter* v. *Arnold*, 5 Mason, 308.

The bill, answer and other proceedings may be looked into to find "errors apparent on the face of the decree."

2 Daniells, Ch. Pl. & Pr. 1632, note 3; *Saum* v. *Stingley*, 3 Clarke (Iowa), 514.

A bill of review for error of law may be brought wherever the decree is contrary to the statute law.

2 Daniells, Ch. Pl. & Pr. 1632, note 1, citing Cooper, Eq. Pl. 89; Wyatt, Prac. Reg. 225.

States have power to regulate within their limits matters of internal police.

Wilson v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7:412); *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18:96); *Cardwell* v. *American Bridge Co.* 113 U. S. 205 (28:959).

Where the subjects are local, the authority of the State may be exerted until Congress interferes and supersedes it.

Escanaba Co. v. *Chicago*, 107 U. S. 678 (27:442); *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 248 (7:413); *Gilman* v. *Philadelphia*, *supra*; *Pennsylvania Wheeling Bridge Co.* 54 U. S. 13 How. 518, 564 (13:249); *Pound* v. *Turck*, 95 U. S. 459 (24:525); *Miller* v. *Mayor of N. Y.* 109 U. S. 385 (27: 971); *Cardwell* v. *American R. Bridge Co.* 9 Sawy. 662.

Mr. **J. N. Dolph**, for appellees:

Navigable waters in Oregon are common highways.

Escanaba Co. v. *Chicago*, 107 U. S. 678 (27: 442); *Pound* v. *Turck*, 95 U. S. 459 (24: 525); *Hamilton* v. *Vicksburg, S. & P. R. Co.* 119 U. S. 285 (30: 395); *Huse* v. *Glover*, Id. 543 (30:487); *Pollard* v. *Hagan*, 44 U. S. 3 How. 288 (11:575); *Permoli* v. *New Orleans*, Id. 609 (11:748); *Strader* v. *Graham*, 51 U. S. 10 How. 92 (13:341); *Palmer* v. *Cuyahoga Co.* 8 McLean, 226; *Columbus Ins. Co.* v. *Curtenius*, 6 McLean, 209; *Hatch* v. *Wallamet Iron Bridge Co.* 7 Sawy. 136.

It is necessary for the appellant, in order to reverse the decree, to show that upon the face of the record the circuit court was without jurisdiction.

Putnam v. *Day*, 89 U. S. 22 Wall. 60 (22: 764); *Whiting* v. *Bank of U. S.* 38 U. S. 13 Pet. 6 (10:33); *Shelton* v. *Van Kleeck*, 106 U. S. 532 (27:269); *Brown* v. *White*, 4 Woods, 614.

It is alleged in the bill of review that the appellees are citizens of Oregon, but the record is not helped by this averment.

Shelton v. *Van Kleeck*, *supra*.

Congress has shown its intention to exercise its power to prevent obstructions to the navigation of the Willamette River and to regulate the construction of bridges over it.

Wheeling Bridge Case, 54 U. S. 13 How. 518 (14:249); *Clinton Bridge Case*, 77 U. S. 10 Wall. 454 (19: 969); *South Carolina* v. *Georgia*, 93 U. S. 4 (23: 782); *Wisconsin* v. *Duluth*, 96 U. S. 379 (24: 668); *Columbus Ins. Co.* v. *Curtenius*, 6 McLean, 209.

No party to a decree can claim the reversal

of a decree upon a bill of review, unless he has been aggrieved.

Whiting v. *Bank of U. S. supra.*

Mr. Justice **Bradley** delivered the opinion of the court:

This is a bill of review filed by the appellants, a corporation of Oregon, to obtain the reversal of a decree made by the court below against them in favor of Hatch and Lownsdale, the appellees. The case is shortly this: On the 18th of October, 1878, the Legislature of Oregon passed an Act entitled "An Act to Authorize the Construction of a Bridge on the Willamette River between the City of Portland and the City of East Portland, in Multnomah County, State of Oregon," by which it was enacted as follows, to wit: "*Be it enacted, etc.*, That it shall be lawful for the Portland Bridge Company, a corporation duly incorporated under and in conformity with the laws of the State of Oregon, or its assigns, and that said corporation or its assigns be and are hereby authorized and empowered to construct, build, maintain, use, or cause to be constructed, built and maintained or used, a bridge across the Willamette River between Portland and East Portland in Multnomah County, State of Oregon, for any and all purposes of travel or commerce, said bridge to be erected at any time within six years after the passage and approval of this Act, at such point or location on the banks of said river, on and along any of the streets of either of said Cities of Portland and East Portland as may be selected or determined on by said corporation or its assigns, on or above Morrison Street of said City of Portland and M Street of said City of East Portland, the same to be deemed a lawful structure; *Provided*, That there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hundred feet in the clear in width of a passage way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge; *And provided*, That the approaches on the Portland side to said bridge shall conform to the present grade of Front Street in said City of Portland."

In the month of July, 1880, the appellants, the Willamette Iron Bridge Company, claiming to be assignees of the Portland Bridge Company, and to act under and by authority of said law, began the construction of a bridge across the Willamette River from the foot of Morrison Street, in the City of Portland, and proceeded in the work so far as to erect piers on the bed of the river, with a draw-pier in the channel on which a pivot draw was to be placed with a clear passage way on each side, when open, of 100 feet in width, or, as the appellants allege, 105 feet in width.

On the third of January, 1881, whilst the appellants were thus engaged in erecting the bridge, Hatch and Lownsdale filed a bill in the Circuit Court of the United States for an injunction to restrain the appellants from further proceeding with the work, and to compel them to abate and remove the structures already placed in the river. This bill described the complainants therein as citizens of the United States residing at Portland, in the State of Oregon, and the defendants as a corporation organized under the laws of that State, having its office and principal place of business at Portland, and alleged that the Willamette River is a known public river of the United States, situate within the State of Oregon, navigated by licensed and enrolled and registered seagoing vessels engaged in commerce with foreign Nations and with other States, upon the ocean and by way of the Columbia River; also a known public and navigable river of the United States, from its confluence with the Columbia River to the docks and wharves of the Port of Portland, and that, up to and beyond the wharves and warehouses of the complainants, Hatch and Lownsdale, it is within the ebb and flow of the ocean tides. That, by the Act of Congress of February 14, 1859, admitting the State of Oregon into the Union, it is declared "that all the navigable waters of said State shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." 11 Stat. at L. 383. That Congress has established a port of entry at the City of Portland, on the Willamette River, and has required vessels which navigate it to be enrolled and licensed, etc., and has frequently directed the improvement of the navigation of the said river, and appropriated money for that purpose; and by an Act approved February 2, 1870, giving consent to the erection of another bridge across said river from Portland to East Portland, asserted the powers of the United States to regulate commerce upon said river and to prevent obstruction to the navigation of the same, and in said Act declared: "But until the Secretary of War approves the plan and location of said bridge and notifies the said corporation, association, or company of the same, the bridge shall not be built or commenced." The complainants further stated that Lownsdale was the owner and Hatch the lessee of a certain wharf and warehouses in Portland, situated about 750 feet above the proposed bridge, heretofore accessible to and used by seagoing vessels and others; and that Hatch is the owner of a steam towboat, used for towing vessels up and down the river to and from the said wharves and warehouses and others in the city; that vessels of 2,000 tons have been in the habit of navigating the river for a mile above the site of the proposed bridge; and that the said river ought to remain free and unobstructed. But they charge that the bridge and piers will be a serious obstruction to this commerce; that the passage ways will not be sufficient for seagoing vessels with their tugs; that the bridge is being constructed diagonally, and not at right angles, to the current of the river; that it will arrest and pile up the floating ice and timber in high stages of water in such a way as to obstruct the passage of vessels; and, in various other particulars stated in the bill, it is charged that the bridge will be a serious obstruction to the navigation of the river. The complainants contended that the Act of the Legislature, authorizing the bridge, contravenes the laws of the United States declaring the river free, and was not passed with the consent of Congress, and was a wrongful assumption of power on the part of the State; and alleged that the pretended assignment by the Portland Bridge

Company to the defendants (the Willamette Iron Bridge Company) was not in good faith, and was not authorized by the directors of the former; and stated various other matters of alleged irregularity and illegality on the part of the Portland Company and the defendants. They also stated that the bridge was not being constructed in conformity with the requirements of the state law; that by reason of its diagonal position across the river, the thread of the current formed an acute angle with the line of the bridge, and that the draws do not afford more than 87 feet of a passage way for the passage of vessels; and that vessels will be unable to pass through said bridge for at least four months of the busiest shipping season of the year.

The defendants in that case, the Willamette Iron Bridge Company, filed an answer in which they admitted that they were building the bridge, and claimed to do so as assignees in good faith of the Portland Bridge Company, under and by virtue of the Act of the Legislature before mentioned, but denied the allegations of the bill with regard to the injurious effects of the bridge upon the navigation of the river, and averred that they were complying in every respect with the state law.

The cause being put at issue, and proofs being taken, on the 22d of October, 1881, a decree was made in favor of the complainants for a perpetual injunction against the building of the bridge, and for an abatement of the portion already built. The decision of the case was placed principally on the ground that the bridge would be, and that the piers were, an obstruction to the navigation of the river, contrary to the Act of Congress passed in 1859, admitting Oregon into the Union, and declaring "that all the navigable waters of the said State shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor;" and that, without the consent of Congress, a state law was not sufficient authority for the erection of such a structure; and, even if it was, the bridge did not conform to the requirements of the state law. See *Hatch* v. *Wallamet Iron Bridge Co.* 7 Sawy. 127, 141. The defendants took an appeal which was not prosecuted; but after the decision of this court in the case of *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [27:442], they filed the present bill of review for the reversal of the decree.

The reasons assigned for reversal are, amongst others, that the court erred in holding and decreeing as follows, to wit:

1. That the bridge, where and as being constructed, was a serious obstruction to the navigation of the Willamette River, contrary to the Act of Congress of February 14, 1859, admitting the State of Oregon into the Union, which declares that all the navigable waters of the State shall be common highways and forever free to all citizens of the United States.

2. That the said court, under section 1 of the Act of March 3, 1875, giving it jurisdiction of a suit arising under an Act of Congress, has authority to restrain parties from violating said Act by obstructing the navigation of any of said waters at the suit of anyone injured thereby.

3. That the proposed bridge is and will be a nuisance and serious impediment to the navigation of said river.

4. That the Legislature of the State of Oregon has not the power to say absolutely that a bridge may be built with only a draw of one hundred feet.

5. That the Willamette Iron Bridge Company, as the assignee of the Portland Bridge Company, was not authorized by the Act of the Legislative Assembly of Oregon to construct the said bridge, because it would be a violation of the said Act of Congress of February 14, 1859, admitting the State of Oregon in the Union, and was and is, therefore, void.

6. That the defendant should be perpetually enjoined from constructing or proceeding with the construction of the said bridge; and

7. That the defendant should be required to abate and remove out of said river all piers, foundations, etc., which it has placed or constructed therein.

This bill was demurred to, and the court affirmed the decree in the original suit and dismissed the bill of review. *Wallamet Iron Bridge Co.* v. *Hatch*, 9 Sawy. 643; 19 Fed. Rep. 847. The present appeal is taken from this decree.

On a pure bill of review, like the one in this case, nothing will avail for a reversal of the decree but errors of law apparent on the record. *Whiting* v. *Bank of U. S.* 38 U. S. 13 Pet. 6 [10:33]; *Putnam* v. *Day*, 89 U. S. 22 Wall. 60 [22:764]; *Buffington* v. *Harvey*, 95 U. S. 99 [24:381]; *Thompson* v. *Maxwell*, Id. 397 [24:483]; *Beard* v. *Burts*, Id. 434 [24:485]; *Shelton* v. *Van Kleeck*, 106 U. S. 532 [27:269]; *Nickle* v. *Stewart*, 111 U. S. 776 [28:599]. Does any such error appear in the present case? The court below has decided in the negative. We are called upon to determine whether that decision was correct. It must be assumed that the questions of fact, at issue between the parties, were decided correctly by the court upon its view of the law applicable to the case. But the important question is, Was its view of the law correct?

The parties in the cause, both plaintiffs and defendants, were citizens of the State of Oregon. The court therefore must necessarily have held, as we know from its opinion that it did hold, that the case was one arising under the Constitution or laws of the United States.

The gravamen of the bill was the obstruction of the navigation of the Willamette River by the defendants, by the erection of the bridge which they were engaged in building. The defendants pleaded the authority of the State Legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the state law; but whether it were or not, it lacked the assent of Congress, which assent the court held was necessary in view of that provision in the Act of Congress admitting Oregon as a State, which has been referred to. The court held that this provision of the Act was tantamount to a declaration that the navigation of the Willamette River should not be obstructed or interfered with; and that any such obstruction or interference, without the consent of Congress, whether by state sanction or not, was a violation of the Act of Congress; and that the ob-

struction complained of was in violation of said Act. And this is the principal and important question in this case, namely, whether the erection of a bridge over the Willamette River at Portland was a violation of said Act of Congress. If it was not, if it could not be, if the Act did not apply to obstructions of this kind, then the case did not arise under the Constitution or laws of the United States, unless under some other law referred to in the bill.

The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced (a point which we do not undertake to decide), it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States, the Circuit Courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Wilson* v. *Black Bird Creek Co.* 27 U. S. 2 Pet. 245 [7: 412]; *Pollard* v. *Hagan*, 44 U. S. 3 How. 229 [11: 578]; *Passaic Bridges*, 3 Wall. 782 [16: 799]; *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 724 [18: 99]; *Pound* v. *Turck*, 95 U. S. 459 [24: 525]; *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [27: 442]; *Cardwell* v. *American Bridge Co.* 113 U. S. 205 [28: 959]; *Hamilton* v. *Vicksburg, S. & P. R. Co.* 119 U. S. 280 [30: 393]; *Huse* v. *Glover*, Id. 543 [30: 487]; *Sands* v. *Manistee River Imp. Co.* 123 U. S. 288 [31: 149]; *Parkersburg & O. Trans. Co.* v. *Parkersburg*, 107 U. S. 691, 700 [27:584, 587]. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable or not conformable to the state law relied on is a state question, not a federal one. The failure of the state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence. But, as we have stated, the court below held that the Act of Congress of 1859 was a law which prohibited any obstructions or impediments to the navigation of the public rivers of Oregon, including that of the Willamette River. Was it such an Act? Did it have such effect?

The clause in question had its origin in the 4th article of the compact contained in the Ordinance of the Old Congress for the government of the territory northwest of the Ohio, adopted July 13, 1787; in which it was amongst other things declared that "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said Territory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor." 1 Stat. at L. 52. This court has held that when any new State was admitted into the Union from the Northwest Territory, the ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original States. On the admission of any such new State, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. See the cases of *Pollard* v. *Hagan*, [*supra*]; *Permoli* v. *First Municipality of N. O.* 44 U. S. 3 How. 589 [11: 739]; *Escanaba Co.* v. *Chicago*; *Cardwell* v. *American Bridge Co.*; *Huse* v. *Glover*, *qua supra*. In admitting some of the new States, however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether the State was carved out of the Territory northwest of the Ohio, or not; and it has been supposed that in this new form of enactment, it might be regarded as a regulation of commerce, which Congress has the right to impose. *Pollard* v. *Hagan*, 44 U. S. 3 How. 212, 230 [11: 565, 574]. Conceding this to be the correct view, the question then arises, What is its fair construction? What regulation of commerce does it effect? Does it prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other States the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction.

It is obvious that if the clause in question does prohibit physical obstructions and impediments in navigable waters, the State Legislature itself, in a State where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of Congress. But it is well settled that the Legislatures of such States do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original States, in reference to which no such clause exists. It was so held in *Pound* v. *Turck*, 95 U. S. 459 [24: 525], in reference to a dam in the Chippewa River in Wisconsin; in *Cardwell* v. *American Bridge Co.* 113 U. S. 205 [28: 959], in reference to a bridge without a draw, erected on the American River in California, which prevented steamboats from going above it; and in *Hamilton* v. *Vicksburg, S. & P. R. Co.* 119 U. S. 280 [30: 393], relating to railroad bridges in Louisiana; in all which cases the clause in question was in force in the States where they arose, and in none of them was said clause held to restrain in any degree the full power of the State to make, or cause to be made, the erec-

tions referred to, which must have been more or less obstructions and impediments to the navigation of the streams on which they were placed. In *Cardwell* v. *American Bridge Co.*, the two alternate constructions of the clause above suggested were brought to the attention of the court, and, on consideration, it was held as follows: "Upon mature and careful consideration, which we have given in this case to the language of the clause in the Act admitting California, we are of opinion that if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public." In *Hamilton* v. *Vicksburg, S. & P. R. Co.* it was said: "Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation;" and in the same case the construction given to the clause in question in *Cardwell* v. *American Bridge Company* was reiterated, namely, that it was intended to prevent any discrimination against citizens of other States in the use of navigable streams, and any tax or toll for their use. In *Huse* v. *Glover*, 119 U. S. 543 [30: 487], where a portion of the Illinois River had been improved by the State of Illinois, by the erection of locks in the river, and a toll was charged for passing through the same, it was held that this was no encroachment upon the power of Congress to regulate commerce, and that whilst the Ordinance of 1787 was no longer in force in Illinois, yet, if it were, the construction given to the clause in the *Cardwell Case* was approved, and the following observation was made: "As thus construed the clause would prevent any exclusive use of the navigable waters of the State—a possible farming out of the privilege of navigating them to particular individuals, classes, or corporations, or by vessels of a particular character." It was also held that the exaction of tolls for passage through the locks, as a compensation for the use of the artificial facilities constructed, was not an impost upon the navigation of the stream. The same views are held in the recent case of *Sands* v. *Manistee River Improvement Co.* 123 U. S. 288 [31: 149].

It seems clear, therefore, that according to the construction given by this court to the clause in the Act of Congress relied upon by the court below, it does not refer to physical obstructions,—but to political regulations which would hamper the freedom of commerce. It is to be remembered that in its original form, the clause embraced carrying places between the rivers, as well as the rivers themselves; and it cannot be supposed that those carrying places were intended to be always kept up as such. No doubt that at the present time some of them are covered by populous towns, or occupied in some other way incompatible with their original use; and such a diversion of their use, in the progress of society, cannot but have been contemplated. What the people of the old States wished to secure was the free use of the streams and carrying places in the Northwest Territory, as fully as it might be enjoyed by the inhabitants of that Territory themselves, without any impost or discriminating burden. The clause in question cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the federal courts the right to hear and determine, according to federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State. With regard to this very river, the Willamette, three Acts of Congress have been passed in relation to the construction of bridges thereon; to wit, one, approved February 2, 1870, which gave consent to the corporation of the City of Portland to erect a bridge from Portland to the east bank of the river, not obstructing, impairing or injuriously modifying its navigation, and first submitting the plans to the Secretary of War; another, approved on the 22d of June, 1874, which authorized the county commissioners of Marion County, or said commissioners jointly with those of Polk County, to build a bridge across said river at Salem; a third Act, approved June 23, 1874, which authorized the Oregon and California Railroad Company, alone, or jointly with the Oregon Central Railroad Company, to build a railroad bridge across said river at the City of Portland, with a draw of not less than 100 feet in the clear on each side of the draw abutment, and so constructed as not to impede the navigation of the river, and allow the free passage of vessels through the bridge. These Acts are special in their character, and do not involve the assumption by Congress of general police power over the river.

The argument of the appellees, that Congress must be deemed to have assumed police power over the Willamette River in consequence of having expended money in improving its nav-

igation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which they relate. Of course, any interference with the operations, constructions or improvements made by the General Government, or any violation of a port law enacted by Congress, would be an offense against the laws and authority of the United States; and an action or suit brought in consequence thereof would be one arising under the laws of the United States. But no such violation or interference is shown by the allegations of the bill in the original suit in this case, which simply states the fact that improvements have been made in the river by the government, without stating where, and that Portland had been created a port of entry. In the case of *Escanaba Co.* v. *Chicago*, 107 U. S. 690 [27:447], it was said: "As to the appropriations made by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges." In the present case there is no allegation, if such an allegation would be material, that any improvements in the navigation of the Willamette River have been made by the government at any point above the site of the proposed bridge.

As to the making of Portland a port of entry, the observations of *Mr. Justice* Grier in the *Passaic Bridge Cases*, 3 Wall. 782, 793 [16: 799 App.], are very apposite. Those cases were decided in September, 1857, by dismissing the bills which were filed for injunctions against the erection of a railroad bridge across the Passaic River at Newark, New Jersey, and a plank road bridge across the same river below Newark. The decrees were affirmed here by an equally divided court in December Term, 1861. It being urged, amongst other things, that Newark was a port of entry, and that the erection of these bridges, though under the authority of the State Legislature, was in conflict with the Act of Congress establishing the port, *Mr. Justice* Grier said: "Congress by conferring the privilege of a port of entry upon a town or city does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals—to land as well as water? Assuming the right (which I neither affirm nor deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no Act of Congress or rule of law which courts could apply to such a case." These views were adhered to by the same judge in the subsequent case of *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 718 [18:96]. The bridge which was the subject of controversy in that case was within the limits of the Port of Philadelphia, which, by the Act of 1799, included the City of Philadelphia, and by that of 1834, was extended northerly to Gunner's Run. That case arose soon after the *Passaic Bridge Cases*, and, so far as interference with navigation was concerned, was identical in character with them; and *Mr. Justice* Grier, upon the same grounds taken and asserted by him in those cases, without delivering an additional opinion, dismissed the bill. The decree was affirmed in this court in December Term, 1865, by a vote of seven justices to three, *Justices* Clifford, Wayne, and Davis dissenting. So that *Justice* Grier's views were finally affirmed by a decided majority of the court.

It is urged that in the *Wheeling Bridge Case*, 54 U. S. 18 How. 518 [14: 249], this court decided the bridge there complained of to be a nuisance, and decreed its prostration, or such increased elevation as to permit the tall chimneys of the Pittsburg steamers to pass under it at high water. But in that case this court had original jurisdiction in consequence of a State being a party; and the complainant (the State of Pennsylvania) was entitled to invoke, and the court had power to apply, any law applicable to the case, whether state law, federal law or international law. The bridge had been authorized by the Legislature of Virginia, whose jurisdiction extended across the whole River Ohio. But Virginia, in consenting to the erection of Kentucky into a State, had entered into a compact with regard to the free navigation of the Ohio*, confirmed by the Act of Congress admitting Kentucky into the Union, which the court held to be violated by authorizing the bridge to be constructed in the manner it was; and the bridge, so constructed, injuriously affected a supra-riparian State (Pennsylvania) bordering on the river, contrary to international law. *Mr. Justice* Grier, in the *Passaic Bridge Cases*, disposes of the *Wheeling Bridge Case* as follows: "This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions:

Could Virginia license or authorize a nuisance on a public river, flowing [*sic.*], which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the States, was declared to be 'free and common to all the citizens of the United States?' If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States by compact made before the Constitution, were held at the mercy or caprice of every or any of the States

*See Mr. Stanton's argument, 18 How. 523 [14: 251]; 1 Bioren's Laws U. S., p. 675, art. *seventh*.

to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defense, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height, or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all state legislation in such cases as unconstitutional and void. It is evident, from this statement," continues *Justice* Grier, "that the supreme court, in denying the right of Virginia to exercise this absolute control over the Ohio River, and in deciding that, as a riparian proprietor, she was not entitled, either by the compact or by constitutional law, to obstruct the commerce of a supra-riparian State, had before them questions not involved in these cases," (the Passaic Bridges), "and which cannot affect their decision. The Passaic River, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State. It is no highway to other States; no commerce passes thereon from States below the bridge to States above." 70 U. S. 3 Wall. 792 [16: 799].

This exposition of the *Wheeling Bridge Case*, by one who had taken a decided part in its discussion and determination, effectually disposes of it as a precedent for the jurisdiction of the Circuit Courts of the United States in matters pertaining to bridges erected over navigable rivers, at least those erected over rivers whose course is wholly within a single State. The Willamette River is one of that description.

On the whole, our opinion is that the original suit in this case was not a suit arising under any law of the United States; and since, on such ground alone, the court below could have had jurisdiction of it, it follows that *the decree on the bill of review must be reversed and the record remanded, with instructions to reverse the decree in the original suit, and to dismiss the bill filed therein, without prejudice to any other proceeding which may be taken in relation to the erection of said bridge, not inconsistent with this opinion.*

CHARLES G. DAVISON ET AL. *Appts.*, *v.* ALEXANDER HENRY DAVIS.

(See S. C. Reporter's ed. 90-98.)

Receipt, agreement in—equitable remedy—laches.

1. A mere receipt is subject to explanation; but an agreement or contract in a receipt is as conclusive as in any other paper executed between the parties.

2. The following words in a receipt "Said note is given me for the purchase of 379½ shares of stock now held by me and to be delivered upon payment of his note to said Davison," held to amount to a conditional sale, or to an agreement for a sale on performance of the condition.

3. The only equitable remedy applicable to such contract is a bill for relief from the condition, or for specific performance.

4. Both of these remedies may be lost by laches on the part of complainant; and where there had been a delay of several years, during which the complainant, from pecuniary inability, had failed to fulfill his part of the contract, and the stock had largely increased in value, held, that specific performance should be denied.

[No. 100.]

Argued Dec. 6, 7, 1887. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Kentucky, in favor of defendant in a suit to compel the delivery of stock. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **Samuel Shellabarger, Marc Mundy** and *J. M. Wilson*, for appellants:

This receipt, taken and given under those conditions, equity regards and treats as a security for the debt—as a mortgage.

Russell v. *Southard*, 53 U. S. 12 How. 139 (13:927); *Vernon* v. *Bethell*, 2 Eden, 113; *Babcock* v. *Wyman*, 60 U.S. 19 How. 289 (15:644); *Villa* v. *Rodriguez*, 79 U. S. 12 Wall. 339 (20:410); *Morgan* v. *Shinn*, 82 U. S. 15 Wall. 105 (21:87); *Peugh* v. *Davis*, 96 U. S. 336 (24: 776); *Brick* v. *Brick*, 98 U. S. 514 (25:256); 1 Hill. Mort. 67.

Equity never aids forfeitures.

Horsburg v. *Baker*, 26 U. S. 1 Pet. 236 (7:127); Story, Eq. Jur. §§ 1315, 1319 and cases in note 5.

A mortgage of a chattel is a conditional transfer of the title itself; but a pledge does not transfer the title.

Sims v. *Canfield*, 2 Ala. 555; *Cortelyou* v. *Lansing*, 2 Cai. Cas. 200; *Eastman* v. *Avery*, 23 Me. 248; *Belden* v. *Perkins*, 78 Ill. 449-454; *Doak* v. *Bank of the State*, 6 Ired. (N. C.) L. 309.

The pledgee, failing to exercise his right to sell, upon a tender of the debt may, at any time, be compelled to restore, since the Statute of Limitations does not operate as a bar in such case.

Story, Bailm. par. 346; *Jones* v. *Thurmond*, 5 Tex. 318; *Kemp* v. *Westbrook*, 1 Ves. Sr. 278; *Cortelyou* v. *Lansing*, *supra*; *Garlick* v. *James*, 12 Johns. 147.

Nor does the right to redeem expire with the pawnor's life; but the right survives to his personal representative.

Vanderzee v. *Willis*, 3 Bro. Ch. 21; *Perry* v. *Craig*, 3 Mo. 516.

And if the pawnee dies before redemption the pawnor may still redeem against his representatives.

Com. Dig. Mortgage, B; Story, Bailm. par. 458.

If the pledge has been sold by the pledgee, without notice to the pledgeor, an action may be maintained therefor without paying or tendering the debt (*Stearns* v. *Marsh*, 4 Den. 227; *Lewis* v. *Graham*, 4 Abb. Pr. 106); and the rule is the same where the pledgee dispenses with a tender, as by refusing under any circumstances to restore the pledge (*Cortelyou* v. *Lansing*, 2 Cai. Cas. 200; *Elliott* v. *Armstrong*, 2 Blackf. (Ind.) 198). But in such an action the pledgee may recoup the amount of the debt (*Jarvis* v. *Rogers*, 15 Mass. 389; *Stearns* v. *Marsh*, *supra*; *Hancock* v. *Franklin Ins. Co.* 114 Mass. 155).

The pledgees had a right, at any time after the note matured, upon giving notice to the

pledgeor, to sell and apply the proceeds to the payment of their debt.

Whipple v. *Blackington*, 97 Mass. 476; *Fletcher* v. *Dickinson*, 7 Allen, 23; *Washburn* v. *Pond*, 2 Allen, 472; *Brown* v. *Tyler*, 8 Gray, 135; *Hunt* v. *Nevers*, 15 Pick. 500.

Sale could only be a sale made at public auction, with full notice to the defendants of the time and place thereof.

2 Story, Eq. § 1108; 2 Kent, Com. 582; *Stearns* v. *Marsh*, *supra*; *Wheeler* v. *Newbould*, 16 N. Y. 392.

Notice of sale means a notice of the time and place of sale.

Genet v. *Howland*, 30 How. Pr. 360; 45 Barb. 560; *Mowry* v. *Wood*, 12 Wis. 413; 7 Pa. 474; *Stevens* v. *Hurlbut Bank*, 31 Conn. 146; *Baker* v. *Drake*, 66 N. Y. 518.

Messrs. George F. Comstock, Alexander Pope Humphrey and *St. John Boyle*, for appellee:

In the ordinary case of the purchase of an estate, exact time is not necessary. Reasonable time will do.

Hipwell v. *Knight*, 1 Younge & C. 415; 1 Story, Eq. § 776, note 1.

When time is not of the essence of a contract, notice given will limit the time.

Walker v. *Jeffreys*, 1 Hare, Ch. 341; *Southcomb* v. *Exeter*, 6 Hare, Ch. 213; *Parkin* v. *Thorold*, 16 Beav. 59.

The circumstances are sufficient evidence of the abandonment or rescission of the contract by the parties.

Thrasher v. *Bentley*, 1 Abb. N. C. 39; *Fullager* v. *Reville*, 3 Hun, 600; 2 Pars. Cont.

In *Preston* v. *Preston*, 95 U. S. 203 (24:495), it is held that courts of equity will refuse relief by specific performance where, by the Statutes of Limitation, an action at law would be barred for the property.

Rogers v. *Saunders*, 16 Me. 92.

In the ordinary case of the sale of an estate, the time of payment is regarded as formal.

Hipwell v. *Knight*, 1 Younge & C. 416; *Lloyd* v. *Collett*, 4 Ves. 689, note b; *Guest* v. *Homfray*, 5 Ves. Jr. 818; *Benedict* v. *Lynch*, 1 Johns. Ch. 375; *Paine* v. *Meller*, 6 Ves. Jr. 349; *Brashier* v. *Gratz*, 19 U. S. 6 Wheat. 529 (5:322); *Cathcart* v. *Robinson*, 30 U. S. 5 Pet. 264 (8:120); *Perkins* v. *Wright*, 3 Har. & McH. 324; *Alley* v. *Deschamps*, 13 Ves. Jr. 228; *Bayly* v. *Leominster*, 1 Ves. Jr. 476; *London* v. *Mitford*, 14 Ves. 41.

In actions for personal property, possession for five years gives title.

Smart v. *Baugh*, 3 J. J. Marsh. 363; *Smart* v. *Johnson*, Id. 373; *Hopkins* v. *Stephenson*, 1 J. J. Marsh. 344.

Mr. Justice **Bradley** delivered the opinion of the court:

The bill in this case was filed by Charles G. Davison and Marc Mundy to compel the defendant Davis to deliver to said Mundy 379¼ shares of capital stock of the Louisville City Railroad Company, alleged to belong to said Mundy as assignee of said Davison, and to be held by Davis as security for the payment of a certain note of Davison for $6,521.36, dated November 10, 1876, and payable in one year, with interest, at 7 per cent, Mundy offering to pay the amount due on said note, and praying for an account to be taken to ascertain said amount.

The transaction out of which the controversy grew was as follows:

In November, 1873, Davison, residing in Louisville, Kentucky, and Alexander H. Davis, of New York City, were each large owners of the capital stock of the Louisville City Railway Company, Davison owning about 800 shares and Davis about 1200; and they entered into the following agreement for the purpose of equalizing their interest, to wit:

"Memorandum of an agreement made this tenth day of November, 1873, between Chas. G. Davison, of the City of Lou., Ky., and Alex. Henry Davis, of the City of New York, N.Y., witnesseth;

"Whereas, the said parties of the first and second parts, respectively, are the actual and equitable owners of certain shares of the capital stock of the Lou. City R. W., the said Davison holding or being entitled to hold about eight hundred and the said Davis holding or being equitably entitled to hold about twelve hundred shares of the said stock; and whereas, the said parties of the first and second parts are desirous of equalizing their respective interests as between themselves, and also of acquiring possession of a greater amount of the said stock; now, therefore, it is hereby agreed that the stock now actually or equitably held by the parties of the first and second parts, respectively, shall be regarded as common property, each party being entitled to the one half ownership of said stock for the considerations hereinafter to be mentioned.

"It is also agreed that all purchases of the said stock that may be made hereafter shall be thus made for the joint account of the parties to this contract, and shall be likewise held by them in common.

"It is furthermore agreed, as the consideration for the equalization of their respective interests, by the said parties to this contract, that the actual cost of the stock held by each party shall be computed as of this date, and a note given by the said Davison at any time upon demand for the amount which would be due from him for the equalization of said joint stock account, it being understood that two hundred and fifteen (215) shares of said stock now held by the said second party shall offset in the account a like number of shares held by the said first party.

"And it is furthermore agreed that in case of the death of either of the parties to this contract, the survivor shall be entitled to purchase the stock of said deceased party, within one year from the time of such decease, at a price not exceeding twenty-five (25) dollars per share, if within twelve months from the date of this agreement, with an advance of ten (10) dollars per share for each succeeding twelve months.

"In witness whereof the parties of the first and second parts hereby attach their hands and seals this tenth day of November, 1873.

"(Signed) ALEX. HENRY DAVIS.
"(Signed) C. G. DAVISON.
"Witness: (Signed) E. H. SPOONER."

On the 11th of November, 1876, Davis made out a report or statement of the account between him and Davison, showing that he, Davis, held 1571 shares which cost $32,723.41, and that Davison held 812 shares which cost

$19,680.69; and that to make them equal, Davis must transfer to Davison 379¼ shares, and Davison must pay therefor the sum of $6,521.36, or, as Davis expressed it, in the report, "That is the result as I make it—that I owe you 379¼ shares of stock, and you owe me $6,521.36, as of November 10, 1876."

This account was assented to by Davison, and on the 29th of January, 1877, the parties met, and Davison delivered to Davis his promissory note for said sum of $6,521.36, dated November 10, 1876, payable one year from date, with interest at 7 per cent, and Davis, retaining the stock, delivered to Davison a receipt for the note in the words following, to wit:

"Syracuse, N. Y., Jan. 29, 1877.

"Received of C. G. Davison his note, dated Nov. 10, 1876, for $6,521.36, payable one year from date, with interest at 7 per cent. Said note is given me for the purchase of three hundred and seventy-nine and one half shares of stock of the Louisville City Railway Co., now held by me, and to be delivered, upon payment of his note, to said Davison.

"ALEX. HENRY DAVIS."

The note became due on the 12th of November, 1877, but was not paid. On the 16th of September, 1882, Davison, by an indorsement on the receipt, transferred the 379¼ shares mentioned therein to Mundy, who assumed to pay the debt due to Davis therefor; and in January, 1883, Mundy offered to pay Davis the amount due on Davison's note, and demanded the 379¼ shares of stock—which Davis refused. Thereupon, on the 27th of March, 1883, the present bill was filed. It sets forth the circumstances of the transaction substantially as above stated, but contains allegations to the effect that the stock in controversy was regarded by the parties as belonging to Davison, and that he agreed and consented that the defendant might hold it by way of pledge or collateral security, for the payment of his note; whereas, the defendant insists that the transaction was an agreement for a sale of the stock, to be assigned and transferred to Davison when it was paid for. The former take their stand on the terms of the original agreement of November, 1876; the latter on the receipt given in January, 1877. If the transaction relating to the 379¼ shares of stock was a sale upon condition of payment of the note at maturity, the nonperformance of the condition defeated it, if the vendor saw fit to avail himself of the breach, which he did. If it was only an agreement for a sale, the delay of the complainants in offering to pay the note and demanding a delivery of the stock would preclude them from asking for a specific performance of the agreement, even if the frame of the bill were adapted to such a decree—which is very doubtful, although it contains a prayer for further and other relief. The delay was upwards of five years after the note became due; and the circumstances which occurred enhance the right of the defendant to rely on that defense against any claim for specific performance. Both Davison and Davis were examined as witnesses, and the latter states positively that, shortly before the maturity of the note, he wrote to Davison that if he did not meet the note at maturity he (Davis) should not recognize any further claim of his to the stock in question; and that some time in the year 1878 he considered the matter at an end, and destroyed the note. Davison, in his testimony, admits that no communication took place between him and Davis in relation to the stock after February, 1878. At that time he states that a conversation occurred between them, in which Davis offered to carry his (Davison's) stock in the company until it worked out, but that nothing was said about the particular stock in question. The conversation, as he afterwards explained, related to 579 shares bought by him of one Johnson, and not to the 379¼ shares. Another circumstance of weight is the fact that the stock would not sell for more than $20 per share until long after the note became due; and that afterwards, when Davis himself took hold of the road, the stock appreciated so as to sell for nearly or quite double that amount. It was after this appreciation of the stock in value that Davison transferred his supposed interest to Mundy, who then made the offer to pay Davison's note and take up the stock. Under all these circumstances, the laches of Davison and Mundy is a perfectly good defense against any claim of relief from the condition (if it was a sale upon condition); or for specific performance of the agreement (if it was an agreement for a sale). In *Brashier* v. *Gratz*, 19 U. S. 6 Wheat. 528, 541 [5: 322, 326], *Chief Justice* Marshall said, "This, then, is a demand for a specific performance, after a considerable lapse of time [five years], made by a person who had failed totally to perform his part of the contract; and it is made after a great change, both in the title and in the value of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction." The reason why the party seeking relief in that case could not be compelled to execute his part of the contract, was his pecuniary inability to execute it—a circumstance which also existed in the present case.

But, as before stated, the complainants contend that the nature of the transaction between the parties is to be gathered from the agreement of November 10, 1876, and not solely from the receipt given in January, 1877; and that by that agreement the parties became joint owners of the stock then held by each, and of all that they or either of them might afterwards purchase. That agreement was undoubtedly the basis of the settlement made in January, 1877; but it cannot be invoked to control the terms of that settlement. The agreement amounted to this: that the respective interests of the parties in the stock of the company should be joint and equal, Davison paying the amount necessary to equalize the difference of costs between them. It appears, from the evidence, that the stock held by the two would control the management of the company; and the object of the agreement, stated shortly, was that they should stand together and be equally interested—Davison being at that time president of the company, and Davis the largest stockholder. Up to January, 1877, Davison had never paid the difference in the cost of the stock. The parties then came to the settlement referred to. Each still held his own individual shares as at first, and as purchased afterwards,

no transfers having been made. They now concluded, instead of holding the stock in common, to make an equal division of their aggregate shares; and to do this, Davis must transfer to Davison 379¼ shares, and, according to the terms of the original agreement, the latter must pay therefor the sum of $6,521.36. In making this change in their proposed relations, the parties treated the transfer of the 379¼ shares as a sale, the terms of which are specified in the receipt of January 29, 1877. Those terms are clear and unmistakable. It is expressly declared that the note was given for the purchase of 379¼ shares of the stock of the Louisville City Railway Company, to be delivered to Davison upon the payment of his note. A mere receipt is subject to explanation; but an agreement or contract in a receipt is as conclusive as in any other paper executed between the parties. Therefore, although the object of the original agreement was, or may have been, a joint and equal ownership of stock, with right of purchase by the survivor, in case of death, yet it is apparent that this plan was abandoned, at the time of the settlement, for that of an equal division of the stock of both, to be held in severalty only. In other words, instead of the old contract, which had never been fully carried into effect, the parties entered into a new contract based upon the principal feature of the old, that Davis should sell to Davison a sufficient amount of stock to make their holdings equal, but to be held in severalty, free from any conditions, and with liberty on the part of each to dispose of his stock as he should see fit; the price being fixed in accordance with the terms prescribed in the original agreement.

That this was the real nature of the transaction which took place in January, 1877, is apparent from the circumstances, and from the subsequent conduct of the parties. Davison, being in embarrassed circumstances, did not retain his stock, but had parted with it all as early as the spring of 1878, thus entirely ignoring the objects and purposes of the agreement of 1873. The answer of the defendant contains the following statement, to wit: "The respondent further says that said agreements were entered into by him in the belief and with the assumption that said Davison was the holder or entitled to hold about eight hundred shares, as represented by him, and respondent does not know how much of said stock said Davison held or was entitled to hold, but he never came into possession or control of about eight hundred shares or near that amount, and as early as the spring of 1878 ceased to be a stockholder; that he then turned over to the company whatever stock he held in part payment of his indebtedness to the company, and the intent and purpose of the agreement between said Davison and respondent wholly ceased and failed." This averment is substantially proved by the testimony of both parties, Davison and Davis. The former continued president of the railway company until February, 1878, but was not re-elected after that time. He had become indebted to the company, which had run down financially, and, as before said, parted with all his stock. It is plain, therefore, that the main purpose of the original agreement had failed and had been abandoned. The only thing we have to guide us, as to what the new contract was, is the receipt of January 29, 1877, the terms of which we have already adverted to. From those terms it is clear that the sale was not to be completed until the payment of Davison's note. The language is, "Said note is given me for the purchase of 379¼ shares of stock now held by me and to be delivered, upon payment of his note, to said Davison." That such language amounts to a conditional sale, or to an agreement for a sale on performance of the condition, see Benjamin on Sales; Book II, chap. III, Rule III, p. 252, second ed., and the cases there collected.

If this is a correct view of the case, it is plain that the only equitable remedy applicable to it is a bill for relief from the condition, or for specific performance. Both of these remedies, as we have seen, have been lost by the laches of the complainant.

The decree of the Circuit Court is affirmed.

CITY OF CHICAGO, *Plff. in Err.*,
v.
CATHARINE A. TAYLOR ET AL., EXRS. of MOSES TAYLOR, Deceased.

(See S. C. Reporter's ed. 161-170.)

Damages for taking private property—Illinois law—constitutional provision—damages.

1. Under the provision in the Illinois Constitution of 1870 that "private property shall not be taken or damaged for public use without just compensation," a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character.

2. It is not necessary that the damage shall be caused by a trespass or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover.

3. The introduction of the word "damaged" into that clause of the Constitution indicated a deliberate purpose to abolish the old test of direct physical injury to the property affected.

4. The charge to the jury, that the real question was whether the value of the property to sell or rent had been diminished by the construction of the viaduct, and that the impairment of value to improvements on the premises was an element of damage, was correct.

[No. 151.]

Submitted Jan. 31, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment against the City of Chicago for damages from the construction by it of a viaduct on a street in said City. *Affirmed.*

The facts are fully stated by the court.

Mr. **Frederick S. Winston,** for plaintiff in error:

A property owner is entitled to recover for damages arising from a public improvement placed in the street in front of his property.

Northern Transp. Co. v. *Chicago*, 99 U. S. 635 (25:336), and cases cited; *Rigney* v. *Chicago*, 102 Ill. 64; *Chamberlain* v. *West End & C. P. R. Co.* 2 Best & S. 605, 110 E. C. L. 604, 617; *Beckett* v. *Midland R. Co.* L. R. 1 C. P. 241; on appeal, L. R. 3 C. P. 82; *McCarthy* v. *Metropolitan Board of Works*, L. R. 7 C. P.

508; *Chicago* v. *Union Building Asso.* 102 Ill. 379; *Culbertson & B. Provision Co.* v. *Chicago*, 111 Ill. 651; *Chicago* v. *McDonough*, 112 Ill. 85; *East St. Louis* v. *O'Flynn*, 8 West. Rep. 85, 119 Ill. 200; *Caledonia R. Co.* v. *Ogilvy*, 2 Macq. (31 App. Cas.) 229; *Guest* v. *Reynolds*, 68 Ill. 478.

That business was diverted from this particular piece of property is not such an element of damage as would warrant a recovery.

Charles River Bridge v. *Warren Bridge*, 7 Pick. 344; *Hyde Park* v. *Dunham*, 85 Ill. 569; *Ricket* v. *Metropolitan R. Co.* L. R. 2 H. L. Eng. & Ir. App. 175, 198; *King* v. *London Dock Co.* 5 Adol. & E. 163; *Goodrich* v. *Chicago*, 20 Ill. 447; 2 Dill. Mun. Corp. 3d ed. § 836; *Hesing* v. *Scott*, 107 Ill. 600; *Chicago* v. *Huenerbein*, 85 Ill. 594; *Booker* v. *Venice & C. R. Co* 101 Ill. 338; *DeBuol* v. *Freeport & M. R. R. Co.* 111 Ill. 499.

Messrs. **George A. Follansbee,** and *Thomas M. Hoyne*, for defendants in error:

Private property shall not be taken or damaged for public use without just compensation.

Const. 1870, art. 2, § 12; *Rigney* v. *Chicago*, 102 Ill. 64.

The words "injuriously affected" are synonymous with the word "damaged."

Chamberlain v. *West End & C. P. R. Co.* 2 Best & S. 605; 110 E. C. L. R. 604; *Beckett* v. *Midland R. Co.* L. R. 1 C. P. 241; on appeal L. R. 3 C. P. 82; *McCarthy* v. *Metropolitan Board of Works*, L. R. 7 C. P. 508; *Hall* v. *Bristol*, L. R. 2 C. P. 322; *East & West India Docks Co.* v. *Gattke*, 3 McN. & G. 155; *Chicago & W. I. R. Co.* v. *Ayres*, 106 Ill. 511; *Pekin* v. *Brereton*, 67 Ill. 477; *Chicago & E. I. R. Co.* v. *Loeb*, 5 West. Rep. 887, 118 Ill. 203.

The value of the improvements is a proper element in the consideration of damages.

DeBuol v. *Freeport & M. R. R. Co.* 111 Ill. 499; *Hyde Park* v. *Washington Ice Co.* 4 West. Rep. 233, 117 Ill. 233; *Chicago & E. R. Co.* v. *Dresel*, 110 Ill. 89; *Lake Shore & M. S. R. Co.* v. *Chicago & W. I. R. Co.* 100 Ill. 21; *St. Louis, J. & S. R. Co.* v. *Kirby*, 104 Ill. 345; *Johnson* v. *Freeport & M. R. R. Co.* 111 Ill. 413.

The damage caused by flooding the premises was a proper element in ascertaining the damage.

Nevins v. *Peoria*, 41 Ill. 503; *Toledo W. & W. R. Co.* v. *Morrison*, 71 Ill. 616; *Aurora* v. *Reed*, 57 Ill. 29; *Pumpelly* v. *Green Bay Co.* 80 U. S. 13 Wall. 166 (20:557).

Evidence that the result of the construction of a viaduct rendered the premises less available for the purposes for which they are especially adapted was competent.

This evidence does not fall within the rule stated in the case of *Jacksonville & S. R. Co.* v. *Walsh*, 106 Ill. 253; *Snyder* v. *Western U. R. Co.* 25 Wis. 60; *Illinois & W. R. Co.* v. *Van Horn*, 18 Ill. 257; *Chicago & E. R. Co.* v. *Blake*, 116 Ill. 163; *Driver* v. *Western U. R. Co.* 32 Wis. 569.

A property owner can recover at common law for an obstruction of a highway adjoining his property.

Wilkes v. *Hungerford Market Co.* 2 Bing. N. C. 281.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by Moses Taylor, as owner of an undivided interest in a lot in Chicago, having sixty feet front on Lumber Street, one hundred and fifty feet on Eighteenth Street, and three hundred feet on the South Branch of Chicago River, to recover the damages sustained by reason of the construction, by that City, of a viaduct on Eighteenth Street, in the immediate vicinity of said lot. The City did this work under the power conferred by its charter "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same," and "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof." It appears that the construction of the viaduct was directed by special ordinances of the city council.

For many years prior to, as well as at, the time this viaduct was built the lot in question was used as a coal yard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing, and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth Street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber Street, as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was, also, evidence tending to show that one of the results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago River, was, that the coal yard was often flooded with water running on to it from said approaches, whereby the use of the premises, as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

On behalf of the City there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all other persons in the vicinity, and could not be the basis of an individual claim for damages against the City.

There was a verdict and judgment against the City. The court below having refused to set aside the judgment and grant a new trial, the case has been brought here for review in respect to errors of law which, it is contended, were committed in the admission of incompetent evidence, in the refusal of instructions asked by the City, and in the charge of the court to the jury.

Before noticing the assignments of error it will be well to ascertain what principles have been announced by this court or by the Supreme Court of Illinois in respect to the liability of municipal or other corporations in that State, for damages resulting to owners of pri-

vate property from the alteration or improvement, under legislative authority, of streets and other public highways.

By the Constitution of Illinois, adopted in 1848, it was provided that no man's property shall "be taken or applied to public use without just compensation being made to him." Art. XIII, § 11. While this Constitution was in force Chicago commenced, and substantially completed, a tunnel under Chicago River, along the line of La Salle Street, in that City. It was sued for damages by the Northern Transportation Company, owning a line of steamers running between Ogdensburg, New York, and Chicago, and also a lot in the latter City, with dock and wharfage privileges, the principal injury of which it complained being that during the prosecution of the work by the City it was deprived of access to its premises, both on the side of the river and on that of the street. This court, in *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635, 641 [25: 336, 338], held that in making the improvement of which the plaintiff complained the City was the agent of the State, performing a public duty imposed by the Legislature; and that "Persons appointed or authorized by law to make or improve a highway are not responsible for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country,"—citing numerous cases, among others *Smith* v. *Corporation of Washington*, 61 U. S. 20 How. 135 [15: 858]. "The decisions to which we have referred," the court continued, "were made in view of *Magna Charta*, and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action." This view, the court further said, was not in conflict with the doctrine announced in *Pumpelly* v. *Green Bay Co.* 80 U. S. 13 Wall. 166 [20: 557], which was a case of the permanent flooding of private property, a physical invasion of the real estate of the private owner, a practical ouster of his possession.

In *Chicago* v. *Rumsey*, 87 Ill. 348, 363, the Supreme Court of Illinois, upon a full review of previous decisions, and especially referring to *Moses* v. *Pittsburg, Ft. W. & C. R. Co.* 21 Ill. 516; *Roberts* v. *Chicago*, 26 Ill. 249; *Murphy* v. *Chicago*, 29 Ill. 279; *Stone* v. *Fairbury, P. & N. W. R. Co.* 68 Ill. 394; *Stetson* v. *Chicago & E. R. Co.* 75 Ill. 74; and *Chicago, Burlington & Quincy R. Co.* v. *McGinnis*, 79 Ill. 269, held it to have been the settled law of that State, up to the time of the adoption of the Constitution of 1870, that there could be "no recovery by an adjacent property holder, on streets the fee whereof is in the city, for the merely consequential damages resulting from the character of the improvements made in the streets, provided such improvement has the sanction of the Legislature."

But the present case arose under, and must be determined with reference to, the Constitution of Illinois adopted in 1870, in which the prohibition against the appropriation of private property for public use, without compensation, is declared in different words from those employed in the Constitution of 1848. The provision in the existing Constitution is that "Private property shall not be taken *or damaged* for public use without just compensation." An important inquiry in the present case is to the meaning of the word "damaged" in this clause.

The earliest case in Illinois in which this question was first directly made and considered is *Rigney* v. *Chicago*, 102 Ill. 64, 74, 80. That was an action to recover damages sustained by the plaintiff by reason of the construction by Chicago of viaduct or bridge along Halstead Street and across Kinzie Street, in that City, some 220 feet west of his premises, fronting on the latter street. There was no claim that the plaintiff's possession was disturbed, or that any direct physical injury was done to his premises by the structure in question. But the complaint was that his communication with Halstead Street, by way of Kinzie Street, had been cut off, whereby he was deprived of a public right enjoyed by him in connection with his premises, and an injury inflicted upon him in excess of that sustained by the public. For that special injury, in excess of the injury done to others, he brought suit. The trial court peremptorily instructed the jury to find for the City, holding, in effect, that the fee of the streets being in the City there could be no recovery for the obstruction of which the plaintiff complained.

That judgment was reversed, an elaborate opinion being delivered, reviewing the principal cases under the Constitution of 1848, and referring to the adjudications in the courts of other States upon the general question as to what amounts to a taking of private property for public use within the meaning of such a provision as that contained in the former Constitution of Illinois. After alluding to the decisions of other state courts to the effect that such a provision extended only to an actual appropriation of property by the State, and did not embrace consequential injuries, although what was done resulted, substantially, in depriving the owner of its use, the Supreme Court of Illinois reviewed numerous cases determined by it under the Constitution of 1848. *Nevins* v. *Peoria*, 41 Ill. 502, decided in 1866; *Gillham* v. *Madison Co. R. Co.* 49 Ill. 484; *Aurora* v. *Gillett*, 56 Ill. 132; *Same* v. *Reed*, 57 Ill. 29; *Jacksonville* v. *Lambert*, 62 Ill. 519; *Toledo, W. & W. R. Co.* v. *Morrison*, 71 Ill. 616. It says: "Whatever, therefore, may be the rule in other States, it clearly appears from this review of the cases that previous to and at the time of the adoption of the present Constitution, it was the settled doctrine of this court that any actual physical injury to private property by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the Constitution, to the extent of the damages

thereby occasioned; and actions for such injuries were uniformly sustained."

Touching the provision in the Constitution of 1870, the court said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and for that purpose extended the right to compensation to those whose property had been "damaged" for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the State, and abolished the old test of direct physical injury to the *corpus* or subject of the property affected. The new rule of civil conduct, introduced by the present Constitution, the court adjudged, required compensation in all cases where it appeared "there has been some physical disturbance of a *right*, either public or private, which the plaintiff enjoys *in connection with his property*, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." The Chief Justice concurred in the judgment, and in the general views expressed by the court, holding that while the owner of a lot on a street held it subject to the right of the public to improve it in any ordinary and reasonable mode deemed wise and beneficial by the proper public functionaries, he was entitled, under the Constitution of 1870, to compensation in case of a sudden and extraordinary change in the grade of the street or highway, whereby the value of his property is in fact impaired. Three of the justices of the state court dissented.

As we understand the previous cases of *Pekin* v. *Brereton*, 67 Ill. 478; *Same* v. *Winkel*, 77 Ill. 56; *Shawneetown* v. *Mason*, 82 Ill. 338; *Elgin* v. *Eaton*, 83 Ill. 535, and *Stack* v. *East St. Louis*, 85 Ill. 378—all of which arose under the present Constitution of Illinois—they proceeded upon the same grounds as those expressed in *Rigney* v. *Chicago*, 102 Ill. 64, although in no one of them did the court distinctly declare how far the present Constitution differed from the former, in respect to the matter now before us.

At the same term when *Rigney's Case* was decided the state court had occasion to consider this question as presented in a somewhat different aspect. The Union Building Association owned a building and lot three and a half blocks from a certain part of La Salle Street in Chicago, which the City proposed to close up, and permit to be occupied by the board of trade with its building. As the streets adjacent to the plaintiff's property were to remain in the same condition as to width, etc., that they were in before, and as the closing up of a portion of La Salle Street would not, in any degree, interfere with access to its lot, or with the use and enjoyment of it, it was held that there was no special or particular injury done for which an action would lie against the City. That case was distinguished from *Rigney* v. *Chicago*, in this: that in the latter case the court held that "Property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets, which cannot be taken away or materially impaired by the City, without incurring legal liability to the extent of the damages thereby occasioned." *Chicago* v. *Union Building Asso.* 102 Ill. 391.

In *Chicago & W. I. R. Co.* v. *Ayres*, 106 Ill. 518, the court—all the justices concurring—observed: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney* v. *Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character—that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Pittsburg & Fort Wayne & C. R. Co.* v. *Reich*, 101 Ill. 157, is in point on this question of damages, and the case of *Chicago* v. *Union Building Association*, 102 Ill. 379, also reviews the authorities and approves the doctrines in *Rigney* v. *Chicago*, *supra*. These cases, therefore, overrule the doctrines of the earlier cases." Our attention has not been called to, nor are we aware of, any subsequent decision of the state court giving the Constitution of 1870 an interpretation different from that indicated in *Rigney* v. *Chicago* and *Chicago & W. I. R. Co.* v. *Ayres*. We concur in that interpretation. The use of the word "damaged" in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution.

The charge to the jury by the learned judge who presided at the trial gave effect to the principles announced in the foregoing cases arising under the present Constitution of Illinois. It covered every vital question in the case, in language so well guarded that the jury could not well have misunderstood the exact issue to be tried, or the proper bearing of all the evidence. So far as the special requests for instructions in behalf of the City contained sound propositions of law they were fully embodied in the charge to the jury.

In behalf of the City it was contended that, if liable at all, it was only liable for such damage as was done to the market value of the property by rendering access to it difficult or inconvenient. The court said, in substance, to the jury that the flooding of the lot by water running down upon it from the approaches to the viaduct was an element of damage which they might consider; though if such flooding merely caused inconvenience to the occupant in the conduct of his business, such as his coal

getting wet or its becoming more difficult to keep his scales properly adjusted, these were not elements of impairment to the value of the property for purposes of sale. The jury were also instructed that although the occupant may have found it difficult to haul coal out of the lot, and although it may have been much more unprofitable to conduct the business of selling coal at this lot, that did not weigh upon the question as to the value of the lot in the market. Other observations were made to the jury; but the court, in different forms of expression, said to them that the question was whether, by reason of the construction of the viaduct, the value, that is, the market price, of the property had been diminished. The scope of the charge is fairly indicated in the following extract: "The real question is, has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good a price for other purposes, except that if the proof satisfies you that any of the permanent improvements put on the lot for the particular business which has been heretofore carried on there and for which it was improved, have been impaired in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements—that is to say, this lot being improved for a specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage."

It would serve no useful purpose to examine in detail all the requests for instructions, and compare them with the charge, or discuss the questions arising upon exceptions to the admission of evidence. After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice. It may be, as suggested by its counsel, that the present Constitution of Illinois, in regard to compensation to owners of private property "damaged" for the public use, has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is "a handicap" upon municipal improvement of public highways. And it may, also, be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their Constitution.

We perceive no error in the record, and the judgment is *affirmed*.

SAMUEL S. CISSEL, *Appt.*,
v.
MARY A. DUTCH, EXTX. of ANTHONY M. DUTCH, Deceased, ET AL.

(See S. C. Reporter's ed. 171-173.)

Suit to cancel deed, decided on the facts.

In a suit in equity to declare a deed and note void and for a reconveyance, where the issue was entirely one of fact, *held*, upon the facts, that the integrity of the transaction was not satisfactorily impeached and that the bill should be dismissed.

[No. 158.]

Argued Jan. 31, Feb. 1, 1888. Decided March 19, 1888.

APPEAL from a decree of the Supreme Court of the District of Columbia, adjudging a deed and note to be void. *Reversed.*

The facts are stated by the court.

Messrs. **T. A. Lambert** and **Enoch Totten**, for appellant:

Fraud is never to be presumed in the absence of facts which necessarily import it.

Gregg v. *Sayre*, 33 U. S. 8 Pet. 244 (8:932).

The bill must be specific in stating facts showing fraud.

Moore v. *Greene*, 60 U. S. 19 How. 69 (15:588.)

Messrs. Francis Miller and **S. S. Henkle**, for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Supreme Court of the District of Columbia, by persons claiming to own a lot of land in the City of Washington, as the heirs at law of one Jenifer, and as devisees under his last will and testament.

The bill alleges that a deed of trust, purporting to have been executed on the 8th of July, 1875, by Jenifer, to R. P. Dodge and P. A. Darneille, conveying the land to them as security for the payment of a promissory note dated that day, purporting to have been made by Jenifer, payable two years after date, for $1,000, with 10 per cent interest until paid, payable semi-annually, to John T. Hall, or order, was a forgery, and that the note was also a forgery. The deed of trust bears the notarial certificate, dated July 8, 1875, with the notarial seal, of James Nicholas Callan, a notary public, certifying that Jenifer, the party to the deed, personally appeared before him, in the County of Washington, being personally well known to him to be the person who executed the deed, and acknowledged it to be his act and deed. The deed was recorded on the 10th of July, 1875, in a book of the land records for Washington County. The note and the deed of trust were each of them signed by Jenifer by making his mark, and each of them bears the signature of Callan as a witness.

The bill alleges that Jenifer was never indebted to Hall in any sum, and never received any money from Hall; that Jenifer never signed

or made his mark to the note or the deed of trust, or authorized anyone to do so, and never acknowledged the deed to Callan; and that on the 29th of May, 1882, the two trustees, having advertised the premises for sale, sold them at public sale to one Cissel, and executed to him a deed of the premises, which has been recorded in the land records of the District. In an amendment to the bill it is alleged that the note and the deed of trust came into the possession of one Brittania W. Kennon, who held them on the day of the sale, and ordered the sale. The two trustees, and Hall, Cissel, and Kennon are made parties to the bill. The prayer of the bill is that the deed of trust and the note, and the deed to Cissel, be declared null and void, and be canceled, and that Cissel reconvey the premises to the plaintiffs. Dodge, Darneille, and Cissel each answered the bill by a separate answer, denying its allegations as to the alleged forgeries, and averring that the note and the deed of trust were genuine and valid instruments. The plaintiffs joined issue, by replication, with the defendants Dodge, Darneille, and Cissel. Proofs were taken on both sides, and the case was heard before the court in special term, which dismissed the bill. On an appeal by the plaintiffs to the court in general term, it reversed the decree of the special term, and adjudged the note, and the deed of trust, and the deed to Cissel to be void, and directed an account, in favor of the plaintiffs, of the mesne profits received by Cissel. From the decree of the general term Cissel has appealed to this court.

The issue is one entirely of fact, in which the burden of proof is upon the plaintiffs. Callan, the notary public, testifies with particularity to the circumstances attending the execution of the note and of the deed of trust in his presence, and to the acknowledgment of the latter before him, and to his signing his name as a witness to the execution of each. It is also satisfactorily shown that the $1,000 secured by the note passed from the lender to the agent of the borrower. It would serve no good purpose to discuss the evidence at length. The integrity of the transaction is not satisfactorily impeached.

The decree of the court below, in general term, is reversed, and the case is remanded to it, with a direction to affirm, with costs, the decree of the court in special term.

CHARLES E. MILLER ET AL., Exrs. of CHESTER A. ARTHUR, Late Collector of the PORT OF NEW YORK, *Plffs. in Err.*,
v.
FREDERICK BUTTERFIELD ET AL.

(See S. C. *Arthur's Exrs.* v. *Butterfield*, Reporter's ed. 70–77.)

Revenue law — manufactures of hair — designation — Act of 1870 — construction of.

1. A designation of an article of commerce by merchants and importers, when clearly established, determines the construction of a revenue law when that article is mentioned.

2. The facts that 20 per cent of cotton entered into the composition of goods, and only 80 per cent of them are of hair, do not change their character as manufactures of hair, within the meaning of the Act of 1870.

3. The words in the 21st section of the Act of 1870, "all other manufactures of hair not otherwise herein provided for," mean not otherwise provided for in the Act of which they are a part.

4. The words "manufactures of hair" are a sufficient designation to place such manufactures among the enumerated articles under said Act. To place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned; it is sufficient that they are designated in any way to distinguish them from other articles.

5. The designation of a cloth as hair, silk or cotton, depends upon the predominance of such article in its composition and not upon the absence of any other material.

[No. 167.]

Argued Feb. 6, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of plaintiffs, recovered for duties illegally exacted. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiffs in error.

Mr. **George Bliss,** for defendants in error:

The law is to be construed liberally to carry out the purpose of its enactment, and its title may be looked to for aid in its construction.

Smythe v. *Fiske*, 90 U. S. 23 Wall. 374, 383 (23: 47, 49).

The goods came within the language of the Act of 1870, as being manufactures of hair not in that Act otherwise provided for. They were in fact 80 per cent hair.

The cases where general words have been held to be limited by the meaning applied to similar words in prior statutes can have no application here.

Reiche v. *Smythe*, 80 U. S. 13 Wall. 162 (20: 566); *Arthur* v. *Zimmerman*, 96 U. S. 124 (24: 770); *Barber* v. *Schell*, 107 U. S. 617 (27: 490).

There being no pretense that these goods have been specifically provided for in prior statutes *eo nomine*, the cases like *Homer* v. *Collector*, 68 U. S. 1 Wall. 486 (17: 688); *Reiche* v. *Smythe*, and *Smythe* v. *Fiske*, *supra*; *Movius* v. *Arthur*, 95 U. S. 144 (24: 420), have no application to this case.

The similitude clause has no application.

Arthur v. *Sussfield*, 96 U. S. 128 (24: 772).

Goods made of mixed materials are not necessarily mixed goods.

Solomon v. *Arthur*, 102 U. S. 208 (26: 147); *Fisk* v. *Arthur*, 103 U. S. 431 (26: 520).

It was a matter for the jury upon the evidence in this case.

Thornton v. *Bank of Washington*, 28 U. S. 3 Pet. 36 (7: 594); *Chinoweth* v. *Haskell*, 28 U. S. 3 Pet. 92 (7: 614); *Adams* v. *Roberts*, 43 U. S. 2 How. 486 (11: 349).

Under the general denial the defendant may give evidence controverting any facts necessary to be established by plaintiff, but not to prove a defense founded on new matter.

McKyring v. *Bull*, 16 N. Y. 304; *Weaver* v. *Barden*, 49 N. Y. 286; *O'Brien* v. *McCann*, 58 N. Y. 373; *Codd* v. *Rathbone*, 19 N. Y. 37; *Koehler* v. *Adler*, 15 J. & S. 518; *S. C.* 91 N. Y. 657.

Mr. Justice **Field** delivered the opinion of the court:

This action was brought by the plaintiffs be-

low, to recover of the late Collector of the Port of New York certain sums of money alleged to have been illegally exacted as duties on goods imported by them. It was tried in the Circuit Court of the United States for the Southern District of New York, where the plaintiffs recovered a verdict; and to review the judgment entered thereon the executors of the Collector, since deceased, have sued out this writ of error.

The complaint describes the goods imported in general terms as manufactures of hair. There were fourteen importations between the 24th of January and the 25th of June, 1874. Upon the goods, which were styled "goat hair goods," the collector assessed duties under provisions of the Act of March 2, 1867, 14 Stat. at L. 561, "to provide increased revenue from imported wool, and for other purposes," relating to women's and children's dress goods, and real or imitation Italian cloths, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other like animals, at six cents a square yard and 35 per centum *ad valorem* upon such as were valued at not more than twenty cents a square yard, and at eight cents a square yard and 40 per centum *ad valorem* upon such as were valued at more than twenty cents a square yard.

The plaintiffs contended that this assessment of duties was erroneous; that the duties should have been assessed under the 21st section of the Act of July 14, 1870, "to reduce internal taxes, and for other purposes," 16 Stat. at L. 264, as the goods were within its terms "manufactures of hair not otherwise provided for," and that a reduction thereon should be made of 10 per centum, under the Act of June 6, 1872. 17 Stat. at L. 231. That section provides that "After the thirty-first day of December, eighteen hundred and seventy, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say: * * * On hair cloth of the description known as hair seating, eighteen inches wide or over, forty cents per square yard; less than eighteen inches wide, thirty cents per square yard. On hair cloth known as crinoline cloth, *and on all other manufactures of hair not otherwise provided for*, thirty per centum *ad valorem*."

By the Joint Resolution of January 30, 1871, this clause was amended by the insertion of the word "herein," between the words "otherwise" and "provided." 16 Stat. at L. 592.

The reduction of 10 per cent under the Act of June 6, 1872, was made upon such of the invoices as were produced, but most of the invoices had been mislaid. It was not, therefore, shown that such reduction had been made upon all of them.

On the trial it appeared that the "goat hair goods" are fabrics manufactured of cotton, and the hair of the angora, or other goat, the warp being cotton and the woof being goat's hair; that their chief use is for women's dresses; that they are known in the trade under such specific names as brilliantines, lustrines, alpacas, and mohairs; that the goat's hair of which they are composed in part constitutes 80 per cent of the whole value, and the cotton 20 per cent.

It also appeared that crinoline cloth is made of cotton and hair, the long hair being from the tail or mane of the horse and woven into a cotton warp, the width being governed by the length of the hair, and that it is used for ladies' underwear; that hair seating is a similar fabric to crinoline cloth, the only difference being that it is more closely woven, and is used mainly for upholstering purposes.

Evidence was offered by the defendant tending to show that the goat hair goods are generally known in the trade and commerce of the country under the name of women's dress goods; but on this point the evidence was conflicting, some of the witnesses stating that they were known by their specific names as brilliantines and alpacas, and some that they were at the time of importation known as women's dress goods.

It was stipulated, for the purpose of the trial, that if the jury should render a verdict for the plaintiffs it should be subject to adjustment as to formal requisites and amounts at the custom house, under the direction of the court. And to raise the questions involved it was also stipulated, as to one of the importations, that the plaintiffs had paid the duties assessed and in due time filed their written protest, appealed to the Secretary of the Treasury, and brought this action.

When the evidence was closed, the court was requested to direct a verdict for the defendant, on the ground that such goat hair goods were:

1. Women's dress goods, composed wholly or in part of the hair of the alpaca, goat, or other like animal;

2. That they were not manufactures of hair, but were manufactures of mixed materials, and by the similitude clause were liable to duty as manufactures of cotton, the latter being assessed at a higher rate of duty than that prescribed for manufactures of hair; and,

3. That under the Act of 1870, the terms "all other manufactures of hair not otherwise provided for" meant other manufactures of hair, like those enumerated in the same section; namely, crinoline cloth or hair seating, and that there was no evidence that the goat hair goods were like them.

The court overruled the motion, and the defendant excepted. It then instructed the jury in substance as follows: That under the Act of 1867, which remained in force until 1870, there was assessed a certain duty on women's and children's dresses composed wholly or in part of wool, worsted, hair of the alpaca, goat, and other like animals; that in 1870 the law was changed in some respects, so as to make the duty assessable on hair cloth, known as crinoline cloth, and all other manufactures of hair, at a less rate; that the goods upon which the duties were assessed in this case were manufactures principally of hair; that the principal value of them was of hair; that according to the evidence 80 per cent was of hair and 20 per cent of cotton; that the general language of the Act of 1870 would control and guide in the assessment of duties upon them, unless they had, before the passage of the Act, come to be specifically known as dress goods among merchants and importers; that the question, therefore, was whether they had acquired such a name in the trade and commerce of the coun-

try as to be specifically known by it, instead of the general name of manufactures of hair; that if they had not acquired such specific name, and were not known by it, they would come under the general name of manufactures of hair, and the plaintiffs would be entitled to recover; and that on the other hand if they had acquired such specific name, and were known by it in trade and commerce, the defendant would be entitled to a verdict.

The defendant took various exceptions to this charge, and in this court presents anew the questions raised upon the instructions refused.

The instructions were in our opinion properly refused, and the case was presented to the jury as fully as was required for their appreciation of the question involved. The goods were composed of 80 per cent of hair, and there is no provision of law, to which our attention has been drawn, that takes goods thus composed, not having a specific commercial designation, from the general designation as manufactures of hair. The finding of the jury is conclusive that they were not known in commerce, among merchants and importers, as women's and children's dress goods. It is well settled that a designation of an article of commerce by merchants and importers, when clearly established, determines the construction of a revenue law when that article is mentioned. It was so held in *Arthur* v. *Morrison*, 96 U. S. 108 [24:764], and in many other cases, which are cited in the opinion of the court in that case. In *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 151 [9:378], the court said that "Laws imposing duties on importations of goods are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the Legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. This rule is fully recognized and established by this court in the case of *Two Hundred Chests of Tea*, reported in 22 U. S. 9 Wheat. 438 [6:129]."

The fact that 20 per cent of cotton entered into the composition of the goods, and only 80 per cent of them are of hair, does not change their character as manufactures of hair, within the meaning of the Act of 1870. Crinoline and hair seating, both of which are in that Act specifically designated as hair cloth, have also cotton in their composition. The designation of a cloth as hair, silk, or cotton, depends on the predominance of such article in its composition, and not upon the absence of any other material.

The 21st section of the Act of 1870 having been, as mentioned above, amended in 1871 by the insertion of the word "herein" between "otherwise" and "provided," the clause of the section is to be construed as though its language was that "After the 31st of December, 1870, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say: * * * On hair cloth of the description known as hair seating, eighteen inches wide or over, forty cents per square yard; less than eighteen inches wide, thirty cents per square yard. On hair cloth known as crinoline cloth, and *on all other manufactures of hair not otherwise herein provided for*, thirty per centum *ad valorem*." The words "all other manufactures of hair not otherwise herein provided for" mean not otherwise provided for in the Act of which they are a part. *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374 [23:47]. There is no provision in that Act for other manufactures of hair than crinoline and hair seating. It therefore necessarily follows that if the goat hair goods in question are to be deemed manufactures of hair the duties are to be assessed in conformity with that Act, and not according to the provisions of any other Act.

The construction of the clause for which the government contends, if admitted, would lead to great embarrassment, if not insurmountable difficulty, in determining the duties to be assessed on many articles. Its position is that by "all other manufactures of hair not otherwise provided for," is meant all other manufactures of hair similar to crinoline cloth and hair seating. If this be correct it would be impossible to say at what rate of duty such other manufactures of hair are to be assessed, whether by the square yard rate or the *ad valorem* rate. The two rates could not be indifferently applied. The natural meaning of the section is that on crinoline cloth an *ad valorem* duty shall be assessed, and a similar duty on all other manufactures of hair not otherwise provided for in the Act.

The similitude clause can have no bearing on the question. That clause only provides that there shall be levied on each nonenumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated as chargeable with duty, the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars mentioned. R. S. § 2499. To place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient that they are designated in any way to distinguish them from other articles. Thus the words "manufactures of which steel is a component part," and "manufactures of which glass is a component part," have been held a sufficient designation to render the goods enumerated articles under the statute, and take them out of the similitude clause. *Arthur* v. *Sussfield*, 96 U. S. 128 [24:772]. Upon the same principle "manufactures of hair" must be held a sufficient designation to place such manufactures among the enumerated articles.

Judgment affirmed.

FREDERICK C. WEIR, *Appt.*,
v.
WILLIAM J. MORDEN ET AL.

(See S. C. Reporter's ed. 98-108.)

Decree affirmed on the facts.

Decree dismissing bill in equity to restrain the alleged infringement of reissued letters patent No. 8914, dated Sept. 30, 1879, for an improvement in railroad frogs, affirmed on the facts of the case.

[No. 182.]

Argued Feb. 13, 1888. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a bill to restrain an infringement of letters patent. *Affirmed.*

Opinion below, 21 Fed. Rep. 243.

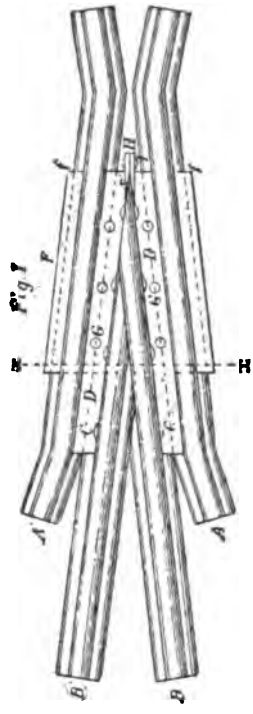
Statement by *Mr. Justice* **Matthews:**

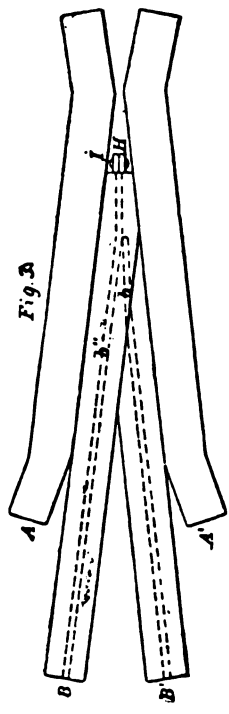
This is a bill in equity to restrain the alleged infringement of reissued letters patent No. 8914, dated September 30, 1879, for an improvement in railroad frogs, the original patent No. 215,548, dated May 20, 1879, having been issued on an application filed February 4, 1879, to Frederick C. Weir, the complainant. In his specification the patentee describes the invention generally as follows:

"My invention relates to the class of frogs made by the bending of the overlapping ends of the rails themselves, and the junction of the same with the central rail constituting the point by rivets or bolts through separating pieces; and my invention consists, first, in such a formation and connection of the two rails which make up the angular point as that one of the rails extends unbroken and uncut directly across the path of the other, and in itself makes a solid end to the point with a full width flange, which is overlapped by the flange of the other rail, and thus a flange of double thickness is afforded at a point where strength is particularly needed, and the cutting away of the flanges (as is the usual custom) is avoided entirely; second, in an improved manner of connecting the two rails of the point together and to channel-iron pieces, to which the outer rails are connected.

"One of the objects of this invention is to furnish a firm lateral support upon each side of the V-shaped rails by means of channel irons, which at the same time unite and hold the centre rails forming the V to the wing rails firmly, uniting and holding all the parts in their proper relative position."

The drawings accompanying the specification are as follows:





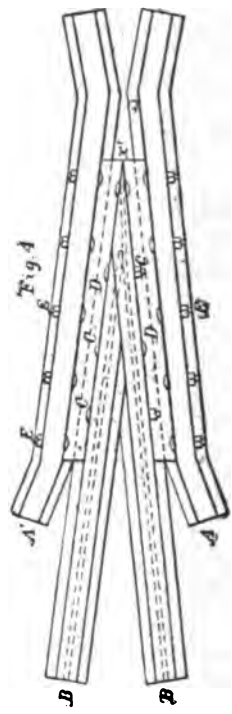


Fig. 2

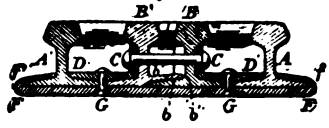


Fig. 5.

The specification explains the drawings as follows:

"In the accompanying drawings Figure 4 is a plan of a frog embodying my improvements. Fig. 5 is a cross section of the same on line *x x*. Fig. 3 is a plan of the under side of the frog, showing the continuations of the main point rail with a full width flange throughout, also showing the riveted extension of the flanges of the channel irons beyond the points.

"It will not be necessary to describe the devices shown in Figs. 1 and 2, as they are fully described in division B of this reissue.

"A A′ are the outer or wing rails of the frog, and B B′, are the two rails which compose the acute angle or point.

"In place of cutting away both the flanges of the rails B B′, so as to make a joint between the two rails midway between the lines of the angle of the frog, as is common now, and, I may say, usually practiced, I continue the flange of the rail B, of full width, intact clear along the junction of the two rails to the point where it strikes the flange of the outer rail, as shown in Fig. 3, which is almost immediately under the point X′ of the frog, and I swage up the flange b^1 of rail B′ on one side, as shown in Figs. 5 and 3, so that it lies over the flange of rail B, this flange of rail B′ being cut away angularly on the edge to properly meet the line of the web b^2 of the rail B.

"I connect the point rails B B′ together by rivets, C, which, while they secure these rails together, also secure pieces of channel iron, D, to said point rails, the channel iron making the separating medium between the point rails B B′ and wing rails A A′, and giving a means for attaching said wing rails.

"The adjacent flanges of the channel irons of the point may be extended beyond the point and riveted, as shown in Fig. 3.

"With channel iron I attach the wing rails in the manner shown in Fig. 5, the outer flanges of the iron being notched at *d* for the passage, before the outer rails are attached, of the long rivets C, the bolts E, which connect the outer rails, being placed between the notches *d*."

The claims are as follows:

"1. A frog having one of its point rails extending with a full width flange along the junction of the two rails, and the flange of the other point rail overlying the flange of the first mentioned one, substantially as and for the purpose specified.

"2. A frog composed substantially of the two centre rails B B′ joined to form the V-shaped point, united to outside diverging or wing rails by means of two channel or U irons, D D, one wing of which channel or U iron is shaped to fit the web of the abutting rails, combined to form the point of the frog, and upon the other side fitting the web of the wing or diverging rail, respectively, and secured by bolts or rivets passing through the webs of the rails and the sides of the channel bars, substantially as shown.

"3. In combination with the point rails B B′, fitted to each other as described, the channel pieces D extending and bolted or riveted together beyond the point of the frog and connecting rivets C, which extend entirely through the two point rails and the channel pieces, substantially as and for the purpose specified."

The only claim involved in this suit is the second, no infringement being alleged of either the first or third. Separate answers were filed by the defendants respectively, which were, however, in substance the same. The defenses are that the reissued letters patent are null and void, as not being for the same invention as set forth and described in the original letters patent; that the defendants do not infringe; and that the alleged invention of the complainant was not a patentable novelty, in view of the state of the art at the time of the alleged invention, as shown in certain prior letters patent specifically mentioned. The answer of Morden, adopted by the others, also sets out the following:

"And this defendant further answering says, on information and belief, that he is the original and first inventor of a U-shaped plate in combination or connection with a railroad frog, and that said invention was secured to him by said letters patent of the United States No. 178,804 and No. 205,496, and that by virtue of said letters patent he has the sole and exclusive right to said U shape in a railroad frog, and that, while the complainant is engaged in the manufacture and sale of railroad frogs, he uses a V-shaped plate so secured to your defendant, as before stated, and in said manufacture and sale has copied from defendant's invention in substantial and material parts secured to defendant by his letters patent aforesaid and in infringement of the same; and this defendant, in this connection, would state that prior to the filing of complainant's bill he, the defendant, filed a bill in this honorable court against said complainant for infringement of his said letters patent No. 178,804 and said wrongful acts, and praying relief on account of said wrongful acts by the complainant, which said bill is now pending against him in this court. Some days after this defendant filed his bill as aforesaid, the said complainant filed his bill, seeking thereby, as defendant is advised and states, on information and belief, to harass and annoy defendant in his said suit and to delay accounting to defendant for said wrongful acts of him, the said complainant."

On final hearing a decree was rendered dismissing the bill for want of equity, to reverse which the present appeal has been taken.

Messrs. **E. E. Wood,** *Edward Boyd* and *Clarence A. Seward,* for appellant:

Where an inventor has manifested his intention to obtain a patent by duly filing an application, any subsequent application filed by him for the same invention will be deemed a renewal thereof.

Godfrey v. *Eames,* 68 U. S. 1 Wall. 317 (17: 684); *Bell* v. *Daniels,* 1 Bond, 212; *Singer* v. *Braunsdorf,* 7 Blatchf. 521; *Jones* v. *Sewall,* 3 O. G. 680; *Johnsen* v. *Fassman,* 5 Fish. Pat. Cas. 471; *Colgate* v. *Western Union Tel. Co.* 15 Blatchf. 365; *Goodyear Dental Vulcanite Co.* v. *Willis,* 7 O. G. 43; *Henry* v. *Francestown Soapstone Stove Co.* 9 O. G. 408; *U. S. Rifle & Cartridge Co.* v. *Whitney Arms Co.* 11 O. G. 378; *Thomas* v. *Waterhouse,* Com. Dec. 1885, 2; *Weir* v. *Morden,* 29 O. G. 83.

The burden of proof is upon defendant and every reasonable doubt is to be resolved against him.

Coffin v. *Ogden,* 85 U. S. 18 Wall. 124 (21: 823).

A liberal construction of claims should be given to make them commensurate with the invention.

Lake Shore & M. S. R. Co. v. *Nat. Car Brake Co.* 110 U. S. 236 (28: 131); *Winans* v. *Denmead,* 56 U. S. 15 How. 341 (14: 721); *Clough* v. *Barker,* 106 U. S. 166 (27: 134); *Webster Loom Co.* v. *Higgins,* 105 U. S. 580 (26: 1177); *Bates*

v. *Coe*, 98 U. S. 31 (25: 68); *Hyndman* v. *Roots*, 97 U. S. 224 (24: 975); *Miller & P. Mfg. Co* v. *DuBrul*, 2 Bann. & A. 618; *Blandy* v. *Griffith*, 3 Fish. Pat. Cas. 619.

Use by the public and by the defendants is evidence that the patented result was the product of invention.

Washburn & M. Mfg. Co. v. *Haish*, 10 Biss. 65; *Smith* v. *Glendale Elastic Fabrics Co.* 1 Holmes, 340; *Lindsay* v. *Stein*, 10 Fed. Rep. 915.

A fortiori is this true where there were acknowledged defects in pre-existing devices, which are remedied by the patent.

Asmus v. *Alden*, 27 Fed. Rep. 684; *Butler* v. *Steckel*, Id. 219; *Niles Tool-Works* v. *Betts Machine Co.* Id. 801; *Ward* v. *Grant Detour Plow Co.* 14 Fed. Rep. 696; *Detroit Lubricator Mfg. Co.* v. *Renchard*, 9 Fed. Rep. 293.

All the presumptions of law are in favor of the novelty, utility and patentability of a patented invention.

Grier v. *Goetinger*, 7 O. G. 563; *Smith* v. *Woodruff*, 6 Fish. Pat. Cas. 476; *Westlake* v. *Cartter*, 4 O. G. 639; *Re Gould*, 5 O. G. 121; *Watson* v. *Cunningham*, 4 Fish. Pat. Cas. 528; *Huddart* v. *Grimshaw*, Web. Pat. Cas. 85; *Murray* v. *Clayton*, Eng. L. R. 7 Ch. App. 577.

Any new combination, if it produces new and useful results, is patentable.

Hailes v. *Van Wormer*, 87 U. S. 20 Wall. 368 (22: 248); *Roberts* v. *Dickey*, 1 O. G. 4; *McCulley* v. *Cunningham*, 3 Pittsb. Legal Jour. 366; *Smith* v. *Fraser*, Id. 397. To the same effect are *Child* v. *Boston & F. Iron Works*, 5 O. G. 61; *Marsh* v. *Dodge & S. Mfg. Co.* 5 O. G. 399; *Foxwell* v. *Bostock*, 12 Weekly Rep. 725; *Adams* v. *Edwards*, 1 Fish. Pat. Cas. 4.

Drawings are judicially accorded a controlling significance on the question of date.

Reeves v. *Keystone Co.* 1 O. G. 468; *Draper* v. *Potomska Mills Corp.* 18 O. G. 276; *Stephenson* v. *Hoyt*, 1 MacA. Pat. Cas. 292.

Authorities sustain the right of an inventor as of the date of his original application.

Smith v. *Prior*, 2 Sawy. 461; *Graham* v. *McCormick*, 10 Biss. 89; *Howes* v. *McNeal*, 15 Blatchf. 128; *Pelton* v. *Waters*, 7 O. G. 425; *Adams* v. *Edwards*, 1 Fish. Pat. Cas. 1; *Sayles* v. *Chicago & N. W. R. Co.* 2 Fish. Pat. Cas. 523; *Re Golding*, 8 O. G. 141; *Fire Extinguisher Case*, 21 Fed. Rep. 48; *Matthews* v. *Wade*, 1 MacA. Pat. Cas. 159; *Gold S. Tel. Co.* v. *Commercial Tel. Co.* 28 Fed. Rep. 848.

Mr. **C. K. Offield**, for appellees:

The law does not permit such enlargement of an original specification as would interfere with other inventors who have entered the field in the mean time.

Chicago & N. W. R. Co. v. *Sayles*, 97 U. S. 554 (24: 1053).

The patentee has attempted to reclaim what originally he had, by plain intention, disclaimed. This cannot be done by reissue.

Leggett v. *Avery*, 101 U. S. 257 (25: 865); *Atwater Mfg. Co.* v. *Beecher Mfg. Co.* 8 Fed. Rep. 606.

Slight mechanical changes were only required to be made in the above patented structures to establish entire identity between such structures and the Weir device.

Hotchkiss v. *Greenwood*, 52 U. S. 11 How. 248 (13: 683); *Stimpson* v. *Woodman*, 77 U. S. 10 Wall. 117 (19: 866); *Hicks* v. *Kelsey*, 85 U. S. 18 Wall. 670 (21: 852); *Smith* v. *Nichols*, 88 U. S. 21 Wall. 112 (22: 566); *Brown* v. *Piper*, 91 U. S. 37 (23: 200); *Reckendorfer* v. *Faber*, 92 U. S. 347 (23: 719); *Terhune* v. *Phillips*, 99 U. S. 592 (25: 293); *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438); *Phillips* v. *Detroit*, 111 U. S. 604 (28: 532); *Clark Pomace Holder Co.* v. *Ferguson*, 119 U. S. 337 (30: 406).

The renewed application on February, 1879, was for a substantially different invention.

Globe Nail Co. v. *Superior Nail Co.* 27 Fed. Rep. 454.

Reissue in suit is invalid. Expansion of the claim cannot be allowed or sustained.

Campbell v. *James*, 21 O. G. 387.

This reissue must fail by reason of adverse rights having accrued.

Combined Patents Can Co. v. *Lloyd*, 11 Fed. Rep. 152; *Jones* v. *Barker*, 11 Fed. Rep. 599.

In the case of *Irish* v. *Knapp*, 18 O. G. 786, the court stated that where an interested witness uses the expression "to the best of his knowledge" and "as near as he can recollect," these expressions show that he had no certain recollection about it.

Mr. Justice **Matthews** delivered the opinion of the court:

The question of infringement depends upon the proper construction of the second claim. The proof shows that the defendants did not infringe either the first or the third. They did not form and connect the two rails, making up the angular point as a part of the frog, so that one of the rails would extend unbroken and uncut directly across the path of the other, and in itself make a solid end to the point with a full width flange overlapped by the flange of the other rail, thus affording a double thickness and avoiding the cutting away of the flanges, as was customary. If there is an infringement, it consists in the use of the channel irons of a U shape, uniting the two centre rails, forming the V-shaped point of the frog, to each other, and the two thus united to the two diverging rails on each side by means of bolts or rivets passing through the webs of the rails and the sides of the channel bars. The question was disposed of by the circuit court in favor of the defendants, as follows:

"The question of fact as to infringement depends upon whether the 'two centre rails B B' joined together to form the V-shaped point,' mentioned in the second claim, necessarily mean the two centre rails which are described in the specification, or does it mean any centre rails joined together in any manner to form a V-shaped point? The answer to this question seems to me to be found in the complainant's own specification. He says: 'My invention consists, first, in such a formation and connection of the two rails which make up the angular point as that one of the rails extends unbroken and uncut directly across the path of the other, and in itself makes a solid end to the point with a full width flange, which is overlapped by the flange of the other rail, and thus a flange of double thickness is afforded at a point where strength is particularly needed, and the cutting away of the flanges (as is the usual custom) is avoided entirely.'

"In his description of the drawings he says:

" 'A A' are the outer or wing rails of the frog, and B B' are the two rails which compose the acute angle or point.'

"And in his description of the mode of constructing his device he says:

" 'In place of cutting away both the flanges of the rails B B', so as to make a joint between the two rails midway between the lines of the angle of the frog, as is common now, and, I may say, usually practiced, I continue the flange of the rail B, of full width, intact clear along the junction of the two rails to the point where it strikes the flange of the outer rail, as shown in Fig. 3, which is almost immediately under the point X' of the frog, and I swage up the flange b^1 of rail B' on one side, as shown in Figs. 5 and 8, so that it lies over the flange of rail B, this flange of rail B' being cut away angularly on the edge to properly meet the line of the web b^2 of the rail B.'

"It will thus be seen that minute directions are given as to the construction of the two centre rails B and B' to form a V-shaped point; and I am of opinion that the two centre rails B and B', described in the second claim, are the rails constructed and joined according to the description given in the patent. The language of the claim is, 'the two centre rails B B' joined to form the V-shaped point', not any two centre rails joined to form a V-shaped point. The V-shaped point made by extending one rail unbroken and uncut directly across the path of the other, and thereby making a solid end to the point, and with the flange of the rail B' swaged up so as to lie upon or overlap the flange of the rail B, seems to me to be an essential element of what complainant supposed he had invented; and, therefore, the two centre rails B B' mentioned in the second claim refer to and mean the two centre rails which he has particularly described in his specification. The proof in the case wholly fails to show that the defendant forms the V-shaped point in his frog in the manner that complainant forms his point."

The construction of the second claim contended for by the appellant is that it embodies separately and distinctly that part of the invention which, in the general description in the preliminary part of the specifications, is stated to be "an improved manner of connecting the two rails of the point together and to channel-iron pieces, to which the outer rails are connected," without reference to the manner in which the two rails of the point are formed, so as to constitute the first part of the invention. If this construction be admitted, the second claim would cover every case of two centre rails joined to form the V-shaped point, which were united to outside diverging or wing rails by means of channel irons of a U shape, bolted or riveted, as therein described, without reference to the manner in which the two centre rails were combined to make the angular point or V shape. In our opinion, the construction placed upon this claim by the circuit court is right, and is required by the language of the specifications and claim. The claim does not on its face profess to cover a mere mode of connecting by means of U-shaped channel irons, the intermediate with the external rails. It is in form a claim for a combination of parts, which together constitute a frog of peculiar construction. The elements of that combination, as stated in the claim, are, first, the two centre rails B B' joined to form the V-shaped point; second, the outside diverging or wing rails; third, the channel irons of a U shape uniting the centre rails together, and also to the outside or wing rails, so that the whole shall constitute a frog with the characteristics imparted by the features of this combination. This coincides with the statement contained in the brief of counsel for the appellant, who say, speaking of the invention as described in the second claim:

"The elements constituting the invention in controversy are: First, two outside diverging wing and main rails; two inside V-shaped point rails, the four rails being united and joined together by two channel irons bolted to these rails by three lines of rivets or bolts, to wit: one line of bolts, bolting one channel iron to one wing rail; another line of bolts, bolting another channel iron to the outer outside wing rail; and the third line of bolts passing through the two inside wings of the two channel plates, and through the webs of the point rails, thereby making one structure or machine. In this construction the cutaway rail forming the point is reinforced on each side by the vertical wings of the channel irons. The claim is for this frog or machine so constructed, a frog composed substantially of the elements above named."

The claim refers specifically to the "two centre rails B B' joined to form the V-shaped point." This points explicitly to the drawings, on which the two centre rails are designated by the letters, and also to the mode in which they are shown by the drawings and the description in the specification to be joined, and excludes the idea of constructing a frog, such as is intended to be covered by the second claim, of any other centre rails than those thus pointed out and described. The patentee by this mode of description and of claim has made the centre rails, formed and connected in the manner described to make up the V-shaped point, an essential part of the invention intended to be secured by the second claim.

An argument against this construction, made by the counsel for the appellant, is based upon the language of the third claim. That claim is for the channel pieces D extending and bolted or riveted together beyond the point of the frog and connecting rivets C, which extend entirely through the two point rails and the channel pieces, "in combination with the point rails B B', fitted to each other as described." It is admitted that the language of that claim limits it to the point rails formed and connected together so as to make the V-shaped point, according to the specific manner described in the specification and shown in the drawings, and that it does not cover centre rails of any other description. This limitation is based upon the words "fitted to each other as described." It is argued that as this phrase is omitted from the second claim, the contrary inference must prevail, so that that claim may be permitted to extend so as to embrace all centre rails joined to form the V-shaped point, however they may be fitted to each other. But this variation of language does not seem to us so significant. The second claim, by the use of the phrase at its close, "substantially as shown," limits its application

quite as effectually to the particular kind of centre rails described in the specification and covered by the first claim; and the reference therein to "the two centre rails B B′ joined to form the V-shaped point," can only mean such point rails as are shown in the drawings marked B B′, and joined to form the V-shaped point referred to in the drawings and described in the specification "substantially as shown."

If this construction of the second claim needed corroboration, that would be found in the state of the art at the time of the alleged invention, as shown by the proof in the present case. The frogs exhibited in evidence as infringements of the complainant's patent were manufactured by the defendants, as they claimed, under patent No. 148,264, dated March 3, 1874, issued to George Thomas and William Miller, under whom they claim, and also under patent No. 178,804, dated February 22, 1876, issued to Morden, one of the defendants, as inventor. Morden's patent of February 22, 1876, showed a connection of the wing rails for use as frogs by means of a U-iron or "trough plate," the upturned sides of which "are made to conform to the curve of the side rails, as well as to the form of the neck and base of the rails, and are firmly secured to the neck of the rails by bolts or rivets." Instead of holding the V-shaped point in place by the use of channel irons, he provided a V-shaped recess in the channel or trough plate, into which the point of the frog was inserted and held; but in applying his device to railroad crossings instead of switches, he used channel or U-shaped irons to connect the points and wing rails. It is true, as suggested by counsel for the appellant, that a crossing of railroad tracks is a very different device from a switch, where the latter is used by means of a frog to shift the engine and train from one line of tracks to another; but the use of channel irons is analogous in the two cases, and it would require no more than ordinary mechanical skill to transfer the channel irons used upon a crossing to firmly hold the parts in place, to a similar use in a frog to unite firmly in their respective positions the centre rails with the exterior rails.

Independently, however, of this use of channel irons on crossings, we think that the patent to Morden of February 22, 1876, for an improvement in railroad frogs, considered in itself, leaves no room for invention in the application of channel irons in uniting the V-shaped point rails with the exterior rails. In that patent the invention consisted in forming a metallic plate into a U-shaped trough for the purpose of connecting the outer rails, leaving the V-shaped ends of the point rails to be secured by means of a V-shaped recess in the bed of the plate at the wide end of the trough. There seems to be no invention in dividing that trough into two, so as to connect the centre rails on each side, by means of a separate channel iron or U-shaped trough, with the outer rail exterior to them.

For these reasons the decree of the Circuit Court is affirmed.

PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY, *Plff. in Err.*,

v.

COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 181–190.)

Pennsylvania Revenue Act, not unconstitutional—foreign corporation, license tax on—state power to exclude—control of commerce—amount of tax—corporations, when not citizens.

1. Section 16 of the Pennsylvania Revenue Act of June 7, 1879, is not in conflict with the clause of the Federal Constitution vesting in Congress the power to regulate commerce; nor with the clause declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States; nor with the clause in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.

2. The States may require such conditions as they may choose, for the admission within their limits of a corporation of another State, without acting in conflict with said Fourteenth Amendment.

3. The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign.

4. The control of such commerce, being in the Federal Government, is not to be restricted by state authority.

5. States may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests.

6. The State could make the grant of the privilege to the corporation, the plaintiff in error, of having an office within its limits, conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the Corporation.

7. Corporations are not citizens within the meaning of the clause of the Constitution declaring that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

[No. 189.]

Argued Feb. 16, 1888. Decided March 19, 1888.

IN ERROR to the Supreme Court of the State of Pennsylvania, to review a judgment of that court affirming a judgment of the Common Pleas of Dauphin County affirming the validity of an assessment of a tax against a foreign corporation. *Affirmed.*

Statement by *Mr. Justice* **Field:**

In May, 1881, the Pembina Consolidated Silver Mining and Milling Company was incorporated under the laws of Colorado, with an authorized capital of one million dollars, for the purpose of carrying on a general mining and milling business in that State. Its principal office is in Alpine, Colorado, and since July 1, 1881, it has had, and still has, an office in the City of Philadelphia, "for the use of its officers, stockholders, agents, and employés." On the 31st of October, 1881, the auditor-general and treasurer of Pennsylvania assessed a tax against the Corporation for "office license" from July 1, 1881, to July 1, 1882, at the rate

of one fourth of a mill on each dollar of its capital stock, which amounted to $250, and added to it a penalty of $125 for failure to take out a license. This tax was assessed and penalty imposed under section sixteen of the Act of the Legislature of the Commonwealth, approved June 7, 1879, entitled "An Act to Provide Revenue by Taxation." The section provides as follows:

"That from and after the first day of July, A. D. 1879, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth, for the use of its officers, stockholders, agents or employés, unless it shall first have obtained from the auditor-general an annual license so to do; and for said license every such corporation shall pay into the state treasury, for the use of the Commonwealth, annually, one fourth of a mill on each dollar of capital stock which said company is authorized to have, and the auditor-general shall not issue a license to any corporation until said license fee shall have been paid. The auditor-general and state treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same; *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock, or a majority thereof, is owned or controlled by a corporation of this State which does pay a tax under any previous section of this Act."

It is conceded that the Corporation is not within the exception of the *proviso* of the Act, as it pays no tax under any previous section.

From this assessment, or settlement of the account against the Corporation, as it is termed in the record, the Corporation appealed to the Court of Common Pleas of Dauphin County, on the ground, among others, that the said 16th section of the Revenue Act is in conflict with the clause of the Constitution of the United States declaring that "Congress shall have power to regulate commerce with foreign Nations and among the several States" (art. 1, § 8, clause 8), and also with the clause declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" (art. 4, § 2, clause 1.) In that court the Commonwealth filed a declaration in debt against the Corporation for the amount claimed. It does not appear from the record that any answer or plea was filed to this declaration, but it is assumed that issue was joined, as counsel of the parties agreed that a trial by jury should be waived, and that the case should be submitted to the decision of the court, subject to a writ of error as in other cases, at the option of either party.

The court of common pleas affirmed the validity of the assessment, and the Corporation took the case on writ of error to the Supreme Court of the Commonwealth, which affirmed the judgment of the common pleas. To review this judgment the case is brought here.

Mr. **James W. M. Newlin,** for plaintiff in error:

The tax is void, as being an attempt by Pennsylvania to tax a franchise not granted by her, property not within her jurisdiction, and business not carried on in her jurisdiction.

State Tax on Foreign-held Bonds, 82 U. S. 15 Wall. 319 (21:186); *Com.* v. *Gloucester Ferry Co.* 98 Pa. 105; *Com.* v. *Standard Oil Co.* 101 Pa. 147; *License Cases*, 46 U. S. 5 How. 504 (12:256); *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 407 (15:452); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 180 (19:360); *St. Clair* v. *Cox*, 106 U. S. 350 (27:222); 5 Morrison's Trans. Supreme Ct. of U. S. 422; *McCabe* v. *Illinois Cent. R. Co.* 13 Fed. Rep. 880; *Memphis & L. R. R. Co.* v. *Nolan*, 14 Fed. Rep. 532.

The tax is void under the Federal Constitution, because it is an attempt to tax and regulate interstate commerce.

Council Bluffs v. *Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 338; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 (6:23); *People* v. *Brooks*, 4 Den. 469; *Smith* v. *Turner*, 48 U. S. 7 How. 337 (12:725); *U. S.* v. *Holliday*, 70 U. S. 3 Wall. 417 (18:185); *Western U. Tel. Co.* v. *Atlantic & P. S. Tel. Co.* 5 Nev. 102; *Paul* v. *Virginia*, *supra*; *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 481 (21:472); *Welton* v. *Missouri*, 91 U. S. 278 (23:348).

Corporations are persons within the meaning of the Fourteenth Amendment.

Bank of U. S. v. *Deveaux*, 9 U. S. 5 Cranch, 61 (3:38); *Society of Gospel* v. *New Haven*, 21 U. S. 8 Wheat. 464 (5:662); *U. S.* v. *Amedy*, 24 U. S. 11 Wheat. 392 (6:502); *Marshall* v. *Balt. & O. R. Co.* 57 U. S. 16 How. 314 (14:953); *Munn* v. *Illinois*, 94 U. S. 113 (24:77); *Sinking Fund Cases*, 99 U. S. 718 (25:501); *Baldwin* v. *Ministerial Fund*, 37 Me. 369; *Otis Co.* v. *Ware*, 8 Gray, 509; *People* v. *Utica Ins. Co.* 15 Johns. 358; *Planters & M. Bank* v. *Andrews*, 8 Port. 404; *State* v. *Nashville University*, 4 Humph. 166; *San Mateo Co.* v. *Southern P. R. Co.* 13 Fed. Rep. 145; *Northwestern Fertilising Co.* v. *Hyde Park*, 3 Biss. 480.

The tax in question is a "denial of the equal protection of the laws."

Washington Avenue, 69 Pa. 362; *Woodbridge* v. *Detroit*, 8 Mich. 301; *Lexington* v. *McQuillan*, 9 Dana, 513; *Exchange Bank* v. *Hines*, 3 Ohio St. 17; *People* v. *Coleman*, 4 Cal. 46; *People* v. *Twelfth Dist. Judge*, 17 Cal. 547; *Geebrick* v. *State*, 5 Iowa, 491; *McAunich* v. *Mississippi & M. R. Co.* 20 Iowa, 338; *Pearson* v. *Portland*, 69 Me. 278.

Messrs. John F. Sanderson, Deputy Atty-Gen. and **W. S. Kirkpatrick,** *Atty-Gen.*, for defendant in error:

No question under the Fourteenth Amendment to the Constitution of the United States is properly presented.

Delaware, L. & W. R. Co. v. *Commonwealth*, 66 Pa. 64; *Phila. Fire Asso.* v. *N. Y.* 119 U. S. 110 (30:346); *Bank of Agusta* v. *Earle*, 38 U. S. 13 Pet. 519 (10:274); *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 (15:451); *Liverpool Ins. Co.* v. *Mass.* 77 U. S. 10 Wall. 566 (19: 1029); *Doyle* v. *Continental Ins. Co.* 94 U. S. 535 (24:148); *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727 (28:1137); *Stanley* v. *Albany*, 121 U. S. 550 (30:1008).

Mr. Justice **Field,** after stating the case, delivered the opinion of the court:

The only questions passed upon by the Su-

preme Court of Pennsylvania, which can be considered by us, are those which arise upon its ruling against the contention of the plaintiff in error that the statute of the Commonwealth is in conflict with clauses of the Federal Constitution. Its ruling upon the conformity of the statute with the Constitution of the Commonwealth does not come under our jurisdiction.

The clauses of the Federal Constitution, with which it was urged in the state supreme court that the statute conflicts, are the one vesting in Congress the power to regulate foreign and interstate commerce, the one declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States, and the one embodied in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.

1. It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the Corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the Corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employés. The tax is not for their office, but for the office of the Corporation, and the use to which it is put is presumably for the latter's business and interest. For no other purpose can it be supposed that the office would be hired by the Corporation.

The exaction of a license fee to enable the Corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied. In *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 [19:857], this court, speaking of a foreign corporation (and under that definition the plaintiff in error, being created under the laws of Colorado, is to be regarded), said: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their consent, it follows as a matter of course that such consent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion." A qualification of this doctrine was expressed in *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 12 [24: 711], so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress. The Act of July 24, 1866, "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," which was considered in that case, declared that any telegraph company then organized, or which might thereafter be organized, under the laws of any State, should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which had been or might thereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States," upon certain conditions specified therein; and this court held that the telegraph, as an agency of commerce and intercommunication, came under the controlling power of Congress, as against any hostile state legislation; and that the Western Union Telegraph Company, having accepted the conditions of the Act, could not be excluded by another State from prosecuting its business within her jurisdiction. The Legislature of Florida had granted to another company, for twenty years, the exclusive right to establish and maintain telegraph lines in certain counties of the State; but this exclusive grant was adjudged to be invalid as against the company acting under the law of Congress. And undoubtedly a corporation of one State, employed in the business of the General Government, may do such business in other States without obtaining a license from them. Thus, to take an illustration from the opinion of *Mr. Justice* Bradley in a case recently decided by him, "If Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union," and, we may add, without the permission and against the prohibition of the State. *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 14.

These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or interstate commerce, or not employed by the government. As to these corporations, the doctrine of *Paul* v. *Virginia* applies. The Colorado Corporation does not come within any of the exceptions. Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employés, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the Corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State. *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 519 [10:274]; *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 [15:451]; *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410 [19:972]; *St. Clair* v. *Cox*, 106 U. S. 350 [27:222].

We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to

tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employés; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent.

2. Nor does the clause of the Constitution declaring that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul* v. *Virginia*. In that case it appeared that a Statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose, and that no license should be received by the corporation until it had deposited with the treasurer of the State bonds of a designated character and amount, the latter varying according to the extent of the capital employed. No such deposit was required of insurance companies incorporated by the State for carrying on their business within her limits. A subsequent Statute of Virginia made it a penal offense for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an agent for a New York insurance company without a license, was indicted and convicted in a Circuit Court of Virginia, and sentenced to pay a fine of $50. On error to the Court of Appeals of the State the judgment was affirmed, and to review that judgment the case was brought to this court. Here it was contended, as in the present case, that the Statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But the court answered, that corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the Legislature, and possessing only such attributes as the Legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the clause in question are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporators, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent. In the subsequent case of *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410 [19:972], the court followed this decision, and observed that the power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, was clearly established by it and the previous case of *Augusta* v. *Earle*, 38 U. S. 13 Pet. 519 [10:274], and added that "As to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110, 120 [30:342, 347].

3. The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment: that no State shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by *Chief Justice* Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514, 562 [7: 939]. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for

lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendment see *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]; *Soon Hing* v. *Crowley*, 113 U. S. 703 [28:1145]; *Missouri* v. *Lewis*, 101 U. S. 22, 30 [25;989,992]; *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512 [29:463]; *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30:220]; *Hayes* v. *Missouri*, 120 U. S. 68 [30:578].

The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by state authority.

Judgment affirmed.

Mr. Justice **Bradley** was not present at the argument of this cause and took no part in its decision.

HENRY C. MAYNARD ET AL., *Appts.*,
v.
W. C. HILL ET AL.

(See S. C. Reporter's ed. 190-216.)

Divorce by Act of Legislature, valid—power of Legislature—constitutional provision—right of divorced wife in donation lands.

1. The Act of the Legislative Assembly of the Territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David F. Maynard and his wife dissolved, was valid and effectual to divorce the parties.

2. The granting of divorces is a rightful subject of legislation, when either of the parties divorced is, at the time, a resident within the territorial jurisdiction of the Legislature.

3. The facts that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the Act.

4. Marriage is not a contract within the meaning of the prohibition of the Federal Constitution against the impairment of contracts by state legislation.

5. Where a settlement on the public lands was made by a married man in order to secure lands under the Donation Act, his wife, divorced from him before he had acquired a vested interest in the land by the residence and cultivation required by such Act, is not entitled to any interest in the donation claim. A divorce ends all rights not previously vested.

[No. 194.]

Argued Feb. 16, 17, 1888. Decided March 19, 1888.

APPEAL from a judgment of the Supreme Court of the Territory of Washington, dismissing a suit to recover lands. *Affirmed.*

Statement by *Mr. Justice* **Field:**

This is a suit in equity to charge the defendants, as trustees of certain lands in King County, Washington Territory, and compel a conveyance thereof to the plaintiffs. The lands are described as lots 9, 10, 13 and 14, of section 4; and lots 6, 7, 8 and 9, of section 5, in township 24 north, range 4 east, Willamette meridian. The case comes here on appeal from a judgment of the Supreme Court of the Territory, sustaining the defendants' demurrer, and dismissing the complaint. The material facts, as disclosed by the complaint, are briefly these: In 1828 David S. Maynard and Lydia A. Maynard intermarried in the State of Vermont, and lived there together as husband and wife until 1850, when they removed to Ohio. The plaintiffs, Henry C. Maynard and Frances J. Patterson, are their children, and the only issue of the marriage. David S. Maynard died intestate in the year 1873, and Lydia A. Maynard in the year 1879. In 1850 the husband left his family in Ohio and started overland for California, under a promise to his wife that he would either return or send for her and the children within two years, and that in the mean time he would send her the means of support. He left her without such means, and never afterwards contributed anything for her support or that of the children. On the 16th of September following he took up his residence in the Territory of Oregon, in that part which is now Washington Territory, and continued ever afterwards to reside there. On the third of April, 1852, he settled upon and claimed, as a married man, a tract of land of 640 acres, described in the bill, under the Act of Congress of September 27, 1850, "creating the office of surveyor-general of public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," and resided thereon until his death.

On the 22d day of December, 1852, an Act was passed by the Legislative Assembly of the Territory, purporting to dissolve the bonds of matrimony between him and his wife. The Act is in these words:

"An Act to Provide for the Dissolution of the Bonds of Matrimony Heretofore Existing between D. S. Maynard and Lydia A. Maynard, His Wife.

"Sec. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are, hereby dissolved.

"Passed the House of Representatives, Dec. 22, 1852.

"B. F. Harding,
Speaker of the House of Representatives.

"Passed the Council, Dec. 22, 1852.

"M. P. Deady,
President Council."

The complaint alleges that no cause existed at any time for this divorce; that no notice was given to the wife of any application by the husband for a divorce, or of the introduction or pendency of the bill for that Act in the Legislative Assembly; that she had no knowledge of the passage of the Act until July, 1853; that at the time she was not within the limits or an inhabitant of Oregon; that she never became a resident of either the Territory or State of Ore-

gon; and that she never in any manner acquiesced in or consented to the Act; and the plaintiffs insist that the Legislative Assembly had no authority to pass the Act; that the same is absolutely void; and that the parties were never lawfully divorced.

On or about the 15th of January, 1853, the husband thus divorced intermarried with one Catherine T. Brashears, and thereafter they lived together as husband and wife until his death. On the 7th of November, 1853, he filed with the Surveyor-General of Oregon the certificate required under the Donation Act of September 27, 1850, as amended by the Act of the 14th of February, 1853, accompanied with an affidavit of his residence in Oregon from the 16th of September, 1850, and on the land claimed from April 3, 1852, and that he was married to Lydia A. Maynard until the 24th of December, 1852, having been married to her in Vermont in August, 1828. The notification was also accompanied with corroborative affidavits of two other parties that he had within their knowledge resided upon and cultivated the land from the third of April, 1852.

On the 30th of April, 1856, he made proof before the register and receiver of the land office of the Territory of his residence upon and cultivation of his claim for four years from April 3, 1852, to and including April 3, 1856. Those officers accordingly, in May following, issued to him, and to Catherine T. Maynard, his second wife, a certificate for the donation claim, apportioning the west half to him and the east half to her. This certificate was afterwards annulled by the Commissioner of the General Land Office, on the ground that, as it then appeared, and was supposed to be the fact, Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.

On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband. From this decision an appeal was taken to the Commissioner of the General Land Office, and from the decision of that officer to the Secretary of the Interior. The Commissioner affirmed the decision of the register and receiver, so far as it awarded the west half to the husband, but reversed the decision so far as it awarded the east half to the first wife; holding that neither wife was entitled to that half. He accordingly directed the certificate as to the east half to be canceled. The Secretary affirmed the decision of the Commissioner, holding that the husband had fully complied with all the requirements of the law relating to settlement and cultivation, and was therefore entitled to the west half awarded to him, for which a patent was accordingly issued. But the Secretary also held that, at the time of the alleged divorce, the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property. He also held that the second wife was not entitled to any portion of the claim, because she was not his wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one half of the claim under the statute; and the plaintiffs insist that the decision of the Commissioner and Secretary in this particular is erroneous, and founded upon a misapprehension of the law.

Subsequently the east half of the claim was treated as public land, and was surveyed and platted as such under the direction of the Commissioner of the General Land Office. The defendants Hill and Lewis, with full knowledge, as the bill alleges, of the rights of the first wife, located certain land scrip, known as Porterfield land scrip, upon certain portions of the land, and patents of the United States were issued to them accordingly, and they are applicants for the remaining portion. The complaint alleges that the other defendant, Flagg, claims some interest in the property; but the nature and extent thereof are not stated.

Upon these facts the plaintiffs claim that they are the equitable owners of the lands patented to the defendants Hill and Lewis, and that the defendants are equitably trustees of the legal title for them. They therefore pray that the defendants may be adjudged to be such trustees and directed to convey the lands to them by a good and sufficient deed; and for such other and further relief in the premises as to the court shall seem meet and equitable.

To this complaint the defendants demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and gave judgment thereon in favor of the defendants. On appeal the Supreme Court of the Territory came to the same conclusion, that the complaint did not state a sufficient cause of action; that no grounds for relief in equity appeared upon it; and that the defendants' demurrer should be sustained. Judgment was accordingly entered that the complaint be dismissed. To review this judgment the case is brought to this court.

Messrs. Henry Beard, and **C. H. Hanford**, for appellants:

The patent relates back to the inception of the right of the patentee.

Stark v. *Starrs*, 73 U. S. 6 Wall. 402 (18: 925); *Barney* v. *Dolph*, 97 U. S. 652 (24: 1063); *Wirth* v. *Branson*, 98 U. S. 118 (25: 86); *Garland* v. *Wynn*, 61 U. S. 20 How. 6 (15: 801); *Lindsay* v. *Hawes*, 67 U. S. 2 Black, 554 (17: 265); *Kansas P. R. Co.* v. *Atchison, T. & S. F. R. Co.* 112 U. S. 422 (28: 797); *Van Wyck* v. *Knevals*, 106 U. S. 360 (27: 201); *Walden* v. *Knevals*, 114 U. S. 373 (29: 167); *Missouri K. & T. R. R. Co.* v. *Kansas P. R. Co.* 97 U. S. 491 (24: 1095).

The residence and cultivation are required of the settler only. His wife's title is completed when his is.

Van Dolf v. *Otis*, 1 Oreg. 153; *Vance* v. *Burbank*, 101 U. S. 520 (25: 981); *Davenport* v. *Lamb*, 80 U. S. 13 Wall. 418 (20: 655); *Hall* v. *Russell*, 101 U. S. 503 (25: 829).

The right to a donation is initiated by settlement, and when the donation is secured the title relates back to the date of settlement.

Lee v. *Summers*, 2 Oreg. 266; *Dolph* v. *Barney*, 5 Oreg. 201; *Chapman* v. *School District*, 1 Deady, 113; *Lamb* v. *Davenport*, 1 Sawy. 682; *Adams* v. *Burke*, 3 Sawy. 416.

Divorce does not disturb property rights

where they are not dealt with in the pleadings.

Dartmouth College Case, 17 U. S. 4 Wheat. 519 (4: 680); *Stuart* v. *Palmer*, 74 N. Y. 191; Cooley, Const. Lim. 355; *Murray* v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 272 (15: 372); *Grosloulis* v. *Northcut*, 3 Oreg. 394; *Whetstone* v. *Coffey*, 48 Tex. 269; *Hardin* v. *Hardin*, 38 Tex. 616; *Newland* v. *Holland*, 45 Tex. 588; *State* v. *Fry*, 4 Mo. 198; *Gaines* v. *Gaines*, 9 B. Mon. 295; *Barney* v. *Dolph*, *supra*.

The court below erred in deciding that the legislative Act of the Territory of Oregon purporting to divorce D. S. and Lydia Maynard was valid.

Starr v. *Pease*, 8 Conn. 541; *Wright* v. *Wright*, 2 Md. 429; *Cronise* v. *Cronise*, 54 Pa. 255; *Crane* v. *Meginnis*, 1 Gill & J. 463; *Townsend* v. *Griffin*, 4 Harr. (Del.) 440; *Gaines* v. *Gaines*, *supra*; *Adams* v. *Palmer*, 51 Me. 480; *Cabell* v. *Cabell*, 1 Met. (Ky.) 319; *Maguire* v. *Maguire*, 7 Dana, 183; 2 Story, Const. 4th ed. § 1397; *State* v. *Fry*, 4 Mo. 120; *Bryson* v. *Campbell*, 12 Mo. 498; *Bryson* v. *Bryson*, 17 Mo. 590; *S. C.* 44 Mo. 282; *Clark* v. *Clark*, 10 N. H. 380; *Ponder* v. *Graham*, 4 Fla. 23; *Levins* v. *Sleator*, 2 Greene (Iowa), 604; *Chouteau* v. *Magenis*, 28 Mo. 187; *Estate of Hicbes*, 5 West. Coast Rep. 505; *Jones* v. *Jones*, 12 Pa. 350; 2 Kent, Com. 4th ed. 105, note *a*; *First Nat. Bank* v. *Yankton Co.* 101 U. S. 133 (25: 1046); Cooley, Const. Lim. 175, 176, 188.

Lydia A. Maynard, at the time of the passage of the Act, was not within the Territory of Oregon. The Act passed is void as to her.

Cheely v. *Clayton*, 110 U. S. 705 (28: 299); *People* v. *Baker*, 76 N. Y. 78; *Harland* v. *Territory*, 13 Pac. Rep. 458; *Dunphy* v. *Kleinsmith*, 78 U. S. 11 Wall. 610 (20: 223); *Ponder* v. *Graham*, 4 Fla. 44; *Burnham* v. *Morrissey*, 14 Gray, 226.

Mr. **Walter H. Smith**, for appellees:

All parties are bound by the decision of the Secretary, upon questions of fact.

Baldwin v. *Stark*, 107 U. S. 463 (27: 526); 7 Neb. 114; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 86 (20: 487); *Gibson* v. *Chouteau*, Id. 102 (20: 537); *Marques* v. *Frisbie*, 101 U. S. 475 (25: 801); *Shepley* v. *Cowan*, 91 U. S. 330 (23: 424).

Legislative bodies are clothed with the power to grant a divorce.

Macq. Practice House of Lords, 471; 1 Bish. Mar. & Div. §§ 667, 668, 664, 6th ed.; Cooley, Const. Lim. 4th ed. 182; 2 Kent, Com. 98, 105, note *c*; *Crane* v. *Meginnis*, 1 Gill & J. 474; *Cronise* v. *Cronise*, 54 Pa. 260; *Noel* v. *Ewing*, 9 Ind. 58; *Levins* v. *Sleator*, 2 Greene (Iowa), 604; *Starr* v. *Pease*, 8 Conn. 541; *Gaines* v. *Gaines*, 9 B. Mon. 295; *Meliezet's Appeal*, 17 Pa. 449; *Townsend* v. *Griffin*, 4 Harr. (Del.) 440; *Bingham* v. *Miller*, 17 Ohio, 448; *Maynard* v. *Valentine*, 2 Wash. Ty. 3; *Wright* v. *Wright*, 2 Md. 451; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162).

The marriage contract is not one of the contracts that are contemplated in that clause of the Constitution forbidding any State from passing any law impairing the obligation of contracts.

Butler v. *Pa.* 51 U. S. 10 How. 302 (13:472); 1 Bish. Mar. & Div. §§ 2, 19, 667, 669; 2 Bish. Mar. & Div. § 199; Cooley, Const. Lim. 134; *Maguire* v. *Maguire*, 7 Dana, 181; *Dickson* v. *Dickson*, 1 Yerg. 110; *Noel* v. *Ewing*, 9 Ind. 37; *Ditson* v. *Ditson*, 4 R. I. 87; *Starr* v. *Pease*, 8 Conn. 541; *Berthelemy* v. *Johnson*, 3 B. Mon. 90; *Hull* v. *Hull*, 2 Strob. Eq. (S. C.) 174; *Bingham* v. *Miller*, 17 Ohio, 445; *Levins* v. *Sleaton*, 2 Greene (Ia.) 604; *Cabell* v. *Cabell*, 1 Met. (Ky.) 319; *Starr* v. *Hamilton*, 1 Deady, 268; *Tolen* v. *Tolen*, 2 Blackf. 407; *Jones* v. *Jones*, 2 Tenn. 2; *Carson* v. *Carson*, 40 Miss. 349; *Askew* v. *Dupree*, 30 Ga. 173; *Adams* v. *Palmer*, 51 Me. 480.

The title did not vest until the four years of settlement and cultivation had expired.

Hall v. *Russell*, 101 U. S. 503 (25: 829); *Vance* v. *Burbank*, Id. 521 (25: 931).

Divorce puts an end to all rights depending upon the marriage not actually vested.

Bish. Mar. & Div. § 660; Cooley, Const. Lim. 114; *Starr* v. *Pease*, 8 Conn. 541; *Levis* v. *Sleaton*, 2 Greene (Ia.) 604; *Townsend* v. *Griffin*, 4 Harr. 440; *Legg* v. *Legg*, 8 Mass. 99; *Barber* v. *Root*, 10 Mass. 260; *Renwick* v. *Renwick*, 10 Paige, 424; *Barrett* v. *Fielding*, 111 U. S. 524 (28: 505).

Mr. Justice **Field** delivered the opinion of the court:

As seen by the statement of the case, two questions are presented for our consideration: first, was the Act of the Legislative Assembly of the Territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties; and, second, if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claim?

The Act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly, consisting of two boards, a Council and a House of Representatives. 9 Stat. at L. chap. 177, § 4. It declared that the legislative power of the Territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of nonresidents should not be taxed higher than the property of residents; and that all the laws passed by the Assembly should be submitted to Congress, and if disapproved should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the Territory to any loan. These exceptions from the grant of legislative power have no bearing upon the questions presented. The grant is made in terms similar to those used in the Act of 1836, under which the Territory of Wisconsin was organized. It is stated in *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 444 [20:661], that that Act seemed to have received full consideration; and from it all subsequent Acts for the organization of territories have been copied, with few and inconsiderable variations. There were in the Kansas and Nebraska Acts, as there mentioned, provisions relating to slavery, and in some other Acts provisions growing out of local circumstances. With these, and perhaps

other exceptions not material to the questions before us, the grant of legislative power in all the Acts organizing territories, since that of Wisconsin, was expressed in similar language. The power was extended "to all rightful subjects of legislation," to which was added in some of the Acts, as in the Act organizing the Territory of Oregon, "not inconsistent with the Constitution and laws of the United States," a condition necessarily existing in the absence of express declaration to that effect.

What were "rightful subjects of legislation" when these Acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative Acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which Legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated Acts of legislation on particular matters, is evidence that those matters have been generally considered by the people as properly within legislative control. Such Acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the Legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the Acts are properly assignable. With special force does this observation apply, when the validity of Acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained. It will be found from the history of legislation that, whilst a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. *Loan Asso.* v. *Topeka*, 87 U. S. 20 Wall. 663 [22:461]. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature which can properly be conducted by the judicial tribunals. Yet such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual—such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity or hopeless idiocy, or a conviction of a felony—which would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce, it is not perceived that any principle should prevent the Legislature itself from interfering and putting an end to the relation in the interest of the parties as well as of society. If the Act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the States. Says Bishop, in his Treatise on Marriage and Divorce: "The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written Constitution binding the legislative power." Section 664. Says Cooley, in his Treatise on Constitutional Limitations: "The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the Colonial and State Legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases." P. 110. Says Kent, in his Commentaries: "During the period of our colonial government, for more than a hundred years preceding the Revolution, no divorce took place in the colony of New York, and for many years after New York became an independent State there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special Act of the Legislature." Vol. 2, 97. The same fact is stated in numerous decisions of the highest courts of the States. Thus, in *Cronise* v. *Cronise*, 54 Pa. 260, the Supreme Court of Pennsylvania said: "Special divorce laws are legislative Acts. This power has been exercised from the earliest period by the Legislature of the Province, and by that of the State, under the Constitutions of 1776 and 1790. The continual exercise of the power, after the adoption of the Constitution of 1790, cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legit-

imate exercise of legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction of the people of their own instrument."

In *Crane* v. *Meginnis*, 1 Gill & J. 474, the Supreme Court of Maryland said: "Divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light than as regular exertions of the legislative power."

In *Starr* v. *Pease*, 8 Conn. 541, decided in 1831, the question arose before the Supreme Court of Connecticut as to the validity of a legislative divorce under the Constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that State on the subject of divorces, passed 180 years before, which provided for divorces on four grounds, said, speaking by *Mr. Justice* Daggett: "The law has remained in substance the same as it was when enacted in 1667. During all this period the Legislature has interfered like the Parliament of Great Britain, and passed special Acts of divorce *a vinculo matrimonii*. And at almost every session since the Constitution of the United States went into operation, now 42 years, and for the 18 years of the existence of the Constitution of Connecticut, such Acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law on this subject, nor into the expediency of such frequent interference by the Legislature. We can only inquire into the constitutionality of the Act under consideration. The power is not prohibited either by the Constitution of the United States or by that of the State. In view of the appalling consequences of declaring the general law of the State or the repeated Acts of our Legislature unconstitutional and void—consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery—the court should come to the result only on a solemn conviction that their oaths of office and these Constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the Act void." It is to be observed that the divorce in this case was granted on the petition of the wife, who alleged certain criminal intimacies of her husband with others; and the Act of the Legislature recited that her allegation, after hearing her and her husband, with their witnesses and counsel, was found to be true. The inquiry appears to have been conducted with the formality of a judicial proceeding, and might undoubtedly have been properly referred to the judicial tribunals; yet the Supreme Court of the State did not regard the divorce as beyond the competency of the Legislature.

The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the Act of the Legislative Assembly of the Territory, that it was beyond the competency of a Legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions was neither intended nor understood to exclude legislative control over the marriage relation. In most of the States the same legislative practice on the subject has prevailed since the adoption of their Constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years in many Constitutions of provisions prohibiting legislative divorces would also indicate a general conviction that without this prohibition such divorces might be granted, notwithstanding the separation of the powers of government into departments by which judicial functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the Supreme Court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their State Constitutions. *Sparhawk* v. *Sparhawk*, 116 Mass. 315; *State* v. *Fry*, 4 Mo. 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the Legislature. We are therefore justified in holding—more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession at the time the organic Act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the Legislature. If within the competency of the Legislative Assembly of the Territory, we cannot inquire into its motives in passing the Act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the Territory, and as he acted soon afterwards upon the dissolution and married again, we may conclude that the Act was passed upon his petition. If the Assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his *status*, he being a resident of the Territory, is undoubted, unless the marriage was a contract within the prohibition of the Federal Constitution against its impairment by legislation, or within the terms of the Ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic Act, questions which we will presently consider.

The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the Act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the Legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his promise, shows conduct meriting the strongest reprobation; and if the facts stated had been brought to the attention of Congress, that body might and probably would have annulled the Act. Be that as it may, the loose morals and shameless conduct of the husband

can have no bearing upon the question of the existence or absence of power in the Assembly to pass the Act.

The organic Act extends the legislative power of the Territory to all rightful subjects of legislation "not inconsistent with the Constitution and laws of the United States." The only inconsistency suggested is that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the Federal Constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the Supreme Court of the Territory, to legislation by territorial Legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. As was said by *Chief Justice* Marshall in the *Dartmouth College Case*, 17 U. S. 4 Wheat. 519 [4:630], not by way of judgment, but in answer to objections urged to positions taken: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces." And in *Butler* v. *Pennsylvania*, 51 U. S. 10 How. 402 [13:472], where the question arose whether a reduction of the *per diem* compensation to certain canal commissioners below that originally provided when they took office, was an impairment of a contract with them within the constitutional prohibition, the court, holding that it was not such an impairment, said: "The contracts designed to be protected by the 10th section of the first article of that instrument are contracts by which perfect rights, certain, definite, fixed private rights of property are vested."

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts as a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams* v. *Palmer*, 51 Me. 481, 488. Said that court, speaking by *Chief Justice* Appleton:

"When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was a contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the Sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other." And again: "It is not, then, a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself, a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress." And the Chief Justice cites in support of this view the case of *Maguire* v. *Maguire*, 7 Dana, 181, 188, and *Ditson* v. *Ditson*, 4 R. I. 101. In the first of these the Supreme Court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the State, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative Acts impairing the obligation of contracts. In the second case the Supreme Court of Rhode Island said that "Marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

In *Wade* v. *Kalbfleisch*, 58 N. Y. 282, the question came before the Court of Appeals of New York whether an action for breach of promise of marriage was an action upon a contract within the meaning of certain provisions of the Revised Statutes of that State, and in disposing of the question the court said: "The general statute, 'that marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent of parties, capable in law of contracting, shall be essential,' is not decisive of the question. 2 R. S. 138. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity; but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word *contract* em-

ployed in the common law or statutes. In this State, and at common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."

In *Noel* v. *Ewing*, 9 Ind. 87, the question was before the Supreme Court of Indiana as to the competency of the Legislature of the State to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage; and the court said: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a *status* had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a *status* or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." In accordance with these views was the judgment of *Mr. Justice* Story. In a note to the chapter on marriage in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belong to ordinary contracts." Section 108*n*.

The 14th section of the organic Act of Oregon provides that the inhabitants of the Territory shall be entitled to all the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the River Ohio by the articles of compact contained in the Ordinance of July 13, 1787, for the government of the territory. The last clause of article two of that ordinance declares "that no law ought ever to be made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed." This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the Federal Constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the Donation Act. But that Act conferred the title of the land only upon the settler who at the time was a resident of the Territory, or should be a resident of the Territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. The words of the Act, that "there shall be, and hereby is, granted to every white settler or occupant," is qualified by the condition of four years' residence on the land and its cultivation by him. The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the Act. Until then he has only a promise of a title, what is sometimes vaguely called an inchoate interest. In some of the cases decided at the circuit, the fourth section of the Act was treated as constituting a grant *in præsenti*, subject to the conditions of continued residence and cultivation, that is, a grant of a defeasible estate. *Adams* v. *Burke*, 3 Sawy. 418. But this view was not accepted by this court. In *Hall* v. *Russell*, 101 U. S. 503 [25: 829], the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditions were fully performed. After citing the language of a previous decision, that "It is always to be borne in mind, in construing a Congressional grant, that the Act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," the court said: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law, and actually in existence at the time." * * * "Coming then to the present case, we find that the grantee designated was any qualified settler or occupant of the public lands * * * who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the Act. The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the Act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The Act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A pres-

ent right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the Territory, having the other requisite qualifications, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." In *Vance* v. *Burbank*, 101 U. S. 521 [25:981], the doctrine of the previous case was reaffirmed, and the court added: "The statutory grant was to the settler; but if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband."

When, therefore, the Act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation which gave him anything more than a mere possessory right; a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confer such right.

It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half she must have continued his wife during his residence and cultivation of the land.

The judgment of the Supreme Court of the Territory must therefore be affirmed; and it is so ordered.

Mr. Justice **Matthews** and *Mr. Justice* **Gray** dissented. *Mr. Justice* **Bradley** was not present at the argument and took no part in the decision.

HOWARD D. POTTS, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 173-176.)

Retired navy officer—pay of—amount.

1. An assistant engineer of the navy, retired on furlough pay, is entitled to one half the leave of absence pay of an officer on the active list.
2. When afterwards transferred by the action of the President and Senate from the furlough to the retired pay list his *status* as a retired officer was not changed, but his pay was raised from that of an officer retired on furlough pay to that of one retired on half sea pay.
3. Such officer is not entitled to recover the differences between one half and three quarters of sea pay from the date of his transfer. The cause of his retirement still remains the same and determines his position on the retired pay list.

[No. 698.]

Argued Feb. 2, 1888. Decided March 19, 1888.

APPEAL from a judgment of the Court of Claims against a claim of the appellant for the difference between one half and three quarters sea pay from the date of his transfer. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. John Paul Jones and **Robert B. Lines**, for appellant:

A codifying statute should only be construed to change existing law where the intent of the Legislature is clear to make such change; or where the language of the Code plainly requires such construction.

Conger v. *Barker*, 11 Ohio St. 13; *Hammock* v. *Farmers Loan & T. Co.* 105 U. S. 85 (26: 1114); *U. S.* v. *Bowen*, 100 U. S. 508 (25: 631).

When the words of a statute prescribing compensation to a public officer are loose and obscure and admit of two interpretations they should be construed in favor of the officer.

U. S. v. *Morse*, 3 Story, 87; *U. S.* v. *Collier*, 3 Blatchf. 325.

The judgment dismissing the counterclaim should be affirmed, because it seeks to recover money voluntarily paid under mistake of law.

Elliott v. *Swartwout*, 35 U. S. 10 Pet. 137 (9:378); *Mullett* v. *U. S.* 21 Ct. Cl. 487.

Mr. A. H. Garland, Atty-Gen., and **Heber J. May**, *Asst-Atty.*, for the United States.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Howard D. Potts, an assistant engineer of the navy, being physically disabled, was examined by a naval retiring board who reported that he was incapacitated from active service, and that in their judgment the incapacity did not originate in the line of duty. In this report the President concurred, and directed a retirement on furlough pay.

The sections of the Revised Statutes governing such a proceeding are as follows:

"Sec. 1449. Said [retiring] board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court martial and of a court of inquiry as may be necessary.

"Sec. 1450. The members of said board shall be sworn in each case to discharge their duties honestly and impartially.

"Sec. 1451. When said retiring board finds an officer incapacitated from active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service.

"Sec. 1452. A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval or orders in the case.

"Sec. 1453. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service, with retired pay, as allowed by chapter 8 of this title.

"Sec. 1454. When said board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay, as the President may determine.

"Sec. 1598. Officers placed on the retired list,

on furlough pay, shall receive only one half of the pay to which they would have been entitled if on leave of absence on the active list."

On the 15th of March, 1877, Potts was nominated by the President and confirmed by the Senate on the 17th of the same month, for transfer from the furlough to the retired pay list under section 1594 of the Revised Statutes. That section is as follows:

"Sec. 1594. The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired pay list."

Since his confirmation he has been paid one half the sea pay of an officer of his rank at the time of retirement, the accounting officers being of opinion that his case fell within the second clause of section 1588 of the Revised Statutes, which is as follows:

"The pay of all other officers on the retired list (excluding those above specified) shall, when not on active duty, be equal to one half the sea pay provided by this chapter for the grade or rank held by them [respectively] at the time of retirement."

He claims, however, that after his transfer from the furlough to the retired list he was entitled to three quarters of the sea pay under the first clause of that section as follows:

"Sec. 1588. The pay of all officers of the navy, who have been retired after 45 years' service after reaching the age of 16 years, or who have been or may be retired after 40 years' service, upon their own application to the President, or on attaining the age of 62 years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to 75 per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement."

This suit was brought to recover the difference between one half and three quarters of sea pay from the date of his transfer. The court of claims gave judgment against him, and from that judgment this appeal was taken.

We agree entirely with the court of claims in the view it took of the case. The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law for the government of the navy to determine such questions,—that Potts be retired from active service for incapacity which "did not originate in the line of duty." This made him a retired officer on furlough pay, and gave him one half the leave of absence pay of an officer on the active list. When he was afterwards transferred by the action of the President and Senate "from the furlough to the retired pay list," his *status* as a retired officer was not changed. He still remained an officer retired for incapacity which did not originate in the line of duty, but his pay was raised from that of an officer retired "on furlough pay" to that of one retired on half sea pay. In other words, he was taken from the furlough list and put on the list of those retired under circumstances which brought them within the second clause of section 1588, instead of the first. The object of the statute is not to enable the President and Senate to vacate the finding of the retiring board that the incapacity of the officer did not "originate in the line of duty," and to decide that it was "the result of an incident of the service," but to afford a means for his relief from the consequences of such a finding, to the extent of adding to his pay the difference between the half of leave of absence pay and the half of sea pay. It may have been intended as a provision for a remedy for wrongs done by retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from "the furlough to the retired pay list." The cause of his retirement still remains the same, and determines his position on the "retired pay list."

The judgment of the Court of Claims is affirmed.

UNITED STATES, *Appt.*,

v.

JABEZ BURCHARD.

JABEZ BURCHARD, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 176–181.)

Pay of retired navy officer—counterclaim.

1. An assistant engineer in the navy after his transfer "from the furlough to the retired pay list" is not entitled to more than half sea pay.

2. In a suit in the court of claims, brought by such officer to recover a balance claimed to be due for pay, the United States may recover back, as a counterclaim, any amount he may have been paid over what he was actually entitled to by law.

[Nos. 158, 1332.]

Argued Feb. 2, 1888. Decided March 19, 1888.

CROSS appeals from a judgment of the Court of Claims against the United States, upon a counterclaim set up by it in an action brought to recover a balance claimed to be due for pay. *Reversed.*

The case is fully stated in the opinion.

This case was argued with the preceding case of *Potts* v. *United States*, and, for points of counsel, see that case.

Messrs. **Robert B. Lines** and *John Paul Jones*, for Burchard.

Mr. **Heber J. May**, *Asst. Atty.*, for the United States.

Mr. Chief Justice **Waite** delivered the opinion of the court:

Jabez Burchard, an assistant engineer in the navy, was examined by a retiring board organized under section 1448 of the Revised Statutes; and the board reported that he was incapacitated from active service, and "that his incapacity was not the result of an incident of the service." The statutes regulating such a proceeding are given in full in *Potts* v. *United States, ante*, 661, just decided. The President approved the findings, and Burchard was retired on furlough pay, October 26, 1874. On the first of March, 1877, the Secretary of the Navy addressed a letter to the Fourth Auditor of the Treasury, stating that "Upon a full review of all the facts in the case * * * the Department is of opinion that the causes which incapacitated him [Burchard] for active duty were in-

cident to the service, and that he should have the higher rates of pay allowed to retired officers by section 1588 of the Revised Statutes."

On the first of March, 1878, the President made the following nomination:

"To the Senate of the United States:

"In accordance with section 1594 of the Revised Statutes, I nominate Jabez Burchard assistant engineer, to be transferred from the furlough to the retired pay list of the navy from the 20th of October, 1874.

"R. B. HAYES."

On the 25th of March, 1878, the Senate advised and consented to the appointment as follows:

"*Resolved*, That the Senate advise and consent to the appointment of Assistant Engineer Burchard to be transferred from the furlough to the retired pay list from the 26th of October, 1874, agreeably to the nomination."

On the 1st of April, 1878, Burchard was notified of this transfer.

From the 26th of October, 1874, until the 1st of April, 1878, he has been paid 75 per cent of the sea pay for the grade or rank which he held at the time of retirement, being $1,275 a year. Since April 1, 1878, he has been paid $850 a year, under the second clause of section 1588—his half sea pay. He brought this suit on the 5th of September, 1883, to recover the difference between one half and three quarters of sea pay from April 1, 1878. The United States set up by way of counterclaim that he had been overpaid $1,168.75 for his salary from April 1, 1875, to March 31, 1878, and asked judgment for that amount. The court of claims, on the 4th of February, 1884, dismissed both the petition and counterclaim. From that judgment both parties appealed. That of the United States was docketed in this court October 24, 1884, which was during the return term; but that of Burchard was not docketed until January 7, 1888, and he did nothing here in the mean time to make himself an actor in that behalf. For that reason his appeal is dismissed, for want of due prosecution, on the authority of *The S. S. Osborne*, 105 U. S. 447 [26:1065]. See also *Hilton* v. *Dickinson*, 108 U. S. 168 [27: 689]; *The Tornado*, 109 U. S. 117 [27:877].

We have, then, for consideration only the questions which arise on the appeal of the United States. The suit was brought to recover a balance claimed to be due for pay after March 31, 1878. The counterclaim is for moneys alleged to have been overpaid between October 26, 1874, and March 31, 1878. As the petition of Burchard was dismissed because he had already been paid in full for all he was entitled to after March 31, 1878, the appeal of the United States brings up only the questions presented by the counterclaim. These are, first, as to the amount which Burchard was actually entitled to for his pay between October 26, 1874, and April 1, 1878, after his transfer "from the furlough to the retired pay list," and, second, as to the right of the United States to recover back any amount he may have been paid over what he was actually entitled to by law.

As to the first of these questions it was settled in the case of *Potts*, *ante*, that he was in no event entitled to more than half sea pay, and that all he got over that was by a mistake of the accounting officers. Whether he was entitled to more than half of leave of absence pay before April 1, 1878, depends on the effect of the action of the President, with the advice and consent of the Senate, in antedating the transfer so as to make it relate back to October 26, 1874, when the nomination to the Senate was not actually made until March 1, 1878.

What is now section 1594 of the Revised Statutes was originally enacted as part of section 8 of the Act of January 16, 1857, chap. 12, 11 Stat. at L. 184, "to amend an Act of February 28, 1855, chap. 127, 10 Stat. at L. 616, being 'An Act to Promote the Efficiency of the Navy,'" and it was evidently intended to enable the President, with the advice and consent of the Senate, to relieve a deserving officer to a limited extent from the consequences of the findings of retiring boards. Under such circumstances it should in our opinion be liberally construed in favor of justice. This case may fairly be taken for illustration. The law requires a record of the proceedings and decision of the retiring board to be made and transmitted to the Secretary of the Navy, and by him laid before the President for his approval or disapproval, or orders in the case. At first the findings in this case were approved, and orders made thereon, but afterwards the Department became satisfied on re-examination that the findings were wrong, and that the incapacity was actually the result of causes incident to the service. Neither the Department nor the President could then change the findings, as they had already been approved, and were no longer open to review. The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment as a judgment could not be disturbed, but under this statement it was just within the power of the President, with the advice and consent of the Senate, to relieve the officer to some extent from its consequences by transferring him from furlough to retired pay. There is no prohibition against antedating such a transfer. The statute simply says that the President, by and with the advice and consent of the Senate, may make it; and in our opinion he may with like advice and consent determine whether it shall operate only in the future, or relate back to a time when in his judgment it ought to have been granted. It follows that Burchard, by this action of the President and Senate, became entitled to half sea pay from October 26, 1874. He has thus been overpaid only to the extent of one fourth of sea pay from October 26, 1874, to March 31, 1878, or at the rate of $425 a year.

It only remains to consider whether the amount which has thus been paid, or as much thereof as is embraced in the counterclaim case, be recovered back in this action, and we are of the opinion that it can. The action was brought by Burchard to recover a balance claimed to be due on pay account from the date of his retirement. He had been paid according to his present claim until April 1, 1878, and consequently there was nothing to complain of back of that date. But in reality the account had never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards.

His pay was fixed by law, and the disbursing officers of the Department had no authority to allow him any more. If they did it was in violation of the law, and he has no right to keep what he thus obtained. Whether the Government can in any case be precluded from reclaiming money which has been paid by its disbursing and accounting officers under a mistake of law, is a question which it is not now necessary to decide any more than it was in *M'Elrath* v. *United States*, 102 U. S. 426, 441 [26:189, 192], when it was suggested. This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected.

It follows that the judgment against the United States upon the counterclaim must be reversed and the cause remanded for further proceedings not inconsistent with this opinion. It is consequently so ordered. Reversed.

RICHARD A. TILGHMAN, *Appt.*,

v.

WILLIAM PROCTOR ET AL.

WILLIAM PROCTOR ET AL., *Appts.*,

v.

RICHARD A. TILGHMAN.

(See S. C. Reporter's ed. 136-161.)

Damages for infringement of patent—in equity action—increase of damages—master's report—burden of proof—interest.

1. In an action at law, for the infringement of a patent, the plaintiff can recover only the actual damages which he has sustained. The usual license fees with interest is the usual measure of damages; but the court may inflict, as punitive damages, thrice the amount of the verdict.

2. Upon bill in equity by the owner against infringers of a patent, the plaintiff can recover the amount of actual gains and profits that the defendants have made by the use of his invention, or, in other words, the fruits of the advantage derived from the use of the invention.

3. Under the provision of the Patent Act of 1870, embodied in the Revised Statutes, the court, sitting in equity, has the same power to increase the damages that it has in actions upon the case.

4. The conclusions of the master, upon the testimony, as to the amount of damages, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.

5. The plaintiff has the burden of proving the amount of profits that the defendants have made by the use of his invention.

6. The profits allowed in equity for the infringement of a patent do not bear interest until after their amount has been judicially ascertained.

[Nos. 537, 548.]

Argued Nov. 3, 4, 5, 1886. Decided March 19, 1888.

CROSS appeals from a decree of the Circuit Court of the United States for the Southern District of Ohio, for damages for infringement of letters patent. *Reversed and remanded, with directions to enter a decree for plaintiff for a larger sum.*

The facts are fully stated by the court.

Messrs. **George Harding** and **Francis T. Chambers,** for Tilghman:

An accounting for profits is the proper mode of ascertaining an infringer's liability in equity. *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 804 (19:571); *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 620 (20:860); *Moss* v. *Conover*, 11 O. G. 1111; *Cawood Patent*, 94 U. S. 695 (24:238); *Birdsall* v. *Coolidge*, 93 U. S. 69 (23:804); *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189 (26:975); *Thompson* v. *Wooster*, 114 U. S. 104 (29:105); *Birdsell* v. *Shaliol*, 112 U. S. 485 (28:768); *Penn* v. *Bibby*, L. R. 3 Eq. 308; *Williams* v. *Rome, W. & O. R. Co.* 18 Blatchf. 181; *Knox* v. *Great Western Q. Mining Co.* 6 Sawy. 430; *Wooster* v. *Taylor*, 14 Blatchf. 408.

Messrs. **William M. Ramsey** and **Robert H. Parkinson,** for Proctor *et al.*

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity, filed June 26, 1874, by Richard A. Tilghman against William Proctor and four others, copartners under the name of Proctor & Gamble, praying for an injunction, for an account of profits, and for damages, for the infringement of letters patent, originally granted to Tilghman for fourteen years from January 9, 1854, and afterwards extended to January 9, 1875, for the process of manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure.

The infringement complained of in this suit was from May 1, 1870, to January 8, 1875. Similar suits by this plaintiff against other defendants had been maintained by the Circuit Courts for the Southern Districts of Ohio and of New York in 1862 and 1864 respectively. *Tilghman* v. *Werk*, 2 Fish. Pat. Cas. 229; *Tilghman* v. *Mitchell*, Id. 518. In the suit in New York, a final decree for an account of profits was entered by the circuit court on September 1, 1871. *Tilghman* v. *Mitchell*, 9 Blatchf. 1, 18; *S. C.* 4 Fish. Pat. Cas. 599, 615. On March 2, 1874, that decree was reversed in this court, by the opinion of four justices against three, two judges not sitting, upon the hypothesis that Tilghman's patent was limited to the apparatus therein described, and that the use of an apparatus similar to that used by the present defendants was not an infringement. *Mitchell* v. *Tilghman*, 86 U. S. 19 Wall. 287, 419 [22:125, 144]. iii.

In the case at bar, the circuit court, on December 2, 1874, following the decision of this court in *Mitchell* v. *Tilghman*, made a decree dismissing the bill. But, on appeal from that decree, this court, at October Term, 1880, by a unanimous opinion, overruled its decision in *Mitchell* v. *Tilghman*, and adjudged that Tilghman's patent was a valid one for a process, and not merely for the particular apparatus described in the specifications; that that apparatus could be operated to produce a beneficial result; that the defendants had infringed the plaintiff's patent; and, therefore, that the decree of the circuit court be reversed, and the case remanded with directions to enter a decree for the plaintiff in conformity with that opinion. *Tilghman* v. *Proctor*, 102 U. S. 708 [26:279]. There is nothing in the record before us to induce any change or modification of the conclusions then announced.

By making a few extracts from that opinion,

the questions now before us will be the better understood.

"The patent in question relates to the treatment of fats and oils, and is for a process of separating their component parts so as to render them better adapted to the uses of the arts. It was discovered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow and oil are regular chemical compounds, consisting of a base which has been termed glycerine, and of different acids, termed generally fat acids, but specifically stearic, margaric and oleic acids. These acids, in combination severally with glycerine, form stearine, margarine and oleine. They are found in different proportions in the various neutral fats and oils; stearine predominating in some, margarine in others, and oleine in others. When separated from their base (glycerine) they take up an equivalent of water, and are called free fat acids. In this state they are in a condition for being utilized in the arts. The stearic and and margaric acids form a whitish, semi-transparent, hard substance, resembling spermaceti, which is manufactured into candles. They are separated from the oleic acid, which is a thin oily fluid, by hydrostatic or other powerful pressure; the oleine being used for manufacturing soap, and other purposes. The base, glycerine, when purified, has come to be quite a desirable article for many uses." 102 U. S. 708, 709 [26: 279, 281].

The substance of Tilghman's discovery and invention was thus summed up by the court: "That the fat acids can be separated from glycerine, without injury to the latter, by the single and simple process of subjecting the neutral fat, whilst in intimate mixture with water, to a high degree of heat under sufficient pressure to prevent the water from being converted into steam, without the employment of any alkali or sulphuric acid, or other saponifying agent; the operation, even with the most solid fats, being capable of completion in a very few minutes when the heat applied is equal to that of melting lead, or 612° Fahrenheit; but requiring several hours when it is as low as 350° or 400° Fahrenheit. The only conditions are a constant and intimate commixture of the fat with the water, a high degree of heat, and a pressure sufficiently powerful to resist the conversion of the water into steam. The result is a decomposition of the fatty body into its elements of glycerine and fat acids, each element taking up the requisite equivalent of water essential to its separate existence, and the glycerine in solution separating itself from the fat acids by settling to the bottom when the mixed products are allowed to stand and cool. In this process a chemical change takes place in the fat, in consequence of the presence of the water and the active influence of the heat and pressure upon the mixture." pp. 712, 713 [282].

The court spoke of the different forms of apparatus, mentioned in Tilghman's patent, or used by the defendants, as follows:

"The apparatus described" in the patent "consists of a coil of iron pipe, or other metallic tubing, erected in an oven or furnace, where it can be subjected to a high degree of heat; and through this pipe the mixture (of nearly equal parts of fat and water), made into an emulsion in a separate vessel by means of a rapidly vibrating piston or dasher, is impelled by a force pump in a nearly continuous current, with such regulated velocity as to subject it to the heat of the furnace for a proper length of time to produce the desired result; which time, when the furnace is heated to the temperature of 612° Fahrenheit, is only about ten minutes. The fat and water are kept from separating by the vertical position of the tubes, as well as by the constant movement of the current; and are prevented from being converted into steam by weighting the exit valve by which the product is discharged into the receiving vessel, so that none of it can escape except as it is expelled by the pulsations produced by the working of the force pump. Before arriving at the exit valve, the pipe is passed in a second coil, through an exterior vessel filled with water, by which the temperature of the product is reduced. After the product is discharged into the receiving vessel, it is allowed to stand and cool until the glycerine settles to the bottom and separates itself from the fat acids. The latter are then subjected to washing and hydraulic pressure in the usual way." pp. 718, 719 [284].

"It is evident that the passing of the mixture of fat and water through a heated coil of pipe standing in a furnace is only one of several ways in which the process may be applied. The patentee suggests it as what he conceived to be the best way, apparently because the result is produced with great rapidity and completeness. But other forms of apparatus, known and in public use at the time, can as well be employed without changing the process. A common digester, or boiler, can evidently be so used, provided proper means are employed to keep up the constant admixture of the water and fat, which is a *sine qua non* in the operation." pp. 719, 720 [284].

"The defendants use a boiler in which the charge of fat and other materials is placed and heated; and do not mix the fat and water in the manner pointed out in the specification of the patent, but, on the contrary, have inserted in the boiler a pump which forces the water, as it settles to the bottom, upwards to the top of the mass, and pours it upon the upper surface, whence it again finds its way down through the fat, thus keeping up a constant mixture." p. 730 [288].

It was expressly decided that neither the form of the defendants' apparatus, nor the addition of lime, nor the use of steam, nor the applying of a lower degree of heat, prevented their process from being an infringement of the plaintiff's patent. pp. 730-733 [288, 289].

The court also said: "It is objected that the particular apparatus described in the patent for carrying the process into effect cannot be operated to produce any useful result. We have examined the evidence on this point, and are satisfied that it shows the objection to be unfounded. A recapitulation of this evidence is not necessary. The testimony of Tilghman himself, of Professor Booth, and Mr. Wilson is directly to the point." p. 730 [288].

In accordance with the judgment and mandate of this court, the circuit court, in February, 1877, entered an interlocutory decree for the plaintiff, and referred the case to a master "to ascertain and tax and state and report to the court an account of the gains, profits, savings

and advantages which the said defendants have received, or which have arisen or accrued to them, from infringing the said exclusive rights of the said complainant by the use of the process patented in the said letters patent, as well as the damages the said complainant has sustained thereby." The master filed his report in August, 1884.

As to damages, "the master finds from the evidence that the complainant has derived no profit from the invention involved in this suit, otherwise than by granting licenses to others to use the same. These licenses have been granted to all manufacturers desiring to use his process, at a substantially uniform fee of twenty cents for each hundred pounds of fat treated, payable monthly. For several years, the respondents held such a license from the complainant, but terminated the same, refusing to pay the stipulated license fees, after May 1, 1870, although continuing to use the process until the expiration of the patent on January 8, 1875." The master further says: "The accompanying table A shows the quantity of fat treated by the respondents during each month of infringement, the license fees therefor, and interest thereon to October 7, the first day of October Term, 1884, making the whole amount of the complainant's damages herein $79,566.91."

As to the profits, gains, savings and advantages which had accrued to the defendants, the master finds that what was known as "the lime saponification process," which consisted in the manufacture of the fat into soap by the use of lime, and in the decomposition of that soap into fatty acids and glycerine by the aid of sulphuric acid, was more advantageous than any other process open to public use at the time in question; and reports the defendants' savings in lime and sulphuric acid, their gain in glycerine, their loss in fat acids produced, and their net gains and savings, as follows:

2,798,733 lbs. of lime, at $.3526 per hundred	$9,868 33
6,880,219 lbs. of sulphuric acid, at $2.527	173,863 13
Amounts saved in chemicals	$182,731 46
Amount gained on glycerine water	61,701 77
Total	$244,433 23
Deducting loss in fatty acids, being 54 cents per hundred on 21,294,753 lbs. of fat	$114,991 76
Net gains and savings	$129,441 47

In September, 1884, each party filed exceptions to the master's report. The circuit court, in February, 1886, overruled all the exceptions, and entered a final decree for the plaintiff for $79,566.91, the amount of damages reported by the master, with simple interest added upon the license fees from October 7, 1884, to February 4, 1886, making in all $83,275.21, and costs. From this decree both parties appealed to this court.

At the hearing before the master, a brother of the plaintiff, called as a witness in his behalf, testified on cross examination that, before this suit was brought, the witness had acquired an interest in all license fees and recoveries under the patent. No further question was asked; or evidence offered, by either party, as to the nature or amount of that interest. The defendants contended before the master, and at the argument here, that the plaintiff could recover in this suit no more than his own share, and, having failed to prove the extent of his interest, was entitled to nominal damages only. It is a sufficient answer to this objection, that it is not shown that anyone but the plaintiff has any interest, legal or equitable, by assignment or otherwise, in the patent sued on; and that, as observed by *Mr. Justice* Strong, sitting in the circuit court, "an interest in the net proceeds of collections under a patent does not necessarily amount to legal ownership of the patent itself. It is plain, therefore, as the case appears, that there has been no want of joinder of the necessary parties." *Jordan* v. *Dobson*, 4 Fish. Pat. Cas. 232, 236.

The principal question of law now presented is as to the general rule that should govern the amount to be recovered. The defendants contend that the plaintiff, having established license fees for the use of his patent, is not entitled to any gains and profits accruing to the defendants, in excess of those fees. The plaintiff contends that, as the profits to be accounted for exceed the damages, he has the right, waiving the damages found by the master, to have a decree for profits.

In an action at law for the infringement of a patent, the plaintiff can recover a verdict for only the actual damages which he has sustained; and the amount of such royalties or license fees as he has been accustomed to receive from third persons for the use of the invention, with interest thereon from the time when they should have been paid by the defendants, is generally, though not always, taken as the measure of his damages; but the court may, whenever the circumstances of the case appear to require it, inflict vindictive or punitive damages, by rendering judgment for not more than thrice the amount of the verdict. Acts of July 4, 1836, chap. 357, § 14, 5 Stat. at L. 123; July 8, 1870, chap. 230, § 59, 16 Stat. at L. 207; Rev. Stat. § 4919; *Seymour* v. *McCormick*, 57 U. S. 16 How. 480, 489 [14: 1024, 1028]; *New York* v. *Ransom*, 64 U. S. 23 How. 487 [16: 515]; *Suffolk Co.* v. *Hayden*, 70 U. S. 3 Wall. 315 [18: 76]; *Philp* v. *Nock*, 84 U. S. 17 Wall. 460 [21: 679]; *Washington, A. & G. Packet Co.* v. *Sickles*, 70 U. S. 19 Wall. 611, 617 [21: 203, 204]; *Burdell* v. *Denig*, 92 U. S. 716 [23: 764].

But upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendants have made by the use of his invention.

This rule was established by a series of decisions under the Patent Act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions, in cases arising under the patent laws. Act of July 4, 1836, chap. 357, § 17, 5 Stat. at L. 124; *Livingston* v. *Woodworth*, 56 U. S. 15 How. 546 [14: 809]; *Dean* v. *Mason*, 61 U. S. 20 How. 198 [15: 876]; *Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 788 [19: 566]; *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 620 [20: 860]; *Littlefield* v. *Perry*, 88 U. S. 21 Wall. 205, 229 [22: 577, 581]; *Mason* v. *Graham*, 90

U. S. 23 Wall. 261 [23: 86]; *Tremolo Patent*, 90 U. S. 23 Wall. 518 [23: 97]; *Cawood Patent*, 94 U. S. 695 [24: 238]; *Mevs* v. *Conover*, October Term, 1876, 11 Pat. Off. Gaz. 1111*; *Elizabeth* v. *Pavement Co.* 97 U. S. 126 [24: 1000]; *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189 [26: 975].

The reasons that have led to the adoption of this rule are that it comes nearer than any other to doing complete justice between the parties; that in equity the profits made by the infringer of a patent belong to the patentee and not to the infringer; and that it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged.

The infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages.

But if the defendant gained an advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for, even if from other causes the business in which that invention was employed by the defendant did not result in profits. If, for example, the unauthorized use by the defendant of a patented process produced a definite saving in the cost of manufacture, he must account to the patentee for the amount so saved. This application or corollary of the general rule is as well established as the rule itself.

For instance, in the case of the *Cawood Patent*, for an improvement in a machine for repairing the crushed and exfoliated ends of railroad iron, *Mr. Justice* Strong, in delivering judgment, said: "It has been argued that it would have been better for these defendants, if, instead of repairing the crushed and exfoliated ends of the rails, they had cut off the ends and relaid the sound parts, or caused the rails to be rerolled. Experience, it is said, has proved that repairing worn out ends of rails is not true economy, and hence it is inferred that the defendants have derived no profits from the use of the plaintiff's invention. This argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair their injured rails. They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter, they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage, growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling an account between a patentee and an infringer of the patent, the question is not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention?" 94 U. S. 710 [24: 248].

In *Mevs* v. *Conover*, where the patent was for an improved machine for splitting kindling wood, the same justice, delivering the opinion

*GRAY, *J.*: In *Mevs* v. *Conover*, which came from the Circuit Court of the United States for the Southern District of New York, and is reported at different stages below in 3 Fisher, Pat. Cas. 386, 6 Fisher, Pat. Cas. 506, and 11 Blatchford, 197, the opinion of this court, not published in its official reports, but printed in the edition of the Lawyers' Coöperative Publishing Company (Bk. 23, p. 1008), appears of record to have been delivered on March 13, 1877, by *Mr. Justice* Strong, as follows:

"The only errors assigned in this case are to the confirmation of the master's report, and they relate to the ascertainment of the profits which the defendant had made by his unauthorized use of the plaintiff's invention. That the machine employed by the defendant in splitting wood was an infringement of the plaintiff's patent is established by the decree which sent the case to the master, and no complaint is made of that, but it is contended the master erred in reporting 'there was saved to the defendant seventy-five cents per cord in the wood split by him and made into bundles.'

"In the ascertainment of profits made by an infringer of a patented invention, the rule is a plain one. The profits are not all he made in the business in which he used the invention, but they are the worth of the advantage he obtained by such use, or, in other words, they are the fruits of that advantage. *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 651 [20: 866]. We are not convinced that the rule declared in that case was not followed in this. The patented invention infringed by the defendant was a new and improved machine for splitting kindling wood, and a distinguishing feature of it, perhaps the principle feature, was a device for the automatic feeding of the wood to the reciprocating splitting knives or cutters, by a movable platform or apron carried forward by an endless chain. That device the defendant used, though it is said he used it in another machine, known as Green's. The evidence is full and uncontradicted that an advantage is gained, in splitting kindling wood by a machine with that device, of at least seventy-five cents a cord over splitting it by hand or without that device. It was in harmony with this evidence the master reported and the court decreed.

"It is urged, however, that the Green machine, in which the defendant used the plaintiff's invention, was old and defective, and that no profits were actually received from such an use. But if such be the fact, if the defendant was a loser by splitting wood with the Green machine, his loss was less to the extent of seventy-five cents on each cord split, than it would have been had he not used the patented invention. Such a result was equivalent to an equal gain, and it was rightly estimated as a part of the profits for which the infringer was responsible.

"These observations are sufficient for the present case. We notice, however, a suggestion made on behalf of the appellant, that since the decree in the circuit court the patentee has surrendered the patent upon which the decree was founded, and obtained a reissue. This does not appear in the record, and if it did it would be immaterial. We have held that the surrender of a patent extinguishes it, and that, after its surrender, pending suits founded upon it fall with its extinguishment. The patent must remain unsurrendered, not only when a suit upon it is commenced, but at the time of trial and judgment. But a surrender after final judgment or decree can have no effect upon a right passed previously into judgment. After that, there is nothing open for litigation. The right of the patentee then rests on his judgment or decree, and not on his patent. The suggestion, therefore, cannot avail the appellant, and the decree of the circuit court must be affirmed. *Decree affirmed.*"

of the court, said: "It is urged, however, that the Green machine, in which the defendant used the plaintiff's invention, was old and defective, and that no profits were actually received from such an use. But if such be the fact, if the defendant was a loser by splitting wood with the Green machine, his loss was less to the extent of seventy-five cents on each cord split, than it would have been had he not used the patented invention. Such a result was equivalent to an equal gain, and it was rightly estimated as a part of the profits for which the infringer was responsible." 11 Pat. Off. Gaz. 1112; *ante*, 667, note.

In *Elizabeth* v. *Pavement Co. Mr. Justice* Bradley stated, as a general proposition that would hardly admit of dispute: "It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention, although, from other causes, the general business of the defendant, in which the invention is employed, may not have resulted in profits,—as where it is shown that the use of his invention produced a definite saving in the process of a manufacture." 97 U. S. 138, 139 [24: 1005, 1006]. In *Root* v. *Railway Co.* that statement was repeated. 105 U. S. 202, 208 [26: 980]. And in *Thomson* v. *Wooster*, 114 U. S. 104 [29: 105], in which the patent was for an improved folding guide for sewing machines, *Mr. Justice* Bradley said: "It might have been a better financial operation to have bought of others, or employed others to make the folded strips which they required, just as, in the case of the *Cawood Patent*, the railroad company would have done better not to have mended the ends of their battered rails, but to have had them cut off; but as they chose to perform the operation they became responsible to the patentee for the advantage derived from using his machine." 114 U. S. 118 [29: 109].

The general rule has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say that a court of equity, which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief, by awarding, as an equivalent or a substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage. *Root* v. *Railway Co.* 105 U. S. 189, 214, 215 [26: 975, 984].

The rule in equity of requiring an infringer to account for the gains and profits which he has made from the use of a patented invention, instead of limiting the recovery to the amount of royalties paid to the patentee by third persons, has been constantly upheld under the provision of the Patent Act of 1870, embodied in the Revised Statutes, which, beside reenacting the grant of general equity jurisdiction in patent cases, further enacts that "upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this Act to increase the damages found by verdicts in actions upon the case"; and thus expressly affirms the defendant's liability to account for profits, as well as authorizes the court sitting in equity to award and to treble any damages that the plaintiff has sustained in excess of the defendant's profits. Act of July 8, 1870, chap. 230, § 55, 16 Stat. at L. 206; Rev. Stat. § 4921; *Birdsall* v. *Coolidge*, 93 U. S. 64, 69 [23: 802, 804]; *Marsh* v. *Seymour*, 97 U. S. 348 [24: 963]; *Root* v. *R. Co. supra; Gould's Mfg. Co.* v. *Cowing*, 105 U. S. 253 [26: 987]; *Garretson* v. *Clark*, 111 U. S. 120 [28: 371]; *Black* v. *Thorne*, 111 U. S. 122 [28: 372]; *Birdsell* v. *Shaliol*, 112 U. S. 485, 488 [28: 768, 769]; *Thomson* v. *Wooster*, 114 U. S. 104 [29: 105].

It was argued for the defendants that the limited construction given to Tilghman's patent by the decision of this court in *Mitchell* v. *Tilghman*, 86 U. S. 19 Wall. 287 [22: 125], became a restriction upon the scope of the patent, and so remained until revoked, and therefore that the defendants in this suit should not be held liable for infringement for the time between the date of that decision and the expiration of the patent,—that is to say, for the last ten months and six days of the period of more than four years and eight months during which the infringement lasted.

But the injustice done to a patentee by an erroneous decision in a suit against one infringer will not justify a repetition of the injustice in another suit against distinct infringers in no way connected with the first one. The decision against Tilghman in his suit against Mitchell was binding as between those parties only, and having been directly overruled by this court on full consideration in 102 U. S. 708 [26: 279], when the present case was first brought before it, affords no ground for not holding these defendants to account to Tilghman for all the profits, gains and savings which they have made from the use of his invention during the whole period of their infringement.

We are then brought to a consideration of the exceptions taken to the master's report in matters of fact, affecting the accuracy of his conclusions in respect to the amount of those profits, gains and savings. In dealing with these exceptions, the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. *Medsker* v. *Bonebrake*, 108 U. S. 66 [27: 654]; *Donnell* v. *Columbian Ins. Co.* 2 Sumn. 366, 371; *Mason* v. *Crosby*, 3 Woodb. & M. 258, 269; *Paddock* v. *Commercial Ins. Co.* 104 Mass. 521, 531; *Richards* v. *Todd*, 127 Mass. 167, 172.

The master, as already stated, reports the amount of chemicals that the defendants have saved by using the plaintiff's invention, as $9,868.33 in lime, and $173,863.13 in sulphuric acid. If each of these two items is correct, he

has made a mistake of $1,000 against the plaintiff in adding them together. But the plaintiff contends that a comparison of the report with the evidence shows that the actual saving in either item was greater.

The facts upon which the master bases his estimates of the savings in chemicals are stated in his report as follows:

After stating that, at the time of the infringement by the defendants of the plaintiff's patent, "the lime saponification process was more advantageous than any other then in public use," he says:

"By that process, the neutral fat was converted into lime soap by boiling it in open tubs with lime. The water was then run off containing the glycerine, and the lime soap was treated with sulphuric acid, which combined with the lime, forming sulphate of lime, and released the fatty acids. Theoretically, 9¼ lbs. of lime and double that quantity of sulphuric acid for each hundred pounds of fat treated were sufficient to effect these results; but in practical operation, manufacturers used from 12 to 14 lbs. of lime per hundred, and from 2 to 3 lbs. of acid for each pound of lime, to insure perfect decomposition.

"The respondents, during the period of infringement, treated the fat with water in closed digesters, adding one per cent of lime and heating with steam at a pressure of 225 lbs. for about nine and a half hours. They then precipitated the lime by using 3 lbs. of sulphuric acid for each pound of lime. As compared with the average amount of each employed in the old process, they saved 12 lbs. of lime and 29¼ lbs. of sulphuric acid for each hundred pounds of fat treated.

"Their books show that they thus treated 23,322,777 lbs. of fat during the period in question, saving 2,798,733 lbs. of lime and 6,880,219 lbs. of sulphuric acid, upon the basis above mentioned. The testimony shows the average cost of lime to have been $.3526 per hundred pounds, and the average cost of the acid $2.527 per hundred."

It appears, by the testimony of the defendants themselves, that, when they manufactured by the old process, they used 14 pounds of lime to each hundred pounds of fat treated, and 3 pounds of sulphuric acid to each pound of lime. It is contended by the plaintiff that that process, as used by the defendants, should be the standard of comparison in this suit; and that, according to the preponderance of evidence, the amount of lime, at least, so used by them, was a necessity in that process. But the plaintiff has the burden of proving the amount of profits that the defendants have made by the use of his invention. *Blake* v. *Robertson*, 94 U. S. 728 [24:245]; *Elizabeth* v. *Pavement Co.* 97 U. S. 126, 189 [24:1000, 1006]; *Dobson* v. *Hartford Carpet Co.* 114 U. S. 439, 444, 445 [29: 177-179]. And the question to be determined is, as stated by *Mr. Justice* Strong in delivering judgment in *Mowry* v. *Whitney*, "What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result." 81 U. S. 14 Wall. 620, 651 [20:860, 866]. In determining that question, the expense of using the new process is doubtless to be ascertained by the manner in which the defendants have in fact conducted their business, and not by the manner in which they might have conducted it. But as to the comparative expense of the old process, the cost at which they used that process, if they did once use it, although strong evidence against them, because they may be presumed to have used it as economically as they could, is not conclusive evidence that the old process could not have been used at a less cost. To hold otherwise would be to hold infringers of a patent for a new process, who had ever used the old process, to a different measure of accounting from those who had never used the old process at all. In the former opinion, the court assumed, as the result of the evidence, that the saponifying process required 12 or 14 per cent of lime. 102 U. S. 731 [26:288]. There being evidence that such was the amount of lime used by some manufacturers under the old process, as well as that the average use of sulphuric acid under that process was 2½ pounds to each pound of lime, we cannot say that the conclusion of the master ought to be set aside or modified as to either of these items.

The master finds that no material economy in operation has been secured by the change of process; and the testimony introduced by the plaintiff is not clear and decisive enough to overthrow his conclusion in this respect.

That part of the master's report which relates to the amount saved in glycerine water is as follows:

"It appears from the evidence that the average density of glycerine water obtained in the old lime saponification process was only ½° Baumé; while that obtained from the digesters was from 8° to 8½°. It also appears that the concentration of the latter to 15° cost $1.55 per barrel at the respondent's factory.

"Assuming the cost of concentration to be in like proportion for each degree, it is claimed that concentration from ½° to 8½° would cost nearly $.94 per barrel; and the cost of such concentration is an item of gain and saving realized by the respondents, by reason of the greater density of the glycerine water obtained from the digesters, for which they should be charged in this accounting. But there is no testimony establishing that the cost of concentration is in proportion to its degree, nor is it reasonable to assume such to be the fact; indeed, it is apparent that the cost of concentrating a single degree would be much greater in proportion than a more extensive operation, while an additional degree of concentration in an extensive operation would affect the cost but little.

"It appears in evidence that glycerine water was sold in the market at so much per barrel for each degree of density, and that the respondents sold it at the market price as it came from the digesters. It, however, required considerable concentration to prepare it for use, and they boiled it down to 15° for the purchasers, charging the cost thereof to them. Provided as they were with facilities for such work, the additional cost of concentration from a still lower degree could not be great. The only witness whose testimony is directly in

point says it would not be material. Besides, if paid by the purchaser, it would not affect the profits of the respondents.

"But the evidence does show a larger yield of glycerine by the new process. While the old lime-saponification process was in use, glycerine had no market value; consequently no effort was made to secure it, and there is no direct testimony as to the best results that could be secured by careful treatment; but the testimony shows that the average density of the glycerine which ran to waste was ½°, and that it was about equal in volume to the fat.

"It is claimed that the same volume of glycerine water was drawn from the digesters, while its density was much greater. But the master finds from the evidence that the respondents used two charges of water, each half the bulk of the fat, the first charge drawn from the digesters being the glycerine water sold by them. There was consequently double the volume of glycerine water in the former process, which accounts in part for difference in density; but the comparison still shows considerable loss, due to various causes, which is further increased by the additional concentration required, the average result of tests made in various degrees of concentration indicating that it requires about 4½ barrels of ½° to make one of 8.°

"The accompanying table B shows the quantity and value of glycerine water obtained by the respondents from the digesters, and also the number of barrels, concentrated to 8°, that could be obtained from the fat treated by lime saponification, and the value thereof at market prices, the difference being the amount gained by reason of the greater yield of glycerine from the digesters, viz., $61,701.77."

As, according to the master's report and the whole evidence, the glycerine obtained by either process must, in order to be sold, be concentrated to 15°, and it is not shown how much, if anything, more it would cost to concentrate from ½° to 15° than from 8½° to 15°, and the purchaser in either case pays the cost of concentration to 15°, the plaintiff fails to show that anything should have been allowed for the cost of concentration.

But the finding of the master, that in the new process "the respondents used two charges of water, each half the bulk of the fat, the first charge drawn from the digesters being the glycerine water sold by them," and "there was consequently double the volume of glycerine water in the former process;" as well as the corresponding statement in his table B, that the amount of glycerine water obtained by the new process was 65,312 barrels, while the amount that would have been obtained under the old process would have been 130,624 (misprinted in the record 134,624) barrels, is quite inconsistent with the sworn answer to the bill, and with the testimony of the defendants.

The answer states that in the tank were placed fat and water in equal quantities, and that during the operation the first charge of water was drawn off and a second charge of water introduced.

The defendant James N. Gamble testified that the barrels of glycerine obtained under the new process were 40-gallon barrels, containing, as he estimated, 330 pounds; and to the question, "Can you state what amount of water was used in each charge in the process as carried on from 1870 to 1875?" answered: "I cannot state positively from recollection of what was absolutely used. My recollection was, however, that it was in each charge about 50 per cent of the fat, and this recollection is confirmed by the amount of glycerine water obtained."

The amount of glycerine water obtained, as stated by the master from the defendants' books, was 65,312 barrels, which, at 330 pounds each, is 21,552,960 pounds. This is not half, but 92.4 per cent of 23,322,777, the number of pounds of fat treated by the defendants, as ascertained by the master from their books; and perhaps a somewhat, but not much, less proportion in bulk.

As to the old process, the defendant William A. Proctor, who was a member of the firm while they were using it, testified as follows:

"64. The saponifying tubs were large enough to contain about double the quantity of fat you put in them, I understand? *Ans.* They were.

"65. About how much water was put into these tubs, along with the fat? *Ans.* A little less than the volume of the fat, so that the vats were almost full. It was calculated that the condensed steam would supply water enough to keep them full.

"66. When the cooking of the mass in the saponifying tubs was completed, the tubs were about full of lime soap and water, I understand? *Ans.* They were not full, there being space enough to allow for the boiling of the water without excessive flashing out; that was all. The water in the vat, when the operation was through, was about equal to the bulk of the fat that had been put in."

Upon this testimony, as the whole of the glycerine could hardly have been separated from the mass of lime soap by merely drawing off, it may safely be concluded that the amount of glycerine water, obtained under the old process, which the witness speaks of as "about equal to the bulk of the fat that had been put in," was not more than 90 per cent of the fat treated, and that there was no substantial difference in this particular between the results of the two processes.

It is therefore clear that the old process would produce only one half the amount of glycerine reported by the master and stated in table B; and that the sum of $61,701.77, at which the master has arrived by deducting from $103,143.03, the value of 65,312 barrels of glycerine water obtained under the new process, $41,441.26, the value of 130,624 barrels, as obtainable under the old process, must be increased by adding half of the amount deducted, or $20,720.63.

The findings of the master, upon which he bases his conclusion of the amount of loss of fatty acids in using the plaintiff's invention as compared with the old process, are shown by the following extracts from his report:

"It does not appear that saponification by water alone in such digesters" as the defendants used "had been regularly employed by any one; but the testimony shows that" those who tried to do so, under licenses from the plaintiff, "all became satisfied that a satisfactory result could not be secured by that process

alone, and found it necessary to employ some additional agency to secure complete saponification at safe pressures within reasonable time."

"During the period of this accounting, the respondents used one per cent of lime and a second charge of water, completing the process in about nine and a half hours, at a pressure of about 225 pounds. With these two modifications, both of which are shown by the evidence to be efficient, a good quality of fatty acids was obtained, though not fully equal to that obtained by lime saponification."

"The fatty acid product obtained by the respondents, operating in their digesters for nine and a half hours, at an average pressure of 225 pounds, by the action of water alone, was inferior in value to the product of lime saponification."

"The experiments made pending the hearing before the master, at 225 pounds pressure, without lime or change of water, yielded products containing an average of 92.5 per cent of fatty acids."

"As compared with the result of lime saponification, the experiments at 225 pounds pressure show a loss of 6 pounds of free fatty acids for each hundred pounds of fat treated, and an admixture of undecomposed fat seriously affecting the value of the product." "The fatty acids were worth at least 9 cents per pound, making the direct loss of fatty acids not less than 54 cents upon each hundred pounds of fat treated."

"There is no testimony from which the master can determine to what extent the value of fatty acids actually obtained was affected by the admixture of undecomposed fat, and no allowance has been made therefor."

"During the period of infringement, the respondents treated 23,822,777 pounds of fat in their digesters with one per cent of lime. The evidence shows that 11¼ pounds of lime completely saponify 100 pounds of fat, in close digesters, under pressure;" and "in the process employed by the respondents 2,028,024 pounds of the fat treated by them were converted into lime soap by the action of lime; and 21,294,753 pounds were converted into a fatty acid mixture, containing 92.5 per cent of free fatty acids, by the action of water, the further decomposition of such mixture being effected by modifications of the complainant's process."

Upon comparing the master's report with the evidence, we are unable to accept his conclusion upon this part of the case.

Much of the testimony on which he chiefly relies was in the record upon which the case had been previously heard before this court, having been introduced to support the objection that the particular apparatus described in the plaintiff's patent for carrying the process into effect could not be operated to produce any useful result, of which the court then said: "We have examined the evidence on this point, and are satisfied that it shows the objection to be unfounded." 102 U. S. 730 [26:288]. Under these circumstances, the master appears to us to have given too much weight to this, as contrasted with the other testimony in the original record, although it is quite true, as argued by the defendants, that the question of the practical economy of the patented process, as compared either with older processes, or with the subsequent modifications used by the defendants, is distinct from the questions of utility and infringement heretofore determined.

The testimony of experts since taken, and the tables of experiments made by them pending the hearing before the master, are quite unsatisfactory, for reasons fully set forth in the brief for the plaintiff, which it would take too much space to recapitulate.

Apart from these considerations, and even assuming that the master is right in reporting that the modifications of using one per cent of lime and two charges of water, made by the defendants in the plaintiff's process, are shown to have been efficient, and that the defendants, in accounting with the plaintiff for the profits made by them from the use of his invention, are entitled to be allowed for the effect of such modifications, the evidence wholly fails to support the master's conclusion that in the use of the plaintiff's process, without addition of lime or change of water, as compared with the lime saponification process, there is a loss of 6 pounds of free fatty acids for each hundred pounds of fat treated; or to show that there has been any loss of free fatty acids which affects the value of the product.

The master's conclusion is based upon the finding that the product of the patented process, without modification, contains only 92½ per cent of free fatty acids, and upon the hypothesis that the product of the old process contained 98½ per cent.

But there is no proof whatever that there was any such difference in the result of the two processes, or that the product of the old process contained 98½ per cent of fatty acid. No chemical analysis of the product of the old process appears to have been made. The defendants' own experts testify that the highest possible amount of fat acid in pure tallow is only 95 and a fraction per cent. And two of the defendants, as well as Ropes, one of the witnesses on whom the master relies, and Verdin, a partner of Mitchell, testify that in using the old process the whole average product was 95 per cent of the amount of fat treated.

The testimony of one of the defendants, James Gamble, who had been forty years in the business, and was examined as a witness in their behalf, clearly exhibits his general impression as a practical manufacturer, not only that the product of the old process was not more than 95 per cent of fatty acid, but also that there was no comparative loss of fatty acid by Tilghman's process. On cross examination he testified as follows:

"14. Was there more or less fatty acid obtained by the old process used by you prior to 1858 than by the process used by you since 1870? *Ans.* I think there would be no difference if the fatty acid from the tank in the new process is well settled, but it won't settle as well as in the old. In actual practice, there is more weight in the product of the new process, as it contains more sediment than from the old; but I think the amount of fatty acids in each is the same."

Upon the direct examination being resumed, he further testified:

"16. Do you know how many pounds of fatty acids were practically produced from 100 pounds of fat treated by the old saponification

process used by you prior to 1858? *Ans.* We always made a calculation of 95 pounds, but I cannot say more than that.

"17. Do you know how many pounds of fatty acids were practically produced from 100 pounds of fat treated by the process used by you from 1870 to 1875? *Ans.* We calculated the same.

"18. Was this calculation or estimate founded upon any tests made by your firm or under their direction? *Ans.* No, sir. I do not think a test practicable; it is no more than guesswork.

"19. So far as you have any actual knowledge, there may have been a difference in the weight of fatty acids produced from 100 pounds of fat treated by the old saponification process, and the process as used by you from 1870 to 1875, may there not? *Ans.* I think when we have examined and find the lime all clear of the acids, the product in each case must be the same, except as to the sediment remaining in the tank stock."

The great preponderance of the evidence is to the effect that the product of the plaintiff's process, using water alone and all at one time, would contain as much as 95 per cent of free fatty acids. Even the defendants' principal expert, in an experiment testified to by him, and stated in his table, obtained that proportion by the use of equal quantities of water and of fat, without lime or change of water, under a treatment for nine hours at 225 pounds of pressure.

Moreover, the real question is not of the exact quantity of fatty acid, as proved by chemical tests, contained in the two products, but whether the one is as good as the other for use in the manufacture of candles. The defendants' testimony shows that manufacturers always test the fitness of the product for that use by pressure with the thumb, and never by chemical analysis; and upon all the evidence there can be no doubt that a difference between 95 and 92½ per cent in the proportion of fatty acids does not affect the commercial or practical value of the product.

From these considerations, it follows that nothing is to be deducted for a loss in fatty acids, and that to the amount of $182,781.46, saved in chemicals, and $61,701.77, gained in glycerine water, as reported by the master, there is to be added $1,000 for his mistake in adding up the items of chemicals, and $20,720.63 for his error in computing the amount of glycerine water, making a total amount of $266,153.86.

This result is arrived at by taking the amount of savings in chemicals, as found by the master, which the defendants produced no evidence to control, and which is less than such savings if computed by the standard of their own use under the two processes; then adding the amount gained in glycerine water, as appearing by the facts stated in the master's report or testified to by the defendants themselves, correcting only a clear error in the master's computation; and rejecting the deduction made by the master on account of a supposed loss of fatty acids in using the plaintiff's invention as compared with the old process, because the evidence returned with the master's report is quite inconsistent with the theory that there was any loss in this respect.

The only exception of any importance, not disposed of or rendered immaterial by what has been already said, is the exception of the plaintiff to the refusal of the master to allow interest on profits before the date of his report.

If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the Patent Act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced. *Silsby* v. *Foote*, 61 U. S. 20 How. 378, 387 [15:953,956]; *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 620, 651 [20:860,866]; *Littlefield* v. *Perry*, 88 U. S. 21 Wall. 205, 229 [22:577, 581]; Act July 8, 1870, chap 230, § 55, 16 Stat. at L. 206; Rev. Stat. § 4921; *Parks* v. *Booth*, 102 U. S. 96, 106 [26:54,58]; *Root* v. *R. Co.* 105 U. S. 189, 198, 200, 204 [26:975,978-980]; *Illinois Cent R. R.* v. *Turrill*, 110 U. S. 301, 303 [28:154,155]. Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. Interest should therefore be allowed, as in *Illinois Central Railroad* v. *Turrill*, just cited, only from the day when the master's report was submitted to the court (which appears, by the terms of his report and of the decree below, to have been October 7, 1884), upon the amount shown to be due by that report and the accompanying evidence.

Decree reversed, and case remanded to the Circuit Court, with directions to enter a decree for the plaintiff for the sum of $266,153.86, with interest from October 7, 1884, and costs.

Mr. Chief Justice **Waite** dissented.

Mr. Justice **Matthews** did not sit in this case or take any part in the decision.

JOHN F. HARTRANFT Collector of Customs for the DISTRICT OF PHILADELPHIA, *Plff. in Err.*,

v.

ABRAM M. LANGFELD, ET AL., Trading as LANGFELD, LICHTEN & CO.

(See S. C. Reporter's ed. 128-136.)

Duty on velvet ribbons—exception, when not sustained—statute—predominant use.

1. Velvet ribbons of silk and cotton, of which silk is the material of chief value, which are trimmings chiefly used for making or ornamenting hats, bonnets and hoods, pay a duty of 20 per cent *ad valorem* under schedule M of the Act of March 3, 1883, 22 Stat. at L. 512.

2. An exception, founded upon an entire misconception of the charge of the court, is not well taken.

3. A criticism, by way of objection to a part of a charge, which is hypercritical, will not be sustained.

4. Where the duty upon an article is specially provided for by a section of a statute, it is excluded from the operation of other sections.

5. It is the predominant use to which articles are applied that determines their character, within the meaning of the above mentioned clause of the Tariff Act.

[No. 750.]

Argued Feb. 15, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment against the Collector, in favor of importers, for an illegal excess of duties exacted. *Affirmed.*

The facts are stated in the opinion.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error:

Mr. **Joseph H. Choate,** *Henry Edwin Tremain, Mason W. Tyler* and *H. T. Kingston,* for defendants in error:

This court has interpreted the tariff paragraph under examination.

Arthur v. *Zimmerman*, 96 U. S. 124 (24: 770).

The commercial meaning of the words of the section does not differ from the ordinary import of the words employed by Congress. It follows that their interpretation is within judicial knowledge and, therefore, matter of law. *Marvel* v. *Merritt*, 116 U. S. 12 (29: 550); *Swan* v. *Arthur*, 108 U. S. 597 (26: 526); *Greenleaf* v. *Goodrich*, 101 U. S. 284 (25: 847); *Maillard* v. *Lawrence*, 57 U. S. 16 How. 251 (14: 925).

This court, in the case of *Arthur* v. *Sussfield*, 96 U. S. 128 (24: 772), has held that such clauses as this hat-material clause are clauses of special enumeration and provision, within the meaning of the Tariff Acts.

Arthur v. *Zimmerman*, 96 U. S. 124 (24: 770); *Arthur* v. *Lahey*, 96 U. S. 118 (24: 766); *Smith* v. *Field*, 105 U. S. 52 (26: 1007); *Schmieder* v. *Barney*, 113 U. S. 645 (28: 1130).

This is not a case where the commercial designation of the article fixes its character for the purpose of the Tariff Law.

Arthur v. *Unkart*, 96 U. S. 118 (24: 768); *Arthur* v. *Moller*, 97 U. S. 865 (24: 1046); *Victor* v. *Arthur*, 104 U. S. 498 (26: 833); *Barber* v. *Schell*, 107 U. S. 617 (27: 490); *Drew* v. *Grinnell*, 115 U. S. 477 (29: 453); *Newman* v. *Arthur*, 109 U. S. 133 (27: 884); *Arthur* v. *Morrison*, 96 U. S. 108 (24: 764); *Marvel* v. *Merritt*, 116 U. S. 11 (29: 550).

Mr. Justice **Matthews** delivered the opinion of the court:

This was an action against the Collector of the Port of Philadelphia by importers, to recover an alleged illegal excess of duties exacted by and paid to him. There was a verdict for $856.56 in favor of the plaintiffs, and judgment rendered thereon, to reverse which this writ of error is prosecuted.

The goods which were the subject of the duty were velvet ribbons made of silk and cotton, of which silk was the material of chief value. The custom house officers assessed upon them a duty of 50 per centum *ad valorem* under the last paragraph of schedule L of the Act of March 3, 1883, 22 U. S. Stat. at L. 510, which reads as follows: "All goods, wares and merchandise not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem.*" The plaintiffs claimed, and the jury found, under the instructions of the court, that the duty should have been assessed under the following paragraph of schedule M of the same Act, 22 U. S. Stat. at L. 512.

"Hats and so forth, materials for: braids, plaits, flats, laces, trimmings, tissues, willow-sheets, and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for in this Act, twenty per centum *ad valorem.*"

A bill of exceptions sets out all the evidence in the cause, together with the charge of the court to the jury, and instructions asked for by counsel on both sides, respectively, with the exceptions to certain parts of the charge as given and to the refusal of the court to charge as requested by counsel for the defendant.

It appears from the evidence that the goods in question were "trimmings," and that they were "used for making or ornamenting hats, bonnets, and hoods." That they were "trimmings" was not a matter of controversy; all the witnesses on both sides spoke of them as such. Neither was it disputed that they were "used for making or ornamenting hats, bonnets, and hoods," but there was no evidence that they were used exclusively for that purpose. The testimony on the part of the plaintiffs tended to show that they were chiefly used for making or ornamenting hats, bonnets, and hoods, but that they also might be, and sometimes were, used for trimming dresses. The testimony on the part of the defendant tended to show that they were dress trimmings equally with hat trimmings, and were commonly used as much for the one purpose as the other. In this state of the proof the judge charged the jury as follows:

"It is the use to which these articles are chiefly adapted, and for which they are used, that determines their character within the meaning of this clause of the Tariff Act. It would in my judgment be a fair construction of the meaning of this Act to say that because certain articles are indifferently adapted for use for different purposes either of these purposes may determine the rate of duty. It is the predominant use to which articles are applied that determines their character. It certainly could not have been the intention of Congress in framing this clause of the law to admit the importation, at a low rate of duty, of articles which may be used for certain purposes, but which are used chiefly for another and different purpose.

"You will therefore determine to which use these articles in question are chiefly devoted. If they are hat trimmings, and used for making and ornamenting hats, then the rate of duty imposed was excessive, and the plaintiff is entitled to recover the excess.

"If, however, in the determination of this question of fact, you find the articles to be chiefly used for other purposes, you will find for the defendant. The question is simply and purely one of fact; namely, what is the predominant use to which these articles are devoted. As you determine that question you will return your verdict."

The plaintiffs had requested the judge to charge the jury as follows:

"1. That if the jury find the goods in question are used for making or ornamenting hats, their verdict should be for plaintiffs.

"II. That where the articles are named or described in one section of the Tariff Act and a duty so imposed thereon, general terms in the same Act, although sufficient to comprehend such articles, by which a higher rate of duty is fixed, are not applicable to it, and will not prevail to make such higher rate of duty; and, that if the jury find the goods in question are hat trimmings used for making or ornamenting hats, and also find that silk is the component material of chief value, the verdict should be for the plaintiffs.

"III. That the clause imposing a duty on hat trimmings being subsequent in the Act to the clause imposing a duty on articles of which silk is the component material of chief value, if the jury find the goods are hat trimmings used for making or ornamenting hats, and also that they are articles of which silk is the component material of chief value, that the subsequent clause imposing the duty at twenty per cent should be taken as showing the latest and final intent of the law-makers, and the verdict should be for the plaintiffs.

"IV. That if the jury find the goods in question are known and used as hat trimmings, used for making or ornamenting hats, although they may be used from time to time for other purposes, their verdict should be for the plaintiffs."

In reply to these requests the judge said to the jury as follows:

"1. If the evidence shows that the goods upon which the duty was charged are adapted to use and are used for various purposes other than for trimming hats, the jury must be satisfied that the use to which they are chiefly applicable and for which they were employed was in making or ornamenting hats, to bring them within the scope of the clause of the Tariff Act imposing a duty of twenty per cent.

"2, 3 and 4. Subject to the qualifications stated in the foregoing answer to the first point, the three remaining points are affirmed."

The counsel for the defendant requested the judge to charge the jury as follows:

"I. That if the jury should find that the goods in question are not specially enumerated or provided for, and that silk is the component material of chief value, then the rate of duty should be fifty per centum *ad valorem*, and your verdict should be for the defendant.

"II. That if the jury should find that silk is the component material of chief value of the goods in question, and that they are suitable for and are occasionally used for hat trimmings, but that they are generally used for other purposes, then, as they are not exclusively or specially used for hat trimmings, they cannot be said to be 'used for making or ornamenting hats' within the meaning of the Act of Congress so as to subject them to a duty of twenty per centum *ad valorem*, and your verdict should be for the defendant.

"III. That if the jury should find that the goods in question can properly be classified under schedule M, Act March 8, 1883, as 'trimmings used for making or ornamenting hats,' not specially enumerated or provided for in said Act, and subject to a duty of twenty per centum *ad valorem*, and can also properly be classified as goods not specially enumerated or provided for, of which silk is the component material of chief value, and subject to a duty of fifty per centum *ad valorem*, then, as two rates of duty are applicable to the goods, they should be classified as subject to a duty of fifty per centum, as this is the higher rate, and your verdict should be for the defendant.

"IV. That unless the jury should find that the goods in question are not specially provided for, and that by their style and character they are fitted only for use for making or ornamenting hats, then your verdict should be for the defendant."

The court declined to give these instructions and the counsel for the defendant excepted as follows:

1. Because the judge declined to charge as requested in defendant's first, second, and fourth points, stating that those points were substantially covered by the answers to the plaintiff's points.

2. Because the judge declined to charge as requested in the defendant's third point.

3. Because the judge charged the jury that "If the evidence shows that the goods upon which the duty was charged are adapted to use and are used for various purposes other than for trimming hats, the jury must be satisfied that the use to which they are chiefly applicable and for which they are employed was in making or ornamenting hats, to bring them within the scope of the clause of the Tariff Act imposing a duty of twenty per cent." And that, "subject to the qualifications stated in the foregoing answer to the first point, the three remaining points are affirmed."

In support of these exceptions, it is argued by the solicitor-general, that the charge of the court and the answers to the points of instruction requested by the respective counsel, misled the jury from the real point involved in the case to a foreign issue, by substantially instructing it, that the inquiry was whether these materials had a predominant use for making and ornamenting hats, bonnets, and hoods; whereas, the true construction of the statute required that the inquiry, which should have been submitted to the jury, was whether the materials imported were "braids, plaits, flats, laces, trimmings, willow-sheets and squares, * * * composed of straw, chip, * * * used for making or ornamenting hats, bonnets, and hoods." The instruction of the court, it is said, was that any material, of which the predominant use was for the making or ornamenting of hats, bonnets, and hoods, not specially provided for, should be classified under this clause. It is contended that "The true construction is that the use of the material must not only be for making and ornamenting hats, bonnets, and hoods, but it must be in some of the forms fixed in the statute; that is, in the form of either 'braids, plaits, flats, laces, trimmings, tissues, willow-sheets, or squares.'"

But this is an entire misconception of the charge of the court. There was no controversy in the evidence as to whether these velvet ribbons were or were not "trimmings." All the witnesses agreed that they were; it was so assumed throughout the case; it was expressly stated in the charge of the court to the jury that they must be "trimmings" within the sense of the section in order to justify a recovery. The court said expressly in its charge: "If they are hat trimmings, and used for making and orna-

menting hats, then the rate of duty imposed was excessive, and the plaintiff is entitled to recover the excess." This necessarily implied that if they were not hat trimmings, the plaintiffs could not recover; and also that even if they were hat trimmings, but were not chiefly used for making and ornamenting hats, the plaintiffs would not be entitled to recover, because in the sentence immediately preceding in the charge, the court had said to the jury: "You will, therefore, determine to which use these articles in question are chiefly devoted." What the court charged the jury, therefore, was that in order to entitle the plaintiffs to recover, they must find that the velvet ribbons in question were "trimmings" used for making and ornamenting hats, and that they were "chiefly" used for that purpose. The jury were told: "If, however, in the determination of this question of fact, you find the articles to be chiefly used for other purposes, you will find for the defendant. The question is simply and purely one of fact, namely, What is the predominant use to which these articles are devoted? As you determine that question, you will return your verdict." The objection, therefore, to the charge of the court, that it would have authorized a recovery if the goods in question were materials used for making or ornamenting hats, although not coming within the enumeration of the section as "braids, plaits, flats, laces, trimmings, tissues, willow-sheets and squares," is not well taken.

The court in fact did instruct the jury that they must find the goods in question to be "trimmings" chiefly used for making and ornamenting hats, bonnets, and hoods, composed of a material not otherwise specially enumerated or provided for. It is not suggested that the velvet ribbons are specially mentioned as subject to a duty by that name or description. It is true that there was no evidence showing that the exclusive commercial designation of such velvet ribbons was "trimmings," but all the witnesses spoke of the velvet ribbons in question as "trimmings," manifestly according to the natural meaning of the word, and because they were used to trim either hats or dresses; the real controversy being for which purpose as "trimmings" they were principally used.

A further criticism, by way of objection, is made to that part of the charge excepted to wherein the judge states that "the jury must be satisfied that the use to which they (the goods) are chiefly applicable, and for which they were employed, was in making or ornamenting hats," etc. The point of this criticism is that the language, "and for which they were employed," "would require the Collector to suspend the assessment until he should know how the goods were used or employed. That use or employment of the goods might not take place for years after the importation was made. The law clearly did not intend the classification should be required to await such an uncertain event." This is hypercritical. The language does not admit of any such instruction. It means for which they were habitually employed, or customarily employed, or usually employed, and not "for which they had been employed." It is impossible that any jury could have otherwise understood the instruction.

The remaining exception was on account of the refusal of the court to instruct the jury as requested by the counsel for the defendant in the third point, viz: "That if the jury should find that the goods in question can properly be classified under schedule M, Act March 3, 1883, as 'trimmings used for making or ornamenting hats,' not specially enumerated or provided for in said Act, and subject to a duty of twenty per centum *ad valorem*, and can also properly be classified as goods not specially enumerated or provided for, of which silk is the component material of chief value, and subject to a duty of fifty per centum *ad valorem*, then, as two rates of duty are applicable to the goods, they should be classified as subject to a duty of fifty per centum, as this is the higher rate, and your verdict should be for the defendant." The section of the Revised Statutes upon which this instruction was framed is section 2499, which provides: "If any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty." The principle of this section, however, is not applicable to the circumstances of this case. The velvet ribbons were found by the jury to be trimmings chiefly used for making or ornamenting hats; that brought them within the operation of schedule M of the Act of March 3, 1883, fixing the duty at twenty per centum *ad valorem;* and being specially provided for by that section, they were excluded from the operation of all others.

The contention which appears to have been made on behalf of the government on the trial of the cause, that these velvet ribbons could not be classified as trimmings used for making or ornamenting hats, bonnets, and hoods, within the meaning of the section levying the duty of twenty per centum *ad valorem*, unless they were shown to have been used exclusively for that purpose, is not insisted upon by the solicitor-general in this court. It was very properly abandoned, the charge of the court upon that point being, in our opinion, clearly right.

The judgment of the Circuit Court is accordingly affirmed.

JACOB KREIGER, *Plff. in Err.*,

v.

SHELBY RAILROAD COMPANY, The SHELBY R. R. DIST. OF SHELBY COUNTY, JAMES P. FOREE ET AL.

JACOB KREIGER ET AL., *Plffs. in Err.*,

v.

SHELBY R. R. CO., A. P. CARRITHERS ET AL.

JACOB KREIGER ET AL., *Plffs. in Err.*,

v.

SHELBY RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 39-46.)

Jurisdiction to review state judgment—opinions of state courts.

1. In order to give jurisdiction to this court to review a judgment of a state court, it must appear that the state court gave effect to the statute which, it is alleged, impaired the obligation of the contract.
2. Where the statutes of a State require that written opinions be delivered by its highest court in all cases, and that they be recorded, this court may examine the opinions so delivered and recorded, to ascertain the grounds of the judgment of the state court.

[Nos. 948, 949, 950.]

Submitted Dec. 12, 1887. Decided March 19, 1888.

IN ERROR to the Court of Appeals of the State of Kentucky, to review judgments of that Court affirming the judgments of a lower court of the State, that the Shelby Railroad District was entitled to vote upon stock. *Dismissed.*

Statement by *Mr. Justice* **Gray:**

These were three suits in equity, one brought by the Shelby Railroad Company, another by the Shelby Railroad District of Shelby County in the State of Kentucky, and the third by Kreiger and other individual stockholders in the Railroad Company. The plaintiffs in each suit were made defendants in each of the other suits. All the cases were argued together in the courts of the State of Kentucky and in this court, and presented the question whether the Shelby Railroad District had the right of voting at stockholders' meetings upon stock held by it in the Shelby Railroad Company, under the following circumstances:

By an Act of the Legislature of Kentucky of March 15, 1851, the Shelby Railroad Company was incorporated; its capital stock was fixed at $600,000, in shares of $50 each, to be subscribed for by any individual or corporation; at any meeting of the stockholders, each stockholder was to be "allowed one vote for every share owned by him, her or it;" on every share subscribed, one dollar was to be paid at the time of the subscription, and the residue in installments and at times to be fixed by the president and directors; all payments made on the stock were to bear interest until a dividend made, certificates of stock for all such interest were to be issued to the persons entitled, in addition to the shares subscribed or held by them, and no certificates of stock were to be issued until they were paid for; the County Court of Shelby County was empowered to subscribe for stock in behalf of the county, its subscription was to be made payable at such times and places and upon such terms as might be agreed on between it and the commissioners or directors taking its subscription, and, for the purpose of paying that subscription, it was authorized to levy and collect a tax on all the property subject to taxation within the county; and every person paying any part of the tax was to be entitled to his *pro rata* share of stock, and to receive a certificate thereof on paying, or producing transfers from those who had paid, for a full, half or quarter share.

An Act of February 8, 1869, amending the original charter, authorized a certain portion of Shelby County, included in a boundary defined in this Act, to subscribe for any amount of the stock not exceeding $300,000, and also authorized other counties to subscribe for certain amounts of stock, and further enacted as follows:

"Sec. 3. Upon the written application of the president and directors of said Company and of ten taxpayers of any of said counties, the county judge of such county shall, within thirty days thereafter, cause a vote of the legal voters residing in the county, or portion of county, to be taxed, to be taken at the several places of voting therein, to ascertain whether the voters of said counties, or portion of Shelby County, are in favor of said subscription."

"Sec. 5. If a majority of the votes cast shall be in favor of said subscription, it shall be the duty of the county judge forthwith to cause the subscription to be made in the name of said county, or portion of Shelby County, as the case may be.

"Sec. 6. Where any such subscription to the capital stock of said Company shall have been ordered, and the conditions aforesaid complied with, bonds shall be executed in the name of and under the seal of or scroll of said portion of Shelby County, or said counties, as the case may be, in such form and in such amounts, the entire amount of said bonds not to exceed the sum subscribed, and payable at such places, and bearing interest payable semi-annually, at such rates, not exceeding eight per centum per annum, as the president and directors may elect. The bonds shall be due and payable twenty years from their date, with the privilege reserved to the said counties to pay them after three years from date. The bonds shall be signed by the judge of the county court and countersigned by the county clerk. When so executed, said bonds shall be delivered to the president and directors of said Company, in payment of said subscription, and they may be by them negotiated, hypothecated or sold, upon such terms and at such times as may by said president and directors be deemed expedient, and may be transferred by indorsement.

"Sec. 7. When any such subscription shall have been made, it shall be the duty of the county judge and the justices of the peace of the precincts or the counties in which the vote is taken, to levy annually a direct tax upon all the property in such county, or portion of county, subject to taxation for state revenue, to pay the interest when due, and the principal at maturity; and they may levy a tax to pay any portion of said bonds at any time after three years; *Provided*, That no greater tax than one per cent shall be levied in any one year, except to pay the bonds at maturity." "The collecting officer shall execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and, when they amount to fifty dollars or more, shall entitle the holder, upon presentation to the proper officers of the Company, to certificates of stock at the rate of one share for fifty dollars, and every multiple of fifty."

"Sec. 9. The several counties and portion of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders."

An Act of March 11, 1870, further amending the charter of the Railroad Company, contained the following section:

"Sec. 8. When any county, or part of a county, city, town or precinct, shall have de-

livered its bonds in payment for stock subscribed, it shall be entitled to representation, and to vote the amount of such stock in any meeting of the stockholders of said Company. The stock owned by a county shall be represented by the county judge and all the justices of the peace of the county; stock owned by a part of a county, or a precinct, by the county judge and by the justices of the peace residing in the district or precinct taxed; stock owned by a city or town, by its general council or board of trustees; and these several bodies may designate a suitable person or persons as their proxies to represent them in any meeting of the stockholders of said Company. It shall be the duty of the county judge to call together at the county seat the justices entitled to vote, and to cause their action to be spread upon the records of the county court."

Another Act, passed February 26, 1878, enacted that "the part of Shelby County embraced in the boundary given" in the Act of 1869 should "have the corporate name of the Shelby Railroad District of Shelby County," and by that name might sue and be sued.

In accordance with the provisions of the Act of 1869, that portion of Shelby County therein defined forthwith subscribed $300,000 to the stock of the Railroad Company, and its bonds for that amount were issued and delivered to the Railroad Company on June 1, 1869, and were sold by the Company and the proceeds applied to the construction of its road; and a tax was annually levied and collected, amounting in all to more than $300,000, which was applied to the payment of interest becoming due on the bonds, and of part of the principal, leaving such bonds, or others given in renewal thereof, now remaining unpaid to the amount of $248,000; and the District holds certificates of stock to that amount, and always voted upon its stock until these suits were brought. Certificates of stock to a large amount have also been issued to taxpayers and are held by Kreiger and others. The first dividend on the stock was declared in December, 1881, and was paid to all the stockholders, including the District.

The Court of Appeals of Kentucky, affirming the judgments of a lower court of the State, adjudged that the Shelby Railroad District of Shelby County was a stockholder in the Shelby Railroad Company to the extent of the principal of the bonds of the District, issued and delivered to the Railroad Company, and still outstanding and unpaid, and was entitled to vote and to receive dividends accordingly.

Kreiger and others sued out these writs of error, which the Railroad Company and the District now move to dismiss for want of jurisdiction.

Messrs. **B. F. Buckner** and **John L. Dodd,** for plaintiffs in error:

A federal question was raised by the pleadings and was decided.

Bridge Propre. v. *Hoboken Co.* 68 U. S. 1 Wall. 142 (17: 575); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 57 (19: 376); *Knox* v. *Exchange Bank*, 79 U. S. 12 Wall. 388 (20: 415); *Northwestern University* v. *People*, 99 U. S. 321 (25: 389); *Almonester* v. *Kenton*, 50 U. S. 9 How. 9 (13: 24); *Fisher* v. *Cockerell*, 30 U. S. 5 Pet. 254 (8: 116); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 688 (22: 443); *Gross* v. *U. S. Mortgage Co.* 108 U. S. 485 (27: 797); *Adams Co.* v. *Burlington & M. R. Co.* 112 U. S. 127 (28: 678); *Jacks* v. *Helena*, 115 U. S. 289 (29: 392); *Myrick* v. *Thompson*, 99 U. S. 295 (25: 326).

The Acts of 1851 and 1869 confer on the individual stockholders rights which are impaired by the Acts of 1870 and 1878.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Thomas* v. *West Jersey R. Co.* 101 U. S. 81, 82 (25: 951, 952); *Gregory* v. *Shelby College*, 2 Met. (Ky.) 589.

Messrs. **P. J. Foree, Bullock & Beckham** and **J. C. Beckham,** for defendants in error:

The question was simply one of the construction of state legislation by a state court. To such questions, the revisory power of this court does not extend.

McBride v. *Hoey*, 36 U. S. 11 Pet. 167 (9: 673); *Lawler* v. *Walker*, 55 U. S. 14 How. 149 (14: 364); *Robertson* v. *Coulter*, 57 U. S. 16 How. 106 (14: 864); *Marshall* v. *Ladd*, (19: 153).

It does not appear that a federal question was raised or, if raised, it was not decided.

Northern R. Co. v. *N. Y.* 79 U. S. 12 Wall. 384 (20: 412); *Knox* v. *Exchange Bank of Va.* 79 U. S. 12 Wall. 379 (20: 414); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18: 381); *Lehigh Water Co.* v. *Easton* (80: 1059); *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 (29: 118); *Williams* v. *Norris*, 25 U. S. 12 Wheat. 117 (6: 571); *Matheson* v. *Branch Bank of Alabama*, 48 U. S. 7 How. 260 (12: 692); *Parmales* v. *Lawrence*, 78 U. S. 11 Wall. 36 (20: 48); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *McManus* v. *O'Sullivan*, 91 U. S. 578 (23: 390); *Chouteau* v. *Gibson*, 111 U. S. 200 (28: 400); *Bolling* v. *Lerner*, 91 U. S. 594 (23: 366); *State* v. *Board of Liquidation*, 98 U. S. 140 (25: 114); *Poydras De La Lande* v. *Louisiana*, 59 U. S. 18 How. 192 (15: 350); *Farney* v. *Towle*, 66 U. S. 1 Black, 350 (17: 216); *Hoyt* v. *Thompson*, Id. 518 (17: 65); *Maxwell* v. *Newbold*, 59 U. S. 18 How. 511 (15: 506); *Susquehanna Boom Co.* v. *West Branch Boom Co.* 110 U. S. 57 (28: 69); *Worthy* v. *Barrett*, 76 U. S. 9 Wall. 611 (19: 565); *Messenger* v. *Mason*, 77 U. S. 10 Wall. 507 (19: 1028); *Caperton* v. *Bowyer*, 81 U. S. 14 Wall. 216 (20: 882).

This court will not interfere if the record shows that besides the federal question there is another and distinct ground on which the state judgment can be sustained.

Kennebec & P. R. Co. v. *Portland & K. R. Co.* 81 U. S. 14 Wall. 23 (20: 850); *Rector* v. *Ashley*, 73 U. S. 6 Wall. 142 (18:783); *Gibson* v. *Chouteau*, 75 U. S. 8 Wall. 314 (19: 317); *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 (20: 635).

When this court comes to construe a state statute it will adopt the construction placed upon it by the highest judicial tribunal of that State.

Green v. *Neal*, 31 U. S. 6 Pet. 291 (8: 402); *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 (12: 666); *Randall* v. *Brigham*, 74 U. S. 7 Wall. 523 (19: 285).

Mr. Justice **Gray** delivered the opinion of the court:

It is contended for the plaintiffs in error that the Statutes of 1851 and 1869 created a contract

by which the stockholders of the Shelby Railroad Company were those persons who had become so by subscribing for stock or by the payment of taxes, and the right to vote upon stock subscribed for by counties or other municipal subdivisions was in taxpayers only; and that the Statutes of 1870 and 1873 first granted to the Shelby Railroad District of Shelby County the right to vote as a stockholder in the Railroad Company, and thereby impaired the obligation of the contract created by the earlier statutes.

But the insuperable difficulty in the way of sustaining these writs of error is that it does not appear that the Court of Appeals of Kentucky gave effect to the Statutes of 1870 and 1873 as making any change in that contract.

The Statutes of Kentucky require written opinions to be delivered by the court of appeals in all cases, and to be recorded by its clerk. Code of Civ. Proc. § 765; Gen. Stat. chap. 28, art. 2, § 10; chap. 16, art. 1, § 1. By the settled course of decision under the existing Judiciary Acts of the United States, this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590, 633 [22: 429, 443]; *McManus* v. *O'Sullivan*, 91 U. S. 578 [23:390]; *Gross* v. *U. S. Mortgage Co.* 108 U. S. 481, 487 [27: 796, 798]; *Adams County* v. *Burlington & M. R. R.* 112 U. S. 123, 129 [28: 678]; *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133, 137 [29:118,119]; *Jacks* v. *Helena*, 115 U. S. 288 [29:392]; *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110 [30:342]. The decision in *Fisher* v. *Cockerell*, 30 U. S. 5 Pet. 248, 255 [8:114,116], cited by one of the defendants in error, in which, on a writ of error to the Court of Appeals of Kentucky, this court held that the opinion of that court could not be taken into consideration, was decided under the Judiciary Act of 1789, which contained a provision, omitted in the later Acts, expressly requiring the error assigned as a ground of reversal to appear on the face of the record. Acts Sept. 25, 1789, chap. 20, § 25, 1 Stat. at L. 86; Feb. 5, 1867, chap. 28, § 2, 14 Stat. at L. 386; Rev. Stat. § 709.

In the cases now before us, the opinions delivered in writing by the Court of Appeals of Kentucky, recorded by its clerk, and sent up with the transcript, consist of an elaborate opinion upon the original hearing, and a shorter one upon a petition for a rehearing.

The original opinion makes no mention of the Acts of 1870 and 1873, but, proceeding wholly upon the construction of the Charter of 1851, as amended by the Act of 1869, holds, for reasons stated at length, that by the legal effect of the Act of 1869, defining by boundaries a district in Shelby County, authorizing it to determine by popular vote of its inhabitants to subscribe for stock in the Railroad Company, and requiring bonds to be executed in its name by the county judge to the Railroad Company for the amount so subscribed for, the District was made a corporation, and entitled to all the rights and privileges of other stockholders in the Railroad Company, and had the right to vote and to receive dividends upon the stock thus subscribed for, except so far as owners of property within the District, having paid taxes assessed upon them towards paying the principal sum so subscribed, had received certificates of stock for the sums so paid by them; and that the right of the District to vote and to receive dividends upon so much of its stock as had not been so paid for was not displaced or affected by the issue of certificates of stock to taxpayers for sums paid by them to meet the accruing interest on the sum subscribed by the District, because the stock so issued for interest was, by the express provisions of the charter constituting the contract between the stockholders, to be in increase of the original capital stock.

The opinion delivered on overruling the petition for a rehearing reaffirms the positions of the former opinion, and declares that, while the provisions of the Act of 1869, amending the original Act of incorporation, were indefinite as to the manner in which stock held by the District should be voted on, the Acts of 1870 and 1873 did no more than make that certain which was before uncertain, or had been omitted from the original Act of incorporation, by giving the District a distinct name and authorizing it to be represented by the county judge and justices of the county, and providing a remedy by which the rights of the corporation might be asserted and its liabilities enforced; but that there had been no change of contract.

It thus appears that the state court, upon full consideration, decided that the Acts of 1870 and 1873 conferred no new rights, but only defined more clearly the manner in which the rights conferred by the earlier statutes should be exercised; and that it based its judgments entirely upon the construction and effect of the earlier statutes, and upon grounds which would have been equally controlling if the later Acts had not been passed. The necessary conclusion is that this court has no jurisdiction to review those judgments. *Bank of West Tenn.* v. *Citizens Bank of La.* 80 U. S. 13 Wall. 432 [20:514]; *S. C.* 81 U. S. 14 Wall. 9 [20:514]; *Palmer* v. *Marston*, 81 U. S. 14 Wall. 10 [20:826]; *Kennebec & P. R. R. Co.* v. *Portland & K. R. R. Co.* Id. 28 [20:850]; *Stevenson* v. *Williams*, 86 U. S. 19 Wall. 572 [22:162]; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [*ante*, 607].

Writs of error dismissed for want of jurisdiction.

SOUTHERN DEVELOPMENT COMPANY OF NEVADA, *Appt.*,
v.
FRANK SILVA.

(See S. C. Reporter's ed. 247-259.)

Answer in equity action, effect of—fraudulent representations—expressions of opinion in regard to value—presumption—acts of vendee—investigation by purchaser.

1. Where an answer to a bill in equity is direct and positive, and under oath, and denies the allegations of the bill, and an answer on oath is not waived, the complainant will not be entitled to a decree unless such denials are disproved by more than one witness or by one witness and corroborating circumstances; and this is so where the bill is filed for fraud.

2. In order that a vendee of property may avoid the sale for fraudulent representations, it must appear that he relied upon such representations in the purchase.

3. Expressions of opinion which are not statements of facts do not constitute fraud.
4. Statements which are expressions of opinion by the vendor, in respect to the value of the property sold, are not fraudulent in law to the extent that the sale will be set aside if they are untrue.
5. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish the defendant's knowledge.
6. In order to set aside a sale for fraudulent representations, it is essential that the vendee has acted upon such representations, to his injury.
7. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations.

[No. 1210.]

Submitted Jan. 9, 1888. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California, dismissing a bill in equity to rescind a contract of purchase on the ground of fraudulent representations. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **Wm. M. Stewart, A. T. Britton** and **A. B. Browne,** for appellant:

If the plaintiff has an adequate remedy at law, then the decree should be reversed without prejudice to the right of the plaintiff to maintain its action at law.

Buzard v. *Houston*, 119 U. S. 354 (30: 454); *Rogers* v. *Durant*, 106 U. S. 644 (27: 303).

These statements as to Silva's opinion, which were untrue and made with an intention to mislead, were fraudulent and afford grounds for relief.

2 Pom. Eq. Jur. § 878.

The rule of *caveat emptor* applies only when the buyer and seller have equal opportunities of knowledge; but it does not apply where the seller makes express representations in respect to matters of which the buyer has no knowledge and no means at hand of obtaining knowledge.

Fishback v. *Miller*, 15 Nev. 440; 2 Pom. Eq. Jur. § 845, pp. 381, 382.

It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction.

Neblett v. *Macfarland*, 92 U. S. 101 (23: 471); *Blake* v. *Mowatt*, 21 Beav. 613; *Veazie* v. *Williams*, 49 U. S. 8 How. 134, 158 (12: 1018, 1028).

Nor, if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed.

Scott v. *Perrin*, 4 Bibb, 360; Kerr, Fraud & M. 337.

Messrs. **John H. Miller** and **J. P. Langhorne,** for appellee:

Equity will pursue money which is once impressed with a trust, even when commingled, and award it to the true owner.

Knatchbull v. *Hallett*, L. R. 13 Ch. Div. 696; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54 (26: 693); *Newton* v. *Porter*, 69 N. Y. 133; *Taylor* v. *Plumer*, 3 Maule & S. 562; *Bank of America* v. *Pollock*, 4 Edw. Ch. 215; *Barry* v. *Brune*, 8 Hun, 395; *Silsbury* v. *McCoon*, 3 N. Y. 379; *Thompson* v. *Perkins*, 3 Mason, 232; *Pennell* v. *Deffell*, 4 De Gex, M. & G. 372; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Stephens* v. *Brooklyn Board of Education*, 79 N. Y. 183; *Re LeBlanc*, 14 Hun, 8; *Wells* v. *Robinson*, 13 Cal. 133; *George* v. *Ransom*, 14 Cal. 660; *Bayles* v. *Baxter*, 23 Cal. 578; *Simson* v. *Eckstein*, Id. 593; *Greiner* v. *Greiner*, 58 Cal. 122.

A misrepresentation, in order to constitute fraud, must contain the following elements: (1) its form as a statement of fact; (2) its purpose of inducing the other party to act; (3) its untruth; (4) the knowledge or belief of the party making it; (5) the belief, trust or reliance of the party to whom it is made; (6) its materiality.

2 Pom. Eq. Jur. § 876.

Fraud is odious, and never to be presumed.

Attwood v. *Small*, 6 Clark & F. 232; *Tuck* v. *Downing*, 7 Morrison, Mining Rep. 108-10; *Walker* v. *Hough*, 59 Ill. 375; *Dirkson* v. *Knox*, 30 N. W. Rep. 49.

The rule of *caveat emptor* applies.

1 Story, Eq. Jur. § 200 a; *Reynolds* v. *Palmer*, 21 Fed. Rep. 434.

Silva merely gave expression of an opinion, and in such there is no fraud.

2 Pom. Eq. Jur. § 878; *Tuck* v. *Downing*, 7 Morr. Min. Rep. 84; *Rendell* v. *Scott*, 70 Cal. 514.

Statements as to value are not fraudulent in law.

McDowell v. *Simms*, 6 Morr. Min. Rep. 476; *Tuck* v. *Downing*, 7 Morr. Min. Rep. 83.

Yerington purchased on the advice of Forman and his own judgment.

Tuck v. *Downing*, 76 Ill. 71.

There never was any valid rescission or offer to rescind.

Wilbur v. *Flood*, 16 Mich. 45; *Pearsoll* v. *Chapin*, 44 Pa. 9.

Rescission is a condition precedent to the commencement of the suit.

Herman v. *Haffenegger*, 54 Cal. 164; *Gifford* v. *Carvill*, 29 Cal. 589; *Getty* v. *Devlin*, 54 N. Y. 403, 7 Morr. Min. Rep. 29; *Byard* v. *Holmes*, 33 N. J. L. 119, 6 Morr. Min. Rep. 599; *Cook* v. *Gilman*, 34 N. H. 556; *Bassett* v. *Brown*, 105 Mass. 557; *Schiffer* v. *Dietz*, 83 N. Y. 308; *Cobb* v. *Hatfield*, 46 N. Y. 536; *Masson* v. *Bovet*, 1 Denio, 74; *Wilbur* v. *Flood*, 16 Mich. 45; *Beetem* v. *Burkholder*, 69 Pa. 249.

Even if the offer to rescind was valid and made in due time, the parties cannot be placed *in statu quo.*

State v. *McCauley*, 15 Cal. 458; *Fratt* v. *Fiske*, 17 Cal. 380; *San Jose* v. *Younger*, 29 Cal. 172; *Morrison* v. *Lods*, 39 Cal. 381; *Perley* v. *Balch*, 23 Pick. 285; *Hunt* v. *Silk*, 5 East, 449; *Masson* v. *Bovet*, 1 Denio, 69, 74; *Reed* v. *Blandford*, 2 Young & J. 278; *Turnpike Co.* v. *Commonwealth*, 2 Watts, 433; *Herman* v. *Haffenegger*, 54 Cal. 163.

Mr. Justice **Lamar** delivered the opinion of the court:

This is a bill in equity to rescind a contract of purchase of a silver mine on the ground of fraudulent representations and to recover the consideration paid.

The suit was commenced originally in the Superior Court of Inyo County, California, on the 8th of May, 1884, but on account of the diverse citizenship of the parties, the plaintiff being a corporation organized under the laws of Nevada, and the defendant a citizen of California, it was removed into the United States Circuit Court. Demurrers to the original bill

and to an amended bill having been sustained, the present "second amended" bill of complaint was filed. Answer was filed by defendant, replication by complainant, and issue was joined. Testimony was taken, and the case was heard, resulting in a decree dismissing the bill on the 14th of March, 1887.

It appears from the record that on the 15th of March, 1884, the appellant (who was the complainant below) purchased from the defendant a mining claim, known as the "Sterling Mine," together with other mining property, all situated in Inyo County, California, paying him therefor the sum of $10,000.

On the 8th of May, 1884, the original bill of complaint was filed, charging in substance that complainant was induced to purchase said mine and mining property solely upon the representations made by Silva as to its condition, extent, and value; that such representations were made to H. M. Yerington, the president of said complainant Company, and to one Forman, a mining expert in his employ, in January, 1884, when an examination of said mine was made by them; that said representations were false and fraudulent, and were well known to the defendant at the time to be such; and that said representations were, in substance and in a somewhat different order, as follows:

(1.) That there were 2,000 tons of ore in the mine;

(2.) That the bottom of what is called the "ore chamber" was solid ore, as good as the ore exposed on the sides of the chamber;

(3.) That there were not less than 500 tons of ore in and about the said "ore chamber;"

(4.) That the mine was worth fifteen thousand dollars; and,

(5.) That, after going through the mine, the defendant represented to said Yerington and Forman that he had shown them all the work which had been done in or about the mine that would throw any light upon the quantity of ore therein.

The answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill, and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud. *Vigel* v. *Hopp*, 104 U. S. 441 [26: 765]; Story, Eq. Jur. § 1528; Daniell, Ch. Pr. 844.

The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show, by clear and decisive proof:

First. That the defendant has made a representation in regard to a material *fact;*

Secondly. That such representation is false;

Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

Fourthly. That it was made with intent that it should be acted on;

Fifthly. That it was acted on by complainant to his damage; and,

Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained; and again (excepting in peculiar cases) it excludes statements by the owner and vendor of property in respect to its value.

The evidence in the case shows that in the development of this mine a tunnel, called the "Sterling Tunnel," had first been dug. At a distance of about 140 feet along the line of this tunnel, from its mouth, there are branches running easterly and westerly. About 60 feet from the main tunnel, in the eastern branch, winze No. 1 starts down. About 38 feet below the level of the tunnel, a level known as the "38 feet level" starts off from this winze, and at the bottom of the winze, a distance of about 82 feet vertical below the main tunnel, there is another level known as "82 feet level." In the easterly branch of the tunnel, about 80 feet from winze No. 1, there is another winze starting downward, inclining to the southeast as it goes down. This winze is numbered 2, and is connected with the 38 feet and the 82 feet levels. Intermediate between these levels is another level, known as the "55 feet level," which opens out to the eastward of winze No. 2, into a chamber about 15 feet long and about 8 feet wide. In the southeast corner of this chamber was a little hole or shaft, extending downward a few feet only. In sinking winze No. 2, Silva struck an ore body at a point opposite the 38 feet level. It was irregular in shape, dipping at an angle of about 45 degrees. Commencing at a point, comparatively speaking, it increased gradually as it descended, and was in form somewhat like a pyramid. At its base it measured 4 or 5 feet across, and it was about 9 feet long. The surface of this inclined pyramid formed the floor or bottom of the chamber. There was, however, a small space between the base and the opposite foot wall, which is called the "bottom" of the chamber by complainant's witnesses, and is the "bottom" spoken of in the bill. The ore comprising this pyramid was carbonate, and being friable, had slacked down over the face of the pyramid to the bottom, partially covering it and partially filling up the little hole or shaft in the southeast corner.

As to the first alleged representation, as classified above—viz., that there were 2,000 tons of ore in sight in the mine, and that Yerington relied upon such statement when he made the purchase—the proof utterly fails to establish either that Silva made the statement, as a statement of fact, or that Yerington relied upon such statement even had it been made. Silva, both in his answer and in his testimony, denies ever having made the statement; and the testimony of Yerington himself is to the effect that Silva's statement was qualified by the phrase "in his judgment." This then is shown to have been nothing more than an expression of opinion on the part of Silva as to the quantity of ore in sight in the mine. But even if Silva had made the statement imputed to him in the bill, there is abundant evidence to show that

Yerington did not rely upon it in the purchase of the mine. Yerington's own evidence, on this point, is against him. He testifies that he did not believe that there were more than 1,000 tons of ore in the mine, and that Forman agreed with him on that point. And he further testifies that, valuing this ore at 32 ounces of ore and 45 per cent of lead per ton (which it appears was its approximate value as determined by several assays) and calculating that there would be 1,000 tons of ore there, the mine would be worth $10,000—the sum he actually gave for it. This lacks much of coming up to the rule that the complainant must have been deceived, and deceived by the person of whom he complains. *Attwood* v. *Small*, 6 Clark & F. 232; *Pasley* v. *Freeman*, 3 T. R. 57. Besides, the quantity of ore "in sight" in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially.

In the case of *Tuck* v. *Downing*, 76 Ill. 71, 94, the court says: "No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative; and everyone knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!"

We approve the position of the court below, that "Yerington and his expert, Forman, were as competent to judge how much ore there was 'in sight' as Silva was. They were no novices in matters of that kind. This misrepresentation, if such it be, does not contain either the 1st, 4th, or 5th element stated by Pomeroy as essential elements in a fraudulent misrepresentation."

As stated above, the substance of the allegation of the bill is that Silva represented that the bottom of this ore chamber, which was covered with loose ore slacked down from the pyramid, was composed of ore as good as that exposed on the sides of the chamber. Silva in his answer expressly denies ever having made such statement. Forman testifies that with a little prospecting pick he had with him he raked through the dirt and loose ore that had slacked down, to see if it would reach the bottom of the ore chamber, but that it would not. He further says: "I asked Silva how the bottom was; if he had sunk below there. He said, 'No.' I said, 'How is the bottom? You as a miner know it is a suspicious thing to see a bottom covered up or anything of that kind.' He said the bottom was as good or better than any ore which we saw in the chamber." Yerington at first testifies that Silva, in reply to a question by Forman, stated that this floor was solid ore; but he says that he does not think any comparison was made between that ore and the ore in the sides of the chamber, as narrated by Forman. On the next day, however, Yerington, having, as he says, refreshed his memory, "and I (he) had the means of doing it," was positive that the conversation between Silva and Forman at that time was as Forman afterwards stated it. Silva, in addition to his positive denial in his answer, testifies that "there never was a word said about that. They asked me this, 'What I thought of the ore body?' and I said 'I thought it would be extensive.' I thought so at the time, and I think so yet." The witness, Eddy, who was present all the time in the ore chamber, except when he went to the 88 feet level to get a pick, does not know anything about a conversation such as Yerington and Forman narrate.

On this point, then, the testimony of Silva is directly to the contrary of that of Yerington and Forman. Certain other material facts in the case seem to indicate that there is just as strong probability that Silva's statements in this matter are true, as that those of Yerington and Forman are true. In the bill Yerington alleged, under oath, that Silva had discovered the fact that the *bottom* of the ore chamber was not composed of ore, and had afterwards covered that *bottom* with ore, vein-rock, and matter—in other words, had "*salted*" the mine. There is no evidence in the record to prove this, or tending to prove it. On the contrary, the evidence of Yerington himself, and of the other witnesses who were examined on that point, is all to the effect that the ore covering the floor of the chamber had slacked down from natural causes in fine particles like wheat. Nor is there such evidence to show that Silva knew the character of this floor, or of the extent of the ore vein, or *deposit* (as it afterwards turned out to be), as would justify the interposition of a court of equity to set aside the contract on the ground of fraudulent representations. He had come on to the ore in excavating from the top. The sides of the ore chamber contained some ore of a good quality, and he had never demonstrated the extent and amount of ore in the pyramidal wedge in the side of the chamber. It is shown by the evidence of Yerington himself, that, in the side of a drift running westerly from the ore chamber, there was ore which appeared to be continuous with the body of ore in the chamber. So that the statement Silva said he made—viz., that he thought the ore body would be extensive—at least, appears reasonable. Upon all the facts and circumstances apparent of record, he might have made the statement he says he made, and believed he was telling the truth. For there is also *some* evidence to the effect that Silva had commenced to run a drift from the bottom of winze No. 1, for the purpose of striking and cutting the supposed downward extension of the ore body in the chamber, and this before the examination of the mine by Yerington and Forman. After the sale of the mine, Coffin, the superintendent for the complainant Company, when he commenced work in the mine, started in where Silva had left off in this drift, and carried it immediately beneath the ore chamber, entering the chamber by an up raise. Then it was that the discovery was made that the ore body, instead of being a continuous ledge or lead, was merely a deposit.

Furthermore, the testimony of Yerington and

Forman, as regards the little hole or shaft in the southeast corner of the chamber, is directly opposed by the testimony of Silva and Eddy. Both Yerington and Forman testify that this little shaft was completely filled up with dirt and loose ore; while Silva and Eddy both testify that it was not so filled up, but that both Yerington and Forman stood in that shaft and took samples of ore from it.

It is thus seen that the evidence on this material point does not clearly establish the fraudulent representations of Silva as claimed by the complainant; but that, on the contrary, the material facts and circumstances as disclosed by the record are entirely compatible with the theory that Silva did not make the representations charged against him, or at most, that he merely gave expression to an opinion as to the extent of the ore body, erroneous though it proved to be. This would not constitute fraud. In the language of the court below: "This testimony was taken in June, 1886, about two and a half years after the conversations took place. They were present at the time examining the mine and engaged in conversation for an hour or more. These discrepancies in matters of detail during a long conversation, related by different parties, viewing the subject from different standpoints after the lapse of so long a period of time, are no more than might reasonably be expected, even in honest witnesses. There is no occasion to impute any intention to testify falsely to either. * * * Parties are extremely liable to misunderstand each other, and, in looking back upon the transaction in the light of subsequent developments, are prone to take the view most advantageous to themselves."

As to the third alleged representation—to wit, that there were not less than 500 tons of ore in and about that ore chamber—Silva, both in his answer and in his testimony, denies that he ever told Yerington and Forman, or anybody else, that there were 500 tons of ore there, or that there was any amount fixed or agreed upon by them as to the quantity of ore there; while the testimony of both Yerington and Forman is to the effect that Silva said *in his opinion*, or *in his judgment*, there were 500 tons of ore in the chamber. So that, taking the strongest testimony produced on the part of complainant upon this point, it simply amounts to an expression of opinion on the part of Silva as to the amount of the ore in the chamber, and not a statement of fact. It therefore does not constitute fraud.

It is equally true that any statements that may have been made by Silva with reference to the value of the mine cannot, under the circumstances of this case, be considered an act of fraud on his part sufficient to warrant a court of equity in setting aside the contract herein. Yerington testifies that Silva said he had been asking $15,000 for the mine, but that he would take $12,500; while Forman says he does not recollect that Silva made any statement as to the value of the mine, but that he heard Silva say he *thought* it was worth $15,000. Such statements are not fraudulent in law, but are considered merely as *trade talk*, and mere matters of opinion, which is allowable. *Gordon* v. *Butler*, 105 U. S, 553 [26:1166]; *Mooney* v. *Miller*, 102 Mass. 217. Moreover it is clear, beyond question, that Yerington did not purchase the mine upon Silva's representations as to its value, as we shall hereafter see.

This disposes of all the alleged fraudulent representations, as arranged above, except the last, adversely to the complaint, and it is to this one that attention will now be directed. This charge is, substantially, that Silva represented to Yerington and Forman, when they visited the mine in January, 1884, and had gone through it, that he had shown them all the work which had been done in and about the mine that would throw any light on the quantity of ore therein. This representation is alleged to have been false and fraudulent, and well known by Silva to be such, because at a cut a short distance from the mouth of the main tunnel, at a point known as the "point of location," a little hole or shaft had been sunk which had been filled up, and was not observable at the time of the examination of the mine in January, 1884, and also because there had been a number of drill holes made in the sides of the ore chamber, and afterwards filled up before the examination in January, 1884, so that they were not observable at that time, which holes clearly developed the fact that the ore about the chamber was nothing more than a shell instead of a continuous body as it appeared to the observer.

The existence of the plugged-up drill holes in the sides of the ore chamber is the worst feature of the case against Silva. They could not have been made by a former proprietor of the mine, as is slightly claimed in his behalf, for, as has been already shown in this opinion, Silva himself, or at least persons in his employ, had excavated that chamber after he had purchased it from one Edwards in 1876. And certain it is that the drill holes were found plugged up within a short time after he had sold the mine to the complainant Company, March 15, 1884. The question is, Did Silva know of their existence at the time he sold the mine, and, having such knowledge, did he falsely represent to the complainant that he knew nothing of them, thereby inducing complainant to act upon such representations? Upon this question the evidence is somewhat conflicting. Yerington testifies that after going through the mine, he asked Silva if he had shown him the whole of the mine, and he replied that he had. And Forman testifies that Silva, in reply to a question from him, said that he had shown him all the work that had been done in and about the mine that would throw any light upon the quantity of ore in the mine, or the extent of the ledge or deposit. Silva admits that, in reply to a question by Yerrington, he told him that he had shown him all the work that had been done in and about the mine, either by himself or under his direction. So that the question is narrowed down to simply this: "Were said drill holes in existence at the time Silva made such statement; if so, had they been made by him or under his direction, or did he know of their existence? In his sworn answer Silva expressly "denies that he drilled any such hole or holes through the ore into the country rock or otherwise, or thereby or at all discovered the extent of said ore, or that he filled up said drill holes, or concealed them from view or kept them secret from complainant," etc.,

and in his testimony he also denies having any knowledge of their existence. He says that he drilled no holes in the mine, except what he had to do as a miner, and that he concealed nothing from Yerington when he showed him the mine. And again he says: "I showed Mr. Yerington all the work that was done in the mine that I knew anything of." There is no direct evidence going to show who drilled the holes. And there is nothing in the entire record to connect Silva with them, except the fact that he was the owner of the mine, and was in possession of it at a time when it is most likely they were drilled. But this circumstance alone should not outweigh the positive denial of Silva in his answer, and also his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish the defendant's knowledge. *Barnett* v. *Stanton*, 2 Ala. 181; *McDonald* v. *Trafton*, 15 Me. 225. This rule is fortified by the consideration that had he known of the limited quantity of ore in and about the "ore chamber," Silva would hardly have gone to the expense and labor of starting a drift from the bottom of winze No. 1, and constructing it for a certain distance, before the sale of the mine, for the purpose of reaching the supposed downward extension of the ore in and about that chamber. Knowing that the ore body terminated within a few inches of the surface of the chamber, and then in the face of that knowledge actually constructing a drift on the 82-feet level, at enormous expense, for the purpose of getting under that limited quantity of ore, would not appear a reasonable thing to do by anyone, especially by such an experienced and practical miner as Silva is admitted to have been.

The testimony, therefore, and all the other facts and circumstances of record, do not substantiate complainant's theory of the case on this point; in other words, there is not a satisfactory case of fraudulent representations on this point made out—not such a case as would justify the interposition of a court of equity to set aside the contract under consideration on the ground of fraudulent representations.

As regards the little hole or shaft that had been sunk at the "point of location" and afterwards filled up, so that it was not observable at the time of Yerington's visit in January, 1884, there is absolutely no testimony at all to show that Silva knew anything about its existence. He had done no work at that place, or very little at most, and was using the cut there as a sort of kitchen. The sides of the cut indicated that there was a ledge of ore there. It is admitted that Forman asked Silva why he did not "go down" on that ore, and that he replied that he considered the tunnel the best place to mine. Silva denies, both in his answer and in his testimony, that he ever knew that a shaft had been sunk at the point of location, and no one is found who can testify that he did know anything about it. On the contrary, the former owner of the mine, one Edwards, testifies that he himself dug that shaft and filled it up prior to the time Silva purchased it, and that to his knowledge Silva did not know anything about that shaft.

It is essential that the defendant's representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations. *Attwood* v. *Small, supra; Jennings* v. *Broughton*, 5 De Gex, M. & G. 126; *Tuck* v. *Downing, supra.*

The evidence abundantly shows that Yerington had been willing to give $10,000 for the mine prior to the time he visited it and made his examination in January, 1884. He had made inquiries of various persons for months previous to that visit. Several experts in his employ had visited the mine, had taken samples of ore from it, and it must have been from reports thus received that Yerington had made up his mind as to what the mine was worth. From the letters of an agent (Woods) to Eddy, the testimony of the witness Boland, the testimony of the witness Anthony, Eddy's testimony, and from the testimony of Silva himself, there can be no doubt that Yerington had offered $10,000 for the mine several months before he had ever seen it; thus showing that his examination of the mine in January, 1884, merely went to corroborate the reports that he had received of it from his experts, Forman, Bliss, *et al.*, and that it was upon such reports, and his own judgment after an examination of the mine, that he made the purchase of it.

From all which it is clear to this court that the complainant has not proven his case, and *the decree below is affirmed.*

DALE TILE MANUFACTURING COMPANY (Limited), *Plff. in Err.*
v.
ELIZABETH A. L. HYATT.

(See S. C. Reporter's ed. 46-54.)

Federal question—action to enforce contract for use of patent—state decision.

1. In an action in a state court upon a contract in regard to letters patent, where the defendant contended that the state court had no jurisdiction, because the plaintiff's right to maintain her action depended upon the question whether the second reissue of her patent was valid or invalid under the Patent Laws of the United States, and that of that question the United States courts had exclusive jurisdiction,—the judgment of the state court, holding that the question of the validity of the reissue could not be contested in that action and assuming jurisdiction to render judgment against the defendant, involved a decision against the immunity claimed by the defendant under the Constitution and laws of the United States, which this court has jurisdiction to review.

2. An action to enforce a contract for the use of a patent right is not within the Acts of Congress by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy.

3. A decision of the state court, based upon the contract between the parties, does not necessarily decide any question depending upon the construction or effect of the Patent Laws of the United States.

[No. 1282.]

Submitted Jan. 9, 1888. Decided March 19, 1888.

IN ERROR to the City Court of New York, to review a judgment for the plaintiff in an action upon a written contract to pay for the use of a patent right.

On motions to dismiss and affirm. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

The original action was brought in a court of the State of New York by Elizabeth A. L. Hyatt, a citizen of New York, and the owner of letters patent for an improvement in illuminated basement and basement extensions, against the Dale Tile Manufacturing Company (Limited), a corporation organized by the laws of New York, upon a written agreement between the parties, dated December 28, 1880, which contained, either in itself, or by reference to previous agreements, the following provisions:

The agreement began by reciting that letters patent for this invention had been issued to the plaintiff on August 27, 1867, and reissued on August 6, 1878. The plaintiff on her part, licensed the defendant to make and sell, within certain States and districts, during the full term of the patent, and of any extension or renewal thereof, illuminated basements, and basement extensions and materials therefor; and agreed not to manufacture herself, or to license others to manufacture, within the same territory. The defendant, on its part, acknowledged the validity of the said letters patent; consented that the plaintiff might obtain further reissues thereof when and as often as she should choose without prejudice to this agreement; and promised to pay her a fee of seventy cents for each square foot of surface in gratings made by the defendant to be used in illuminated basements or basement extensions made and sold by it under the license; provided, however, that "until a court shall have given a decree sustaining the validity of the above named patents" the plaintiff should receive a fee of thirty cents only, in lieu of the fee of seventy cents; and that "if at any time an adverse decision shall be rendered against the validity of the patent which shall not be appealed from for three months", the fees under this license should cease; and the defendant agreed to make such payments and render accounts to the plaintiff quarterly. It was further stipulated that either party, knowingly violating the agreement, should forfeit all rights under it.

The defendant in its answer admitted the agreement, and set up sundry breaches thereof by the plaintiff, and, among others, that on September 27, 1881, she obtained from the United States a reissue of her patent, whereby a discontinuance of actions previously brought by her against infringers in the Circuit Court of the United States became necessary, and she refused to bring new suits against them.

The plaintiff afterwards, by leave of court, amended her complaint by alleging the reissue of 1881.

By order of the City Court of New York, the case was referred to a referee, who found that the plaintiff was the owner of the letters patent issued and twice reissued as aforesaid; that there had been no breach of the agreement on her part; that the defendant made and sold the invention under the license, and rendered quarterly accounts for the royalties down to and including the quarter ending October 31, 1881; that by the account for that quarter there appeared to be due to the plaintiff the sum of $524.55, which the defendant refused to pay; and that in December, 1881, the plaintiff gave notice to the defendant that it had forfeited its license, and withdrew the notice upon its promising to pay the royalties.

The defendant requested the referee to find, as a conclusion of law, that by the plaintiff's surrender of the patent on taking out the reissue of 1881, the license held by the defendant was canceled and became of no effect; and also that the court had no jurisdiction of the action because it involved necessarily and directly the construction of letters patent of the United States. The referee declined so to find, and reported, as his conclusion of law, that the plaintiff was entitled to judgment against the defendant for the sum of $524.55, with interest from November 1, 1881.

The referee filed with his report an opinion in which he said that the defense, at first, proceeded upon the theory that the plaintiff had violated her agreement by not prosecuting and restraining infringers, but that defense was abandoned, because it appeared that she had assumed no such duty; and that "the defense was finally rested upon this sole ground: that the reissue of the patent in 1881 was entirely void, because it covered much more ground than the patent of 1867 as reissued in 1878, and that therefore the surrender of 1878 left no patent whatever existing;" but that the defendant was not in a position to raise this question, because it could not, in this action to recover the royalties agreed upon, deny the validity of the original patent or of any reissue thereof, so long as it had not been declared void by a court of competent jurisdiction, and while the defendant retained and acted under its license from the plaintiff.

The City Court of New York gave judgment for the plaintiff on the referee's report. That judgment was affirmed by the court of common pleas, and the defendant appealed to the court of appeals, which affirmed the judgment, and remitted the case to the City Court of New York. The opinion filed by the court of appeals, and included in the transcript sent up to this court, is mentioned, but not reported in full, in 106 N. Y. 651, and is copied in the margin.* [See 7 Cent. Rep. 790, for full report.]

*PECKHAM, *J.* We think this case is controlled by that of *Marston* v. *Swett*, reported upon two appeals to this court. See 66 N. Y. 206; 82 N. Y. 526.

The general and material features of the two cases are similar. In both there was an agreement on the part of the plaintiff to refrain from manufacturing, in consideration, among other things, of the promise of the defendant to pay the royalties. While continuing the manufacture under the license, the defendant ought not to escape liability to pay the royalties.

The defendant's counsel, it is true, seeks to distinguish this case from *Marston* v. *Swett*, *supra*, because, as he says, since the reissue of the patent in 1881, which he insists was wholly void, the defendant has no protection from the manufacture by others, for the reason that by the surrender of the patent of 1878 and the reissue of 1881 there was no valid patent in existence, and the consideration for the promise to pay royalties had therefore wholly failed.

There was consideration enough for the promise to pay such royalties, in that the plaintiff bound herself not to manufacture, and because the defendant could not be called to account as an alleged infringer while manufacturing under the license.

The defendant sued out this writ of error; and assigned for error, that the state courts, both of original and of appellate jurisdiction, had no power to entertain the issues in this action, because they involved directly and solely the validity of the letters patent reissued by the United States to the plaintiff on September 27, 1881. The defendant moved to dismiss the writ of error for want of jurisdiction, and also moved to affirm the judgment.

Mr. **George W. Van Slyck,** for defendant in error in support of motion:

There were no issues in the case involving directly or solely the validity of the letters patent, and hence the state court had jurisdiction.

The validity or invalidity of the reissued patent was an immaterial fact in this case, it being decided upon the contracts made between the parties.

Marston v. *Swett*, 66 N.Y. 212; *S. C.* 82 N.Y. 526; *Jones* v. *Burnham*, 67 Me. 93; *Kinsman* v. *Parkhurst*, 59 U. S. 18 How. 289 (15:385); *Washburn & M. Mfg. Co.* v. *Wilson*, 16 Jones & S. 160; *Bartlett* v. *Holbrook*, 1 Gray, 114.

The decision of the state courts was made exclusively on settled pre-existing rules of general jurisprudence.

Bank of West Tennessee v. *Citizens Bank*, 81 U. S. 14 Wall. 9 (20:514); *Palmer* v. *Marston*, Id. 10 (20:826); *Marqueze* v. *Bloom*, 88 U. S. 16 Wall. 351 (21:280); *U. S.* v. *Central Pac. R. R. Co.* 99 U. S. 454 (25:289); *Hartell* v. *Tilghman*, Id. 547 (25:357).

It is essential to the jurisdiction of this court that a federal question must have been presented to the state court, and that a decision upon such question was necessary.

Detroit City R. Co. v. *Guthard*, 114 U. S. 133 (29:118); *Jenkins* v. *Loewenthal*, 110 U. S. 222 (28:129); *Chouteau* v. *Gibson*, 111 U. S. 200 (28:400); *Brown* v. *Atwell*, 92 U. S. 327 (23:511); *Barnes* v. *Dist. of Columbia*, 91 U. S. 554 (23:444); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22:429); *Ex parte Newman*, 81 U. S. 14 Wall. 154 (20:877); *Parmelee* v. *Lawrence*, 78 U. S. 11 Wall. 38 (20:49); *Jacks* v. *Helena*, 115 U. S. 288 (29:392).

Mr. **Edward D. McCarthy,** in opposition:

This reissue of patent has been declared void.

Hyatt v. *Southworth*, 15 Fed. Rep. 751; *Hyatt* v. *Lindsay*, U. S. C. Ct. So. Dist. N. Y. Dec. 18, 1884.

The opinion of the court below cannot be resorted to.

Gibson v. *Chouteau*, 75 U. S. 8 Wall. 317 (19:317); *Rector* v. *Ashley*, 73 U. S. 6 Wall. 142 (18:783); *Williams* v. *Norris*, 25 U. S. 12 Wheat. 117 (6:571).

Opinions will be read in aid of construction of the record.

Philadelphia Fire Asso. v. *New York*, 119 U. S. 116 (30:345).

Licensee estopped from refusing to pay royalties, because of the patent's alleged invalidity.

Taylor v. *Hare*, 1 Bos. & P. N. R. 260; *Williams* v. *Hicks*, 2 Vt. 36; *Marston* v. *Swett*, 66 N. Y. 206.

When the plaintiff's patent is put in question by the pleadings in a state court, the jurisdiction is in the courts of the United States exclusively.

Saxton v. *Dodge*, 57 Barb. 118; *Elmer* v. *Pennel*, 40 Me. 434; *Ball* v. *Murry*, 10 Pa. 118; *Dudley* v. *Mayhew*, 3 N.Y. 14; *Gibson* v. *Woodworth*, 8 Paige, 132; *Burrall* v. *Jewett*, 2 Paige, 134.

That the Commissioner of Patents has granted letters is not equivalent to the decision of a federal court.

Russell v. *Dodge*, 93 U. S. 460 (23:973); *Woodward* v. *Dinsmore*, 4 Fish. Pat. Cas. 163.

State courts have jurisdiction when the validity of a patent comes up incidentally, or is only a matter of evidence not essential to the judgment.

Dickinson v. *Hall*, 14 Pick. 217; *Cross* v.

If it were a question of the validity of the reissue of 1881, and a decision of that question were necessary to the decision of this case, the defendant is, of course, correct in his claim that a state court has no jurisdiction to determine such an issue; but within the decision of the *Marston Case* no such question arises. The defendant has protection enough to base its promise to pay royalty upon as long as it so conducts itself towards the plaintiff as to prevent her from treating it as an infringer. In other words, so long as the defendant continues to manufacture under its license (the patent not having been legally annulled), and thus elects to treat the agreement as in existence, it prevents the plaintiff from treating the defendant in any other light than that of a licensee. If the defendant desired to repudiate any obligation under this agreement, it should have given notice to the plaintiff that it refused to longer recognise its binding force, and that it would thereafter manufacture under a claim of right founded upon the alleged invalidity of the patent. Otherwise, the defendant in claiming to manufacture under the license and refusing to pay the royalties thereunder would, if successful, prevent the plaintiff from recovering anything from it. She could not treat the defendant as an infringer, because it was manufacturing under a license from her; and she could not collect the royalties under the license (although herself refraining from manufacturing, as she had agreed), because the defendant would allege the invalidity of the patent, although continuing to manufacture under cover of a license from its owner. Such doctrine cannot stand a moment. Of course, as is said in the *Marston Case*, from the time that the patent is annulled by proper legal proceedings no royalties could be collected, even though no notice of the repudiation of the agreement had been thereafter served.

There is another ground upon which it seems to me this judgment might well rest. Under the clause in the agreement between the parties, which provided for a forfeiture of all rights thereunder if one party should willfully violate one of its provisions, the plaintiff gave notice of such forfeiture to the defendant, based upon its refusal to pay the royalties which it had acknowledged to be due for the quarter ending October 31, 1881 (the very quarter in question here), an account of which it had rendered under the oath of its secretary, as provided for in such agreement. Subsequently to the service of such notice, the plaintiff withdrew the same at the request of the defendant and upon its promise to pay these very royalties which it had already acknowledged to be due. A failure to carry out such promise gives, as it seems to me, a good cause of action.

The defendant says there was no consideration for such a promise, because there was no patent upon which to ground a license, and the defendant therefore had no license and no protection; but the plaintiff of course contended that the reissued patent was valid, and at the request of the defendant the plaintiff withdrew her notice of forfeiture of the license, and thus reinstated the defendant in its possession, and freed it from the liability to be proceeded against as an infringer and put to expense and inconvenience in the defense of such a litigation. This was saved at the request of the defendant, and upon its special promise to pay the royalties. Plainly here was a good and sufficient consideration for the defendant's promise.

The judgment should be affirmed, with costs. All concur.

Huntley, 13 Wend. 385; *Head* v. *Stevens*, 19 Wend. 411; *Bliss* v. *Negus*, 8 Mass. 46.

Whenever it becomes necessary to try the patent itself, then the state court loses jurisdiction.

Hartell v. *Tilghman*, 99 U. S. 550 (25: 358); *Burr* v. *Gregory*, 2 Paine, 426; *Brooks* v. *Stolley*, 3 McLean, 523; *Mercerole* v. *Union Paper Collar Co.* 6 Blatchf. 356; *Wilson* v. *Sandford*, 51 U. S. 10 How. 99 (13:344); *Continental Store Service Co.* v. *Clark*, 100 N. Y. 368.

Neither is it essential that the pleadings should present the jurisdictional issue.

Murray v. *Charleston*, 96 U. S. 442 (24:761).

Mr. Justice **Gray** delivered the opinion of the court:

The defendant contended in the courts of New York that those courts had no jurisdiction, because the plaintiff's right to maintain her action depended upon the question whether the second reissue of her patent was valid or invalid under the Patent Laws of the United States, and that of that question the courts of the United States had exclusive jurisdiction. The judgments of each court of the State, holding that the question of the validity of that reissue could not be contested in this action, and assuming jurisdiction to render judgment against the defendant, necessarily involved a decision against the immunity claimed by the defendant under the Constitution and laws of the United States, which this court has jurisdiction to review.

The motion to dismiss must therefore be denied. But the decision was so clearly right, that the motion to affirm is granted.

The action was upon an agreement in writing, by which the plaintiff, as owner of letters patent, already once reissued, granted to the defendant an exclusive license to make and sell the patented articles within a certain territory, during the term of the patent and of any extension or renewal thereof; and the defendant expressly acknowledged the validity of the letters patent, and stipulated that the plaintiff might, without prejudice to this agreement, obtain further reissues, and promised to pay to the plaintiff certain royalties, so long as no decision adverse to the validity of the patent should have been rendered.

The defendant contended that this was a case arising under the patent laws, of which the courts of the United States have exclusive jurisdiction. Rev. Stat. § 629, cl. 9; § 711, cl. 5. But it is clearly established by a series of decisions of this court that an action upon such an agreement as that here sued on is not a case arising under the patent laws.

It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the Acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, chap. 357, § 17, 5 Stat. at L. 124; Rev. Stat. § 699; *Wilson* v. *Sandford*, 51 U. S. 10 How. 99 [13:344]; *Brown* v. *Shannon*, 61 U. S. 20 How. 55 [15: 826].

Following those decisions, it was directly adjudged in *Hartell* v. *Tilghman*, 99 U. S. 547 [25: 357], that a bill in equity by a patentee, alleging that the defendants had broken a contract by which they had agreed to pay him a certain royalty for the use of his invention and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition, and he filed this bill charging them as infringers, and praying for an injunction, an account of profits, and damages, was not a case arising under the patent laws, and therefore, the parties being citizens of the same State, not within the jurisdiction of the Circuit Court of the United States. And the judges who dissented from that conclusion admitted it to be perfectly well settled "that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws." 99 U. S. 558 [25: 361].

In the still later case of *Albright* v. *Teas*, 106 U. S. 613 [27: 295], a patentee filed a bill in equity in a state court, setting up a contract by which he agreed to assign his patent to the defendants and they agreed to pay him certain royalties, and alleging that the defendants had refused to account for or pay such royalties to him, and had fraudulently excluded him from inspecting their books of account. The defendants answered that the plaintiff had been paid all the royalties to which he was entitled, and that, if he claimed more, it was because he insisted that goods made under another patent were an infringement of his. This court held that it was not a case arising under the Constitution or laws of the United States, removable as such into the circuit court under the Act of March 3, 1875, chap. 137, § 2, 18 Stat. at L. 470.

It was said by *Chief Justice* Taney in *Wilson* v. *Sandford*, and repeated by the court in *Hartell* v. *Tilghman*, and in *Albright* v. *Teas*: "The dispute in this case does not arise under any Act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no Act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common-law and equity principles." 10 How. 101, 102 [13: 345]; 99 U. S. 552 [25: 359]; 106 U. S. 619 [27:298].

Those words are equally applicable to the present case, except that, as it is an action at law, the principles of equity have no bearing. This action, therefore, was within the jurisdiction, and, the parties being citizens of the same State, within the exclusive jurisdiction of the state courts; and the only federal question in the case was rightly decided.

Upon the merits of the case, it follows from what has been already said, that no question is presented, of which this court, upon this writ of error, has jurisdiction. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 [22: 429]. The grounds of the judgment below appear in the opinion of the court of appeals, to which, under the existing Acts of Congress, this court is at liberty to refer. *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110 [30: 342]; *Kreiger* v. *Shelby R. R. Co.* 125 U. S. 39 [*ante*, 675].

Whether that court was right in its suggestion that it would have no jurisdiction to determine the validity of the second reissue if incidentally drawn in question in an action upon an agreement between the parties, we need not consider; inasmuch as it expressly declined to pass upon any such question, because it held that, in this action to recover royalties due under the agreement, the defendant, while continuing to enjoy the privileges of the license, was estopped to deny the validity of the patent, or of any reissue thereof. The decision was based upon the contract between the parties; and the court did not decide, nor was it necessary for the determination of the case that it should decide, any question depending on the construction or effect of the Patent Laws of the United States. *Kinsman* v. *Parkhurst*, 59 U. S. 18 How. 289 [15: 385]; *Brown* v. *Atwell*, 92 U. S. 327 [23: 511].

Judgment affirmed.

BENJAMIN F. FELIX, *Plff. in Err.*,
v.
WILLIAM SCHARNWEBER.

(See S. C. Reporter's ed. 54–60.)

Federal question, what is—certificate allowing writ of error.

1. An action upon a contract in writing between joint owners of a patent to recover royalties, by which it was agreed that defendant should have control of the manufacture and sale of the patented article, paying to the plaintiff a certain royalty on each article sold, is not a case within the exclusive jurisdiction of the federal court, and does not present any federal question, no ruling upon the validity or the construction of the patent having been made.

2. The certificate of the Chief Justice of the state court allowing the writ of error, that a federal question arose and was decided against the plaintiff in error, cannot supply the want of all evidence to that effect in the record.

[No. 1255.]

Submitted Jan. 16, 1888. Decided March 19, 1888.

IN ERROR to the Supreme Court of the State of Illinois, to review a judgment of that court affirming a judgment of the Appellate Court, affirming a judgment of the Circuit Court of Cook County for the plaintiff, in an action of assumpsit to recover royalties.

On motion to dismiss. *Dismissed for want of jurisdiction.*

Reported below, 7 West. Rep. 441, 119 Ill. 445.

Statement by *Mr. Justice* **Gray**:

This was an action of assumpsit, brought in the Circuit Court of Cook County in the State of Illinois by Scharnweber against Felix to recover royalties under the following contract signed by both parties:

"Memorandum of agreement between Benjamin F. Felix and William Scharnweber, both of the City of Chicago, made this 12th day of February, 1878, witnesseth: That, whereas, the said Benjamin F. Felix and William Scharnweber are joint proprietors of a certain patent for an improved rope reel, and it is mutually decided between them that the interests of both are best subserved by one of them having exclusive control of the manufacture and sale of said reel: It is hereby agreed that the said Benjamin F. Felix shall make such arrangements as may appear most desirable to him for their manufacture, and supervise and direct solely their sale. On each and every rope reel sold, the said William Scharnweber is to receive a royalty of one dollar, to be paid to him on the last business day of each and every month. The said William Scharnweber agrees not to manufacture any rope reels whatever, or cause them to be manufactured, but can make sales and report the same to Benjamin F. Felix, or Felix, Marston & Blair, who will deliver and collect for the same."

The defendant pleaded nonassumpsit, with notice that he would prove a failure of consideration by the plaintiff's manufacturing rope reels and selling them to third persons.

At the trial, the plaintiff offered evidence that at first the reels made under the contract worked satisfactorily, but afterwards the defendant complained to him that they had too many coils and needed larger rolls; that thereupon, in January, 1879, he made and showed to the defendant a model of a reel with little pieces of cast iron on the wooden roller, so as to form a screw to hold the flanges; and that reels subsequently sold by the defendant, made from a later model furnished by one Mason, were of the same construction, except in being wholly of iron, and that there was no difference in principle between them. The defendant objected to the admission of this evidence, as going to show that the plaintiff invented the new style of reel, and as collaterally attacking another patent. The court admitted the evidence, and the defendant excepted to its admission.

The defendant afterwards offered in evidence a patent issued to Mason on June 10, 1879, for the iron reel, "for the purpose of showing, or tending to show, that this reel was not the same reel as that patented on January 29, 1878, and referred to in the contract." The plaintiff objected to its admission, on the ground that it had nothing whatever to do with this suit on the contract. But the court admitted it.

The defendant also put in evidence the patent of January 29, 1878, to Felix and Scharnweber, as well as evidence tending to show that the old style of reel did not work well, and was unsatisfactory to purchasers, and called Mason as a witness, who testified that he invented the reel described in his patent.

It was admitted on both sides that the defendant had made and sold 335 of what he called the old style or original style of rope reels, on which he had paid the plaintiff a royalty of one dollar each, and 2164 of what the defendant called the new style, on which no royalty had been paid.

The court instructed the jury that if they should find from the evidence that the plaintiff and defendant executed the contract sued on, and that the defendant thereafter sold rope reels such as or substantially like the rope reel mentioned in the contract, the plaintiff was entitled to recover under the contract for all such rope reels sold by the defendant, if any.

The defendant excepted to this instruction, and requested the court to instruct the jury as follows:

"This is an action on a contract for royalty

claimed upon the sale of certain rope reels invented by the plaintiff and sold by defendant or his firm. Under this contract, as alleged in the declaration, the defendant is liable only for royalty unpaid, if any, on such reels sold by him or his said firm as are contemplated or covered by the terms of the contract. He is not liable in this suit for royalty on any other [and] different reels, whether invented by him, by the plaintiff, or anyone else."

The court at first refused to give this instruction; and the defendant excepted to the refusal. The court then modified the instruction requested, by inserting the word "and," as above printed in brackets, and gave the instruction so modified. The bill of exceptions contained these further statements:

"To which action of the court in modifying said instruction the defendant duly excepted.

"Thereupon the court further charged the jury for the defendant as follows: Therefore, unless you find from the evidence that the defendant owes to the plaintiff royalty upon a sale of the original Scharnweber reels made substantially as these reels were made at the date of the contract between the parties, then your verdict should be for the defendant.

"No other instructions were given to the jury by the court."

The jury returned a verdict for the plaintiff in the sum of $2,255. The defendant moved for a new trial; but, upon the plaintiff's remitting the sum of $91 from the verdict, the court overruled the motion. The defendant excepted to this ruling, and judgment was rendered upon the verdict.

The defendant appealed to the Appellate Court for the First District of Illinois, assigning for error the admission of incompetent evidence for the plaintiff, and the charge to the jury. The appellate court affirmed the judgment.

The defendant then appealed to the Supreme Court of Illinois, which affirmed the judgment of the appellate court, and in the opinion filed with its clerk held that the charge of the court to the jury was as full and favorable to the defendant as the law would warrant, inasmuch as it confined the issue to the number of reels sold under the contract; and the question of fact how many machines were sold by the defendant under the contract was conclusively settled by the findings of the lower courts; and that in the admission of the testimony objected to by the defendant there was no error, certainly none that could affect the merits of the case under the instructions given to the jury. 119 Ill. 445.

A writ of error was allowed by the acting Chief Justice of the Supreme Court of Illinois, upon the petition of the defendant, representing that in said case in that court the defendant set up and relied on the patent granted by the United States to Mason on June 10, 1879, the validity of that patent was assailed, and the decision was against the rights and privileges set up by the defendant under it; and also that in said proceedings he alleged that the jurisdiction to try the questions so involved was exclusively in the courts of the United States, and the decision of the court was against him. The plaintiff moved to dismiss the writ of error for want of jurisdiction.

Mr. **Henry Decker**, for defendant in error in support of motion:

The following cases refer to contracts relating to patents and hold that where the suit is brought on such a contract no question arises under the Constitution and Laws of the United States which gives the federal court jurisdiction.

Wilson v. *Sandford*, 51 U. S. 10 How. 99 (13:344); *Hartell* v. *Tilghman*, 99 U. S. 547 (25:357); *Merserole* v. *Union Paper Collar Co.* 6 Blatchf. 356; *Goodyear* v. *Day*, 1 Blatchf. 565; *Goodyear* v. *Union India Rubber Co.* 4 Blatchf. 63; *Blanchard* v. *Sprague*, 1 Cliff. 298; *Ingalls* v. *Tice*, 14 Fed. Rep. 352; *Kelly* v. *Porter*, 17 Fed. Rep. 519; *Teas* v. *Albright*, 13 Fed. Rep. 406; *Rich* v. *Atwater*, 16 Conn. 409; *Middlebrook* v. *Broadbent*, 47 N. Y. 443; *Brooks* v. *Stolley*, 3 McLean, 525.

Motions similar to this were entertained by this court in the cases of *Evans* v. *Brown*, 109 U. S. 180 (27:898); *Foster* v. *Kansas*, 112 U. S. 206 (28:697).

Messrs. **Burton C. Cook** and **John A. Jameson**, for plaintiff in error in opposition:

To give a construction to a patent means to determine its principle and its scope.

Wilson v. *Sandford*, 51 U. S. 10 How. 99 (13:344).

It is sufficient to confer jurisdiction that the question was decided adversely to the plaintiff in error and that the court was induced by it to make the judgment which it did.

Furman v. *Nichol*, 75 U. S. 8 Wall. 56 (19:375).

Mr. Justice **Gray** delivered the opinion of the court:

This record does not present any federal question. No such question is stated in the pleadings, involved in the rulings at the trial or in the final judgment, or mentioned in the opinion of the Supreme Court of Illinois.

The action was brought upon a contract in writing between the parties, being the joint owners of a patent for an improved rope reel, by which it was agreed that the defendant should have the exclusive control of the manufacture and sale of the reel, paying to the plaintiff a certain royalty on each reel sold. This was not a case arising under the Patent Laws of the United States, within the exclusive jurisdiction of the federal courts; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46 [*ante*, 683]; and no suggestion that it was appears by the record to have been made in either of the courts of the State.

The only exceptions taken by the defendant at the trial were to the admission of evidence offered by the plaintiff, and to the instructions given by the court to the jury.

But that evidence does not appear to have been admitted for any other purpose than to show that the reels made and sold by the defendant were substantially like those mentioned in the agreement sued on. At the time of its admission, no letters patent were in the case. The question at issue was not of priority of invention, or of the validity or construction of any patent, but simply whether the reels made and sold by the defendant were such as, or substantially like, those mentioned in his contract with the plaintiff; and in the instructions to the jury the plaintiff's right of recovery

was carefully limited to such reels. The patent to Mason was introduced in evidence afterwards, and by the defendant himself, against the plaintiff's objection; and no ruling upon the validity or the construction of either patent, or upon the legal effect of the evidence, was requested by the defendant, or made by the court.

The petition, upon which the writ of error was allowed by the acting Chief Justice of the Supreme Court of Illinois, does indeed represent that the patent to Mason was set up by the defendant and its validity assailed, and that the defendant also alleged that the jurisdiction to try the questions involved was exclusively in the courts of the United States, and that the decision of the state court was against him on both of these points.

But in allowing a writ of error from this court to the highest court of a State, and in issuing a citation, the Chief Justice of that court does but exercise an authority vested by Congress in him concurrently with each of the justices of this court. Rev. Stat. § 999; *Gleason* v. *Florida*, 76 U. S. 9 Wall. 779 [19: 780]; *Bartemeyer* v. *Iowa*, 81 U. S. 14 Wall. 26 [20: 792]. When counsel applying for the allowance of a writ of error insist that a federal question has been decided against the plaintiff in error, the Chief Justice of the state court may feel bound to allow the writ, for the purpose of submitting to the final determination of this court whether such a question was necessarily involved in the judgment sought to be reviewed. But his certificate that such a question arose and was decided against the plaintiff in error cannot supply the want of all evidence to that effect in the record. As has been more than once observed by this court, "the office of the certificate, as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question." *Parmelee* v. *Lawrence*, 78 U. S. 11 Wall. 36, 39 [20: 48, 49]; *Brown* v. *Atwell*, 92 U. S. 327, 330 [23: 511, 513]. See also *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S 123, 129 [28: 678, 680].

Writ of error dismissed for want of jurisdiction.

NATIONAL BANK OF REDEMPTION,

Plff. in Err.,

v.

CITY OF BOSTON.

(See S. C. Reporter's ed. 60-70.)

Taxation of national bank shares—savings banks—bank owning shares of other banks.

1. However much may be the amount of deposits in savings banks which the State exempts from taxation, that exemption does not affect the rule for the taxation of shares in national banks, provided they are taxed at a rate no greater than other moneyed capital in the hands of individual citizens, otherwise subject to taxation.

2. Savings banks, organized for the purpose of investing the savings of small depositors, are not banking institutions in the commercial sense of that phrase.

3. The Massachusetts law permits the taxation of a national bank, owning shares of the capital stock of another national bank, by reason of that ownership, on the same footing with all other shares.

[No. 1824.]

Argued Feb. 14, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment in favor of defendant in an action by a national bank to recover a tax alleged to have been illegally assessed. *Affirmed.*

The facts are fully stated by the court.

Messrs. **George S. Hale,** *Chas. W. Wells* and *Willard Brown*, for plaintiff in error:

Under the provisions of the Act of March 3, 1875, Circuit Courts of the United States have original cognizance. In this class of cases the residence of the parties is immaterial.

Osborn v. *Bank of U. S.* 22 U. S. 9 Wheat. 818, 818–823 (6:222–224); *Trebilcock* v. *Wilson*, 79 U. S. 12 Wall. 687 (20:460).

Shares of national banking associations are subject to taxation at no greater rate than is assessed upon other moneyed capital.

People v. *Weaver*, 100 U. S. 539, 543 (25:705, 706); *Mercantile Nat. Bank* v. *Mayor of N. Y.* 121 U. S. 154 (30:901).

By Statutes of 1866, chapter 184, 14 Stat. at L. 188, the dividends of banks, trust companies and savings institutions were taxed.

Oulton v. *German Sav. & L. Society*, 84 U. S. 17 Wall. 109 (21:618).

Savings banks are not benevolent or charitable institutions.

Sheren v. *Mendenhall*, 23 Minn. 92.

Corporations created by statute can exercise no powers and have no rights except such as are expressly given, or necessarily implied.

Huntington v. *National Sav. Bank*, 96 U. S. 388 (24:777); *First Nat. Bank of Manhattan* v. *Citizens Bank of Topeka*, 21 Int. Rev. Rec. 382.

The taxation in question is disproportionate and unequal.

People v. *Weaver*, *supra*; *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143 (25:901); *Cummings* v. *Merchants Nat. Bank*, Id. 153 (25:903).

A corporation is a "person."

Louisville, C. & C. R. R. Co. v. *Letson*, 43 U. S. 2 How 497 (11:353); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 739 (6:204); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19:357); *U. S.* v. *Amedy*, 24 U. S. 11 Wheat. 392 (6:502); *Boyer* v. *Boyer*, 113 U. S. 689 (28:1089); *Otis Co.* v. *Ware*, 8 Gray, 509.

Shares in banks are to be taxed in the city valuation like the property of residents.

Tappan v. *Merchants Nat. Bank*, 86 U. S. 19 Wall. 490 (22:189).

Franchise tax is not a tax on property.

Portland Bank v. *Apthorp*, 12 Mass. 255; *Commonwealth* v. *People's Savings Bank*, 5 Allen, 428; *Commonwealth* v. *Provident Sav. Inst.* 12 Allen, 312; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Commonwealth* v. *Hamilton Mfg. Co.* 12 Allen, 298; *Manufacturers Ins. Co.* v. *Loud*, 99 Mass. 146; *Commonwealth* v. *Lancaster Sav. Bank*, 123 Mass. 493; *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 632 (18:904).

The capital of the Bank cannot be taxed.

Van Allen v. *Albany Assessors*, 70 U. S. 3 Wall. 573 (18:229); *Austin* v. *Boston*, 14 Allen, 359; *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 (19:701.)

The earnings and moneys of a corporation are not the separate property of the stockholders.

Morawetz, Corp. §§ 450, 451, 465; *Minot* v. *Paine*, 99 Mass. 101, 106; *Rand* v. *Hubbell*, 115 Mass. 461, 474; *Hyatt* v. *Allen*, 56 N. Y. 553.

The proper form of action in Massachusetts to recover back a tax illegally assessed is assumpsit.

Lincoln v. *Worcester*, 8 Cush. 55 and cases cited; *U. S. Bank* v. *Bank of Washington*, 31 U. S. 6 Pet. 8 (8:299).

A state statute might compel a national bank to pay a legal tax assessed to its shareholders on their shares.

First Nat. Bank v. *Kentucky*, *supra*.

If such a tax is illegal, the bank is entitled to recover it back.

Cummings v. *Merchants Nat. Bank*, 101 U. S. 153 (25:903); *Hill* v. *National Albany Exchange Bank*, 105 U. S. 319 (26:1052); *Allen* v. *Baltimore & O. R. R. Co.* 114 U. S. 311 (29:200); *Albany City Nat. Bank* v. *Maher*, 20 Blatchf. 341.

Payment under protest to a collector holding a warrant is compulsory.

Preston v. *Boston*, 12 Pick. 7; *Boston & S. Glass Co.* v. *Boston*, 4 Met. 181; *Joyner* v. *Egremont Third School Dist.* 8 Cush. 567; *Lee* v. *Templeton*, 13 Gray, 476; *Goodrich* v. *Lunenburg*, 9 Gray, 88; *Erskine* v. *Van Arsdale*, 82 U. S. 15 Wall. 75 (21:63); *Carleton* v. *Ashburnham*, 102 Mass. 343; *Wilson* v. *Shearer*, 9 Met. 504; *Sherwin* v. *Mudge*, 127 Mass. 547; *Knowles* v. *Boston*, 129 Mass. 551; *Hunnewell* v. *Charlestown*, 106 Mass. 350; *Norton* v. *Boston*, 119 Mass. 194.

An application for abatement is the proper remedy when the taxpayer complains only of an excessive valuation.

Osborn v. *Danvers*, 6 Pick, 98; *Bates* v. *Boston*, 5 Cush. 98; *Lincoln* v. *Worcester*, 8 Cush. 55; *Bourne* v. *Boston*, 2 Gray, 494; *Davis* v. *Macy*, 124 Mass. 193.

This rule does not apply to assessments on distinct subjects of taxation (as real or personal estate), on one only of which the taxpayer is legally liable to assessment.

Preston v. *Boston*, 12 Pick. 7.

Messrs. George F. Hoar and Andrew J. Bailey, for defendant in error:

The Bank cannot maintain a suit to recover back the amount paid for tax on its shares.

Albany County v. *Stanley*, 105 U.S. 305 (26: 1044); *Williams* v. *Albany County*, 122 U. S. 154 (30:1088); Mass. Pub. Stat. chap. 13, § 9.

The payment was voluntary. Plaintiff cannot make such payment the foundation of a suit.

Wabaunsee County v. *Walker*, 8 Kan. 431; *Preston* v. *Boston*, 12 Pick. 14; *Union Pac. R. R. Co.* v. *Dodge County*, 98 U. S. 541, 545 (25: 196, 197); *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 137 (9:373); *Lamborn* v. *Dickinson County*, 97 U. S. 181 (24:926); *U. S.* v. *Lawson*, 101 U. S. 164 (25:860); *U. S.* v. *Ellsworth*, Id. 170 (25: 863); *Swift & C. & B Co.* v. *U. S.* 111 U. S. 22 (28:341); *Boston & S. Glass Co.* v. *Boston*, 4 Met. 181; *Forbes* v. *Appleton*, 5 Cush. 115; *Benson* v. *Monroe*, 7 Cush. 125; *Lee* v. *Templeton*, 13 Gray, 476; *Barrett* v. *Cambridge*, 10 Allen, 48; *Marriot* v. *Hampton*, 2 Smith, Lead. Cas. 400; *Brown* v. *McKinally*, 1 Esp. 279; Cooley, Tax. 2d ed. 809; *Loud* v. *Charlestown*, 99 Mass. 208.

The plaintiff in error had a clear and sufficient remedy by an application to the assessors for abatement.

Osborn v. *Danvers*, 6 Pick. 100; *Boston Water Power Co.* v. *Boston*, 9 Met. 204; *Bates* v. *Boston*, 5 Cush. 98; *Howe* v. *Boston*, 7 Cush. 273; *Lincoln* v. *Worcester*, 8 Cush. 55; *Wright* v. *Boston*, 9 Cush. 233; *Bourne* v. *Boston*, 2 Gray, 494; *Chapel of Good Shepherd* v. *Boston*, 120 Mass. 212; *Davis* v. *Macy*, 124 Mass. 193; *Stanley* v. *Albany County*, 121 U. S. 535 (30: 1000); *Williams* v. *Albany County*, 122 U. S. 154 (30:1088).

The purpose which controlled the enactment has been recently stated.

Mercantile Nat. Bank v. *Mayor of N. Y.* 121 U. S. 138 (30.895); *National Newark Bkg. Co.* v. *Newark*, Id. 168 (30:904); *Davenport Nat. Bank* v. *Davenport Equalization Board*, 128 U. S. 83 (*ante*, 94).

National banks cannot be taxed without the consent of Congress. Consent may be given upon condition.

Van Allen v. *Albany Assessors*, 70 U. S. 3 Wall. 573 (18:229).

The condition is violated if there is unfair discrimination against bank capital.

Boyer v. *Boyer*, 113 U. S. 689 (28:1089); *Pelton* v. *Commercial Nat. Bank*, 101 U. S. 143 (25: 901); *People* v. *Weaver*, 100 U. S. 539 (25:705); *Albany County* v. *Stanley*, 105 U. S. 305 (26: 1044); *Hill* v. *National Albany Exchange Bank*, Id. 319 (26:1052); *Evansville Bank* v. *Britton*, Id. 322 (26:1053); *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153 (25:903); *Commonwealth* v. *Hamilton Mfg. Co.* 12 Allen, 298; *Manufacturers Ins. Co.* v. *Loud*, 99 Mass. 146.

If impartiality of result be obtained, the application of different methods of procedure to different kinds of property is unobjectionable.

Kentucky R. R. Tax Cases, 115 U. S. 321 (29: 414); *Lionberger* v. *Rouse*, 76 U. S. 9 Wall. 468 (19:721); *Adams* v. *Nashville*, 95 U. S. 19 (24: 369).

It is competent for the States, under the permission of Congress to tax the shares of national bank stock.

People v. *Tax Comrs.* 71 U. S. 4 Wall. 244 (18:344); *Hepburn* v. *Carlisle School Directors*, 90 U. S. 23 Wall. 480 (23:112); *Delaware R. R. Tax*, 85 U. S. 18 Wall. 206 (21:888); *Tappan* v. *Merchants Nat. Bank*, 86 U. S. 19 Wall. 490 (22:189); *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 (19:701).

The State may make exemptions.

Adams v. *Nashville*, 95 U. S. 19 (24:369); *Bradley* v. *Illinois*, 71 U. S. 4 Wall. 459 (18: 433); *Austin* v. *Boston*, 14 Allen, 359.

There is nothing to show that there were any shareholders of the plaintiff Bank who had any debts they were entitled to deduct from the value of their shares.

Stanley v. *Albany County*, 121 U. S. 535 (30: 1000); *Austin* v. *Boston*, 74 U. S. 7 Wall. 694 (19:224); *Hill* v. *National Albany Exchange Bank*, and *Evansville Bank* v. *Britton*, *supra*.

The decisions of state courts interpreting their own Constitutions or laws will ordinarily be held to be binding on the supreme court.

Norton v. *Shelby County*, 118 U. S. 425 (30: 178); *Fairfield* v. *Gallatin County*, 100 U. S. 47

(25:544); *Chambers County* v. *Clews*, 88 U. S. 21 Wall. 317–324 (22:517–520); *Rowan* v. *Runnels*, 46 U. S. 5 How. 139 (12:87); *Richmond* v. *Smith*, 82 U. S. 15 Wall. 429 (21:200); *State R. R. Tax Cases*, 92 U. S. 575 (23:663); *Green* v. *Neal*, 31 U. S. 6 Pet. 291 (8:402); *U. S.* v. *Morrison*, 29 U. S. 4 Pet. 134 (7:807); *Kibbe* v. *Ditto*, 93 U. S. 674 (23:1005); *Moores* v. *Citizens Nat. Bank*, 104 U. S. 625 (26:870); *Williams* v. *Kirtland*, 80 U. S. 13 Wall. 306 (20:683); *Walker* v. *State Harbor Comrs.* 84 U. S. 17 Wall. 648 (21:744).

The Fourteenth Amendment was framed for the purpose of protecting the negro race.

Slaughter House Cases, 83 U. S. 16 Wall. 36 (21:394); *Strauder* v. *West Virginia*, 100 U. S. 306 (25:665); *Ex parte Virginia*, Id. 344 (25: 678); *Elk* v. *Wilkins*, 112 U. S. 94 (28:643).

Mr. Justice **Matthews** delivered the opinion of the court:

This is an action at law, brought by the plaintiff in error, a national bank located in Boston, to recover from the City of Boston the amount of $14,464, paid to the tax collector of the City, upon demand, he then holding a tax list and warrant for its collection, after a protest in writing; being an amount which it alleges was illegally assessed on its shares at $12.80 per $1,000 of valuation, in violation of section 5219 of the Revised Statutes, of the 14th Amendment to the Constitution, and of the provisions of the Constitution of the State of Massachusetts. The cause was submitted to the court without the intervention of a jury. Judgment was rendered in favor of the defendant upon an agreed statement of facts. That judgment is brought here upon this writ of error.

The tax in question was levied under chapter 13 of the Public Statutes of Massachusetts, relative to the taxation of bank shares, as follows:

"Sec. 8. All the shares of stock in banks, whether of issue or not, existing by authority of the United States or of the Commonwealth and located within the Commonwealth, shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere, in the assessment of all state, county, and town taxes, imposed and levied in such place, whether such owner is a resident of said city or town or not; all such shares shall be assessed at their fair cash value on the first day of May, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate and no greater than that at which other moneyed capital in the hand of citizens and subject to taxation is by law assessed. And the persons or corporations who appear from the records of the banks to be owners of shares at the close of the business day next preceding the first day of May in each year, shall be taken and deemed to be the owners thereof for the purposes of this section.

"Sec. 9. Every such bank or other corporation shall pay to the collector, or other person authorized to collect the taxes of the city or town in which the same is located, at the time in each year when other taxes assessed in the said city or town become due, the amount of the tax so assessed in such year upon the shares in such bank or other corporation. If such tax is not so paid, the said bank or other corporation shall be liable for the same; and the said tax, with interest thereon, at the rate of twelve per cent per annum from the day when the tax became due, may be recovered in an action of contract brought by the treasurer of such city or town.

"Sec. 10. The shares of such banks or other corporations shall be subject to the tax paid thereon by the corporation or by the officers thereof, and the corporation and the officers thereof shall have a lien on all the shares in such bank or other corporation, and on all the rights and property of the shareholders in the corporate property for the payment of said taxes."

From these sections it appears that:

1. The shares in national banks are to be assessed at their fair cash value, after deducting therefrom the proportionate part of the value of the real estate belonging to the bank.

2. They are to be assessed at the same rate and no greater than that at which other moneyed capital in the hands of citizens and subject to taxation is by law assessed.

3. The bank itself, as a corporation, is made liable in the first instance for the payment of the taxes so assessed upon its shares belonging to its shareholders.

4. If not paid when due, the bank is liable to an action for the recovery of the same, brought by the treasurer of the city or town in which it is located, with interest thereon at the rate of twelve per cent per annum from the day when the tax became due.

5. For the payment of said taxes the corporation has a lien on all the shares in the bank and on all the rights and property of the shareholders in the corporate property, as an indemnity.

It further appears, from a comparison of the statutes on the subject, that the action given by section 9, for the recovery of the taxes, with interest at twelve per cent per annum, is the only mode of collection provided in case of default, no power being given to any collecting officer to proceed by distraint or other seizure of the property of the bank or the shares of the stock for that purpose.

Chapter 11 of the Public Statutes of Massachusetts provides that personal property, for the purposes of taxation, shall include goods, chattels, money, and effects wherever they are, money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for, but not including in such debts or indebtedness any loan on mortgage of real estate taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate; public stocks and securities; stocks in turnpikes, bridges and moneyed corporations within or without the State; the income from an annuity, from ships and vessels engaged in the foreign carrying trade, and so much of the income from a profession, trade, or other employment as exceeds the sum of $2,000 a year; but no income shall be taxed derived from property subject to taxation, and no taxes shall be assessed upon the shares in the capital stock of a corporation organized or chartered in the Commonwealth which pays a tax upon its corporate franchises, except for school, district, and parish purposes.

It is not disputed but that under these and

other provisions of the law all personal estate included within this enumeration and real estate are taxable and were taxed upon their fair cash value at the same rate of $12.80 for each $1,000 of value levied during the same period upon shares of capital stock of national banks located in Boston. The amount of personal property in the City of Boston taxed during that period and at that rate is stated to be $189,605,672. The aggregate value of shares in national banks in that City for the same year was $60,428,000.

Corporations chartered by the Commonwealth or organized under general laws, for purposes of business or profit, having a capital stock divided into shares, excepting banks, are subject to a tax upon their corporate franchises. For purposes of taxation, the law requires the corporate franchise in each case to be estimated at a valuation thereof equal to the aggregate value of the shares in its capital stock. The rate of taxation is determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year, as returned by the assessors of the several cities and towns, upon the aggregate valuation of all the cities and towns for the preceding year. From the valuation of the corporate franchise, there is to be deducted, in case of railroad and telegraph companies whose lines extend beyond the limits of the Commonwealth, such a portion of the whole valuation of their capital stock as is proportional to the length of that part of their line without the Commonwealth, and also an amount equal to the value of their real estate and machinery located and subject to local taxation within the Commonwealth; the same deduction as to real estate and machinery being made in case of other corporations.

Savings banks are required to pay to the treasurer of the State a tax on account of their depositors of one half of one per cent per annum on the amount of their deposits, excluding so much of the deposits as are invested in real estate used for banking purposes, or in loans secured by mortgages on taxable real estate, and also for a certain period so much of the deposits as are invested in real estate, the title to which has been acquired by the completion of foreclosure or by purchase; and such deposits so taxed are otherwise exempt from taxation in the hands of their owners.

Life insurance companies are required to pay an excise tax at the rate of one quarter of one per cent per annum upon a valuation equal to the aggregate net value of all policies, in force on the last day of the year next preceding, held by residents of the Commonwealth. All other insurance companies pay a tax by way of excise of one per cent on all premiums received during the year for insurance, and one per cent on all assessments made by such companies upon policy holders.

The Massachusetts Hospital Life Insurance Company is required to pay a tax upon all deposits, trust funds, or funds held for purposes of investment, except upon deposits invested in loans secured by mortgages on taxable real estate, the same rate of tax imposed upon savings banks on account of deposits; and the same rule applies to all trust companies, safe deposit and trust companies, banking and trust companies, loan and trust companies, and other moneyed corporations incorporated in the Commonwealth. The American Bell Telephone Company is subjected to a franchise tax, based upon an apportionment made upon the number of telephones in use by it, or under its authority, or with its permission, or under letters patent owned or controlled by it, within and without the Commonwealth, respectively, deducting the market value of all stocks in other corporations held by it upon which a tax has been assessed and actually paid, either in Massachusetts or in other States, for the preceding year.

Savings banks, under the laws of the Commonwealth, are authorized to receive deposits from any person until they amount to $1,000, and to allow interest thereon to be compounded until the principal with the accrued interest amounts to $1,000, no interest to be paid on any greater sum. The deposits are to be invested only as follows: 1. In first mortgages of real estate situated in the Commonwealth to an amount not to exceed 60 per cent of the valuation of such real estate, but not exceeding 70 per cent of the whole amount of deposits. 2. In public funds of the United States and of certain enumerated States and municipal corporations, or in the notes of any citizen of the Commonwealth secured by a pledge of any such securities at their par value. 3. In the first mortgage bonds of certain descriptions of railroad companies, or in the notes of any citizen of the Commonwealth, secured by a pledge of any such securities at not less than 80 per cent of the par value thereof. 4. In certain bank stocks, including the stocks of national banks located in the New England States, or on the notes of any citizen with such bank stocks as collateral security, at not more than 80 per cent of the market value thereof, and not exceeding the par value thereof, but the amount of such investments in such bank stocks is specifically limited. 5. In loans upon the personal notes of depositors of the corporation, not exceeding one half of the amount of the deposit, in which case the deposit is held as collateral security for the payment of the loan. 6. If the deposits cannot be conveniently invested in the modes heretofore named, not exceeding one third part thereof may be invested in bonds or other personal securities payable at a time not exceeding one year, with at least two sureties, all of whom are to be citizens of the Commonwealth and residents therein. 7. Ten per cent of the deposits of any such corporation, not exceeding $200,000, may be invested in the purchase of a suitable site and building for the transaction of its business. 8. Any such corporation may hold real estate acquired by the foreclosure of any mortgage owned by it or by purchase at sales made under the provisions of any such mortgage, or for the satisfaction of debts due to it, but all such real estate shall be sold within five years after the title is vested in the corporation.

The particular in which the plaintiff in error chiefly insists that the tax imposed upon its shares is at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of Massachusetts, is the alleged inequality existing in favor of that imposed upon savings banks. The contrast of

which this inequality is the result is stated to be as follows; viz., that in 1885 a tax of $1,564,995 was collected upon national bank shares in Massachusetts of the value of $118,000,000, while upon $163,000,000 of savings bank deposits in the same year there was collected as a tax only $815,930.

In view of the state of the question, as fixed by the previous decisions of this court, it is not perhaps very material now to inquire whether this alleged contrast between the taxation of national bank shares and of savings banks in Massachusetts is real or only apparent. There are several particulars which might be mentioned, and which, when properly allowed for, would certainly reduce the apparent inequality. There is only one, however, which we deem it important to notice. The tax on savings banks is based upon deposits merely. This is because deposits furnish the only capital which is invested and employed. The institutions themselves, although corporations, have no capital stock, and are managed by trustees not selected by the depositors, but by public authority. The whole amount of the deposits, with the exceptions noted, are subjected to a tax of one half of one per cent. On the other hand the national banks pay a tax assessed upon the market value of the shares as personal property, upon a valuation and at a rate exactly equal to that of all other personal property subject to taxation in the State. But shares of the national banks, while they constitute the capital stock of the corporations, do not represent the whole amount of the capital actually employed by them. They have deposits, too, shown in the present record to amount, in Massachusetts, to $132,042,332. The banks are not assessed for taxation on any part of these, although these deposits constitute a large part of the actual capital profitably employed by the banks in the conduct of their banking business. But it is not necessary to establish the exact equality in result of the two modes of taxation. The question of the exemption from taxation of deposits in savings banks, as affecting the rule for the state taxation of national bank shares, was very deliberately considered by this court in the case of *Mercantile Nat. Bank* v. *Mayor of N. Y.* 121 U. S. 138, 160 [30: 895,903]; and the conclusion reached in that case was reaffirmed in the case of *Davenport Nat. Bank* v. *Davenport Equalization Board*, 128 U. S. 88 [*ante*, 94]. In the former case deposits in savings banks in the State of New York to the amount of $487,107,501, with an accumulated surplus in addition of $68,669,001, were exempted by the laws of the State from all taxation, neither the bank itself nor the individual depositor being taxed on account thereof. It was said in that case, p. 161 [903]: "However much, therefore, may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens, otherwise subject to taxation."

It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks, or of those of Iowa considered in the case of the Davenport Bank. The principal distinction, indeed, between the case of the New York savings banks and those of Massachusetts, involved in the present inquiry, is that the latter pay a tax of one half of one per cent on the amount of their deposits, while the New York banks were exempt from all taxation whatever.

The argument on behalf of the plaintiff in error, indeed, seeks to establish another distinction. It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the saving banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case.

A similar objection to the tax in question, founded on a comparison of the taxation of national bank shares with that of insurance companies and trust companies, the American Bell Telephone Company, and the Massachusetts Hospital Life Insurance Company, is equally untenable. Within the definition of that phrase, established in the case of the *Mercantile Nat Bank* v. *Mayor of N. Y.* 121 U. S. 138 [30:895], the interest of individuals in these institutions is not moneyed capital. The investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State. *People* v. *Tax Comrs.* 71 U. S. 4 Wall. 244 [18: 344].

It is further contended, however, on the part of the plaintiff in error, that the taxation in question is not only at a greater rate than that imposed upon other moneyed capital held by individual citizens, but that it is repugnant to the Fourteenth Amendment to the Constitution of the United States, because it operates to deny to the taxpayer the equal protection of the laws, and also that it is disproportionate and unequal, in violation of the provisions of the Constitution of Massachusetts. The two branches of this proposition are equivalent; if the tax is not disproportionate and unequal, within the meaning of the Constitution of the State, the taxpayer is not denied the equal protection of the laws within the sense of the Fourteenth Amendment. The point is fully met by the reasoning and judgment of the Supreme Judicial Court of Massachusetts in the cases of the *Providence Sav. Institution* v. *Boston*, and *Jewell* v. *Boston*, 101 Mass. 575, 585.

Another point to be noticed arises upon the third count of the declaration. It is therein alleged that other national banking associations,

some located in Massachusetts and others in the several New England States, are the owners of 1,448 shares of the capital stock of the National Bank of Redemption, on which the amount of tax paid was $2,051. It is urged in argument that these shares are not taxable by virtue of section 5219 of the Revised Statutes. The language of the section is: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It is contended that no tax is thereby authorized upon the national bank itself as a corporation, nor upon the personal property of any such, and that, therefore, these shares in the National Bank of Redemption are exempt from taxation by virtue of their ownership. This, however, is not a reasonable interpretation of the language of the section. The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership, on the same footing with all other shares.

Other questions have been raised by counsel for the defense. The right of the plaintiff to sue is denied, on the ground that the right of action belongs to the owners of the shares taxed; the right of recovery is denied, on the ground that the payment by the plaintiff was voluntary, and the right of action, if it exists, it is alleged is against the collecting officer, and not the City of Boston. These questions we have not considered it necessary to examine or decide, preferring to rest our judgment upon the validity of the tax.

The judgment of the Circuit Court is accordingly affirmed.

Mr. Justice **Bradley**, *Mr. Justice* **Gray**, and *Mr. Justice* **Blatchford** did not sit in this case or take any part in the decision.

RUSSELL SAGE, *Appt.*,
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), *Appt.*,
v.
RUSSELL SAGE.

(See S. C. Reporter's ed. 361-381.)

Receiver, when appointed—order of appointment—execution—mortgagor of railroad, when entitled to earnings—earnings when not applied to discharge mortgage, but to a judgment.

1. Whether a receiver shall be appointed is always a matter of discretion, to be exercised with caution in the case of quasi public corporations operating a public highway, and always with reference to the special circumstances of each case.

2. Where, under the circumstances of a case, the appointment of the receiver is within the power of the court, the order appointing him is not a nullity.

3. Where the railroad company made no objection, at the time the receiver was appointed, that an execution was not sued out and returned "*nulla bona*" before the suit was commenced, that point may be afterwards disregarded.

4. The mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made therefor or for a surrender of the possession under the provisions of the mortgage.

5. Trustees in a railroad mortgage, who have not asked possession, nor intervened in the suit, are not entitled to have the net earnings of the property, while it was in the hands of a receiver (appointed in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees or of the bondholders or of other creditors), applied in discharge of the bonds secured by the mortgage.

[Nos. 126, 127.]

Argued Jan. 6, 9, 1888. Decided March 19, 1888.

APPEALS from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, directing the distribution of a fund in the registry of that court, arising from the operation by its Receiver of the Memphis and Little Rock Railroad Company, as reorganized. *Reversed.*

Opinion below, 18 Fed. Rep. 571.

Statement by *Mr. Justice* **Harlan:**

The decree from which these appeals are taken relates to the distribution of a fund in the registry of the circuit court arising from the operation, by its receiver, of the Memphis and Little Rock Railroad Company (as reorganized). The decree directed it to be paid to the surviving trustees in a certain mortgage executed by that Company, for distribution among the beneficiaries under said mortgage. Sage and the Railroad Company each complain of that decree; the former insisting that the money should have been applied in satisfaction of a judgment obtained by him against the Company, while the latter insisted that it was entitled to receive it.

The history of the claims of the respective parties is as follows:

On the 24th day of June, 1882, the Memphis and Little Rock Railroad Company (as reorganized) in an action brought by Russell Sage, on that day, in the Circuit Court of the United States for the Eastern District of Arkansas, confessed judgment in his favor for the sum of $125,921.18, that sum being the aggregate amount, principal and interest, of a demand note for $115,479.08 executed by that Company, June 20, 1882, to the President of the Missouri Pacific Railway Company, and indorsed by him to Sage, and of another note of $10,000 held by the latter against the same defendant.

On the same day on which this judgment was entered, Sage commenced in the Chancery Court of Pulaski County, Arkansas, a suit in equity against the Memphis and Little Rock

Railroad Company (as reorganized). The bill, after setting out the judgment, alleged that the entire tangible property of the Company consisted of its railroad—extending from its junction with the St. Louis, Iron Mountain and Southern Railroad, through the Counties of Pulaski, Lonoke, Prairie, Monroe, St. Francis and Crittenden to the Mississippi River—an inclined track used to transfer its rolling stock across that river to Memphis, a steamboat, certain lands and depot in that city, locomotives, cars, and other property, such as are usually employed in the management of a railroad; that the defendant by deed of May 1, 1877, duly recorded, mortgaged its property to trustees to secure the payment of bonds, amounting to $250,000, and maturing in installments of $50,000 each, on the first day of May in the years 1879 to 1883, inclusive, of which installments four were then due and unpaid; that by deed of May 2, 1877, duly recorded, defendant mortgaged its property, rights, and franchises of every description to secure the payment of other bonds with coupons attached, amounting to $2,600,000, payable July 1, 1907, and bearing interest, after July 1, 1882, at the rate of 8 per cent per annum; that both of said mortgages authorized the trustees to take possession of and sell the mortgaged property upon the nonpayment of any of the bonds or interest at maturity; that the aggregate amount of the mortgages exceeded the salable value of the property and franchises of every description owned by the Company, or, at least, the sum for which they would sell under execution; that by reason of the existence of the mortgages no bidders could be found at more than nominal amounts for the property; that a large part of the bonds secured by the mortgages being due and unpaid, the trustees would interfere with the sale of any part of the property under execution if the plaintiff should attempt, in that mode, to enforce payment of this judgment; and that for these reasons the suing out of execution upon such judgment would cause useless expense and delay, and result in no benefit whatever to plaintiff.

The plaintiff also alleged that if the Company's property was held together, and carefully used in the transportation of passengers and freight, it would produce a large income, sufficient to pay all operating expenses and necessary repairs, leaving each year a large surplus to pay off and discharge plaintiff's debt; that such income could be made only by working the property as a unit, for purposes of transportation; consequently, the seizure and sale of it, or of any material part thereof, would destroy its capacity to produce such income, without benefit to the plaintiff, and at the same time incommode the public by destroying the use of the road in the manner contemplated by the State.

The bill further alleged that the Company had hitherto failed and refused to apply its surplus income to the payment of its debts, and unless prevented would continue in that course, and apply its surplus to other uses to his great injury and loss.

The relief asked was that the court take possession of and operate the road, by a receiver, and, in that manner, seize upon the only means in reach of the law for satisfying the plaintiff's demands; such relief to be subject to all the rights and equities of the holders of bonds or of said trustees.

The Railroad Company appeared and waived notice, and the court being of opinion that the relief asked was necessary for the protection of the plaintiff's interests and rights, E. K. Sibley was appointed receiver. He was directed to take possession of the entire railroad, with the inclines, connections, tracks, depots, rolling stock, books, papers, and all other property of the Company of every kind. The Company was ordered to surrender possession and the receiver directed to operate the railroad, in the usual manner, in the carriage of passengers, freights and express matter, keeping account of all receipts and expenses, and making report of all his acts and doings, as might be required. Such surrender was made, and possession was taken by the receiver.

John L. Farwell and Robert K. Dow, as stockholders of the Company, respectively intervened, October 14, 1882, and November 1, 1882, as defendants, and assailed the proceeding in which the receiver was appointed as being merely a financial expedient, by which Sage and others could make a successful speculation in the stocks and securities of the Company. They charged that the Company was not really indebted to Sage in any sum, and, among other things, they asked that he be enjoined from prosecuting his judgment, and that the receiver be discharged. On the 10th of November, 1882, they filed their respective petitions for the removal of the cause to the Circuit Court of the United States, and it was so removed.

On the 1st of December, 1883, Dow and many others, holding judgments rendered by default upon preferred mortgage and general mortgage coupons, filed their claims. These judgments aggregated nearly $200,000. Two days thereafter, December 8, 1883, an order was entered requiring the receiver at once to surrender *to the Railroad Company* all the property of whatever kind in his custody as receiver; to pay out of the money in his hands all sums and dues authorized by the order appointing him; to retain the balance subject to the order of the court; and to make full report of his acts, showing what moneys he had received and for what purpose they had been expended. The order declared that the railroad and other property in the hands of the receiver were delivered to the defendant only upon the condition—to which it assented—that it assume all the liabilities of the receiver and agree to pay and discharge, out of the property or its income, all demands which might be legally established by judgment against the receiver; in default whereof the court might retake possession, and, by proper order, enforce the payment of such judgments.

On the 12th day of February, 1884, the receiver filed a report of his administration of the property, from which it appeared that there were a few unsettled accounts for traffic balances due to and from him, which he was unable to adjust. The Company assuming in open court to pay such balances as were due from the receiver, it was, by consent of the parties, ordered that the receiver transfer to it all balances due to him, and that it receive and retain them for its own use. Thereupon the

complainant filed a petition praying that the receiver, out of the funds in his hands, pay his judgment in the bill mentioned. The defendant filed a motion to strike from the files sundry claims of H. Sanford and other creditors of the defendant, and that the money in the hands of the receiver, after paying the amount due the complainant, be paid to the defendant and to certain named creditors.

Upon the hearing, February 14, 1884, of the motion to strike out the claims of H. Sanford and others, said creditors respectively amended their claims by adding the following: "Claimant says that the bill filed in this suit, and all the subsequent proceedings therein, have been simulated, collusive, and fraudulent, and intended to cheat, hinder, and delay this claimant, and others in like cases, in the collection of their just debts, one of which is evidenced by said judgment in favor of claimant; wherefore he prays that his said claim be paid out of said fund in preference to all unsecured debts against said defendant." The court, thereupon, overruled the motion to strike out the claims of Sanford and others.

The cause was then referred to the master to report upon the charges of fraud and collusion made in the amended claims. By subsequent order, the master was directed to show by his report the total amount of money which came to the hands of the receiver; the amount expended by him in new construction and improvement of the road; the operating expenses of the road while in his hands; the amount paid out by him in costs and attorneys' fees in this suit, to whom paid, and for what services; and the total amount of money with which the receiver should be charged in a final settlement of his accounts.

On the 23d of February, 1884, Dow and Matthews, trustees in the mortgage of May 1, 1877, filed their claim and petition of intervention, they having previously brought suit to foreclose. In that petition they prayed that the moneys in the hands of the receiver be applied in discharge of the bonds secured by such mortgage. April 15, 1884, Dow, Matthews, and Moran, trustees in the mortgage of May 2, 1877 (the latter being successor of Pierson), filed their claim of intervention praying that if the fund in court was not paid out on the claim and intervention theretofore filed by Dow and Matthews, it be paid in discharge of overdue interest on the bonds secured by the latter mortgage.

On the 22d of May, 1884, the master made a report, embodying among others the following findings: 1. That the total amount which came to the hands of the receiver during his term of office, was $1,675,919.78. 2. That the amount expended, during his administration, for new construction, was $310,992.92, not including certain sums expended for bridge repairs, cross ties, repairs to locomotives, and maintenance of cars. 3. That the amount chargeable to the receiver on final settlement of his accounts was $218,998.98, which he had deposited as required by the court, and that he was thereby fully acquitted. 4. That the suit instituted by Sage was collusive in that it was brought with the connivance of the Railroad Company, for the purpose of shielding it, by means of a receivership, against suits by the Company's creditors. 5. That during the receivership, the railroad was largely improved by the receiver out of the income of the property, and that the receiver was honest, competent, and faithful. 6. That Dow, one of the trustees in both the preference and general mortgages of the Company, was the managing trustee, having or seeming to have the chief direction of all litigation involving either the trustees or the holders of bonds secured by the general mortgage. 7. That the intervenors were holders of bonds secured by the general mortgage, and that at no time during the continuance of the receivership did the trustees, as trustees of either mortgage, seek to intervene in the cause, or to take any action in regard to the property, or to cause its restoration to the defendant Company, or to take any steps to put an end to the receivership. 8. That before the failure of the Company to pay any installment of interest, Dow stated and threatened that in case any default in the payment of such interest occurred, the bondholders would not take any steps to foreclose the mortgage, but would bring as many separate suits at law in the United States Circuit Court as could be separarately brought upon coupons taken from the bonds secured by the mortgages every six months.

Exceptions by Sage and the Company to the master's report having been overruled, it was adjudged that the money in the registry of the court be paid to Robert K. Dow and Watson Matthews, surviving trustees in what is called the preference mortgage of May 1, 1877, for distribution by them among the beneficiaries under that mortgage, and that plaintiff pay all the costs of this suit. From that decree Sage and the Railroad Company have separately appealed. No appeal was prosecuted by bondholders having judgments at law, and who, by the decree, were placed upon an equality with other bondholders secured by the same mortgage, who had not obtained judgments for the amount of their unpaid coupons.

Mr. **Wager Swayne,** for appellant Sage, and for R. R. Co. against Intervening Trustees and Judgment Creditors.

To procure a receiver if not hindering and delaying creditors.

Brassey v. *New York & N. E. R. Co.* 19 Fed. Rep. 668; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 (29:968); *Wallace* v. *Loomis*, 97 U. S. 146 (24:895); *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286 (27:117); *Long Dock Co.* v. *Mallery*, 12 N. J. Eq. 481.

The Sage judgment should have been paid from the net earnings of the receivership. The course to be pursued with that fund was not discretionary and was reviewable upon appeal.

Forgay v. *Conrad*, 47 U. S. 6 How. 201 (12: 404); *Thompson* v. *Dean*, 74 U. S. 7 Wall. 342 (19:94); *Stovall* v. *Banks*, 77 U. S. 10 Wall. 583 (19:1036); *Whiting* v. *Bank of U. S.* 38 U. S. 13 Pet. 15 (10:87); 8th Eq. Rule, U. S. Supreme Ct. (20:910).

Sage is entitled to be first paid, because he who first files his bill is entitled to satisfaction.

Beach, Receivers, § 628; *Parks* v. *Sprinkle*, 64 N. C. 687; *Corning* v. *White*, 2 Paige, 567; *U. S. Bank* v. *Burke*, 4 Blackf. 141; *Storm* v. *Waddell*, 2 Sandf. Ch. 508; *Edgell* v. *Haywood*, 3 Atk. 352;

Lynch v. *Johnson*, 48 N. Y. 33; *Hills* v. *Sherwood*, 48 Cal. 393; *Pullis* v. *Robison*, 78 Mo. 201; *Day* v. *Washburn*, 65 U. S. 24 How. 355 (16:714); Wait, Fraud. Conv. § 392; 2 Hoff. Ch. Pr. 114; *Burt* v. *Keyes*, 1 Flipp. 72; *Douglass* v. *Huston*, 6 Ohio, 156; *Miers* v. *Zanesville & M. Turnpike Co.* 18 Ohio, 197.

The creditor who first files his bill obtains a priority.

Weed v. *Pierce*, 9 Cow. 722; *Beck* v. *Burdett*, 1 Paige, 305; *Edmeston* v. *Lyde*, Id. 637.

The filing of the creditor's bill creates *eo instante* an equitable lien upon the fund sought to be reached.

Miller v. *Sherry*, 69 U. S. 2 Wall. 249 (17:880); *George* v. *Williamson*, 26 Mo. 190; *Brown* v. *Nichols*, 42 N. Y. 26; *Perego* v. *Bonesteel*, 5 Biss. 66; Wait, Fraud. Conv. § 68.

That Sage did not issue an execution before filing his bill does not impair his rights.

Wright v. *Campbell*, 27 Ark. 641; *Royer Wheel Co.* v. *Fielding*, 31 Hun, 277; *Buswell* v. *Lincks*, 8 Daly, 518.

To affirm the decree of the court below is to violate an established and necessary rule of equity by which the marshaling of liens has always been controlled.

Lanoy v. *Duke of Athol*, 2 Atk. 446; *Aldrich* v. *Cooper*, 8 Ves. Jr. 388; *Ex parte Kendall*, 17 Ves. Jr. 520; *Trimmer* v. *Bayne*, 9 Ves. Jr. 209; *Cheesebrough* v. *Millard*, 1 Johns. Ch. 413; *Averall* v. *Wade*, Lloyd & G. 252; *Gwynne* v. *Edwards*, 2 Russ. 289, note; *Cradock* v. *Piper*, 15 Sim. 301; *Atty-Gen.* v. *Tyndall*, Amb. 614; *Selby* v. *Selby*, 4 Russ. 336; *Greenwood* v. *Taylor*, 1 Russ. & M. 185; *Wiggin* v. *Dorr*, 3 Sumn. 410, 414.

Mr. **U. M. Rose**, for Dow *et al.*, trustees:

Parties dealing with corporations have the right not only to sue, but also to secure themselves by means of the remedies provided for in like cases between natural persons.

Smith v. *Eastern R. R. Co.* 124 Mass. 157.

Between the mortgagor and the mortgagee, the surplus must be awarded to the latter.

Pullan v. *Cincinnati & C. A. L. R. R. Co.* 5 Biss. 247.

The fund should go to the insolvent company.

Dow v. *Memphis & L. R. R. Co.* 20 Fed. Rep. 768.

A court of chancery had jurisdiction to apply the fund to the payment of the bonds whose holders were represented by the trustees, though no judgments at law had been recovered on them.

Case v. *Beauregard*, 101 U. S. 688 (25:1004); *King* v. *Payan*, 18 Ark. 588.

Every attempt by a debtor to violate or evade the law is fraudulent and void as against creditors.

Kimball v. *Thompson*, 4 Cush. 447; *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 523 (22:762).

A deed fraudulent in fact is absolutely void.

Bean v. *Smith*, 2 Mason, 252.

Another creditor who has participated in the fraud will not be allowed to share with the plaintiff in the proceeds of the litigation.

Smith v. *Craft*, 11 Biss. 351.

Fraud may always be proved by parol.

Hill v. *Elliot*, 12 Mass. 31; *Harris* v. *Sumner*, 2 Pick. 137; *Murray* v. *Riggs*, 15 Johns. 571.

Where a creditor has been guilty of actual fraud he cannot participate in the fund.

Millington v. *Hill*, 47 Ark. 311; *Milwaukee & M. R. R. Co.* v. *Soutter*, 80 U. S. 13 Wall. 525 (20:545); *Beers* v. *Wabash, St. L. & P. R. Co.* 26 Am. & Eng. R. R. Cas. 458; *Blair* v. *St. Louis, H. & K. R. Co.* 22 Fed. Rep. 37; *Ruckman* v. *Conover*, 37 N. J. Eq. 588.

The bondholders being very numerous, the trustees properly represented them in the court below.

Kerrison v. *Stewart*, 93 U. S. 155 (23:843); *Carey* v. *Brown*, 92 U. S. 172 (23:469); *Boyd* v. *Jones*, 44 Ark. 316; *Dickenson* v. *Harris*, 48 Ark. 358; *Shaw* v. *Little Rock & Ft. S. R. Co.* 100 U. S. 611 (25:758).

Sage cannot complain of a decree establishing the superior claim of the trustees.

Little Rock Water Works Co. v. *Barrett*, 103 U. S. 516 (26:523); *Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289 (25:937); *U. S.* v. *Babbitt*, 104 U. S. 767 (26:921).

The right of the trustees to intervene was clear.

Day v. *Washburn*, 65 U. S. 24 How. 352 (16:712); *Wiswall* v. *Sampson*, 55 U. S. 14 How. 66 (14:328); *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798 (24:144); *Williams* v. *Gibbs*, 58 U. S. 17 How. 256 (15:141); *Ex parte Boyd*, 105 U. S. 652 (26:1202); *Re Howard*, 76 U. S. 9 Wall. 175 (19:634); *Galveston, H. & H. R. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 478 (20:205).

The property of the Railroad Company could not be sold under execution.

Tice v. *Annin*, 2 Johns. Ch. 130; 2 Jones, Mort. § 1229; *Gus* v. *Tide Water Canal Co.* 65 U. S. 24 How. 257 (16:635); *Milwaukee & M. R. R. Co.* v. *James*, 78 U. S. 6 Wall. 750 (18:854); *Jackson* v. *Ludeling*, 88 U. S. 21 Wall. 623 (22:495).

Where an execution can accomplish nothing, its issue is not a prerequisite to the filing of a creditor's bill.

Wright v. *Campbell*, 27 Ark. 641; *Russell* v. *Clark*, 11 U. S. 7 Cranch, 89 (3:279).

This court will not reverse for any alleged error not indicated in the exceptions filed to the master's report.

Terry v. *Commercial Bank*, 92 U. S. 456 (23:621).

When a railroad company or other corporation is using its earnings and will not pay its debts with them, a court of chancery will appoint a receiver.

Covington Draw Bridge Co. v. *Shepherd*, 62 U. S. 21 How. 125 (16:41); *Lawrence* v. *Greenwich Fire Ins. Co.* 1 Paige, 587; Beach, Receivers, § 252; *Weed* v. *Pierce*, 9 Cow. 724.

Equity treats a mortgage of property to be afterwards acquired as a contract, binding in conscience, to execute a mortgage.

Little Rock & Ft. S. R. Co. v. *Page*, 35 Ark. 304; *S. C.* 7 Am. & Eng. R. R. Cas. 36; *Fosdick* v. *Schall*, 99 U. S. 255 (25:343); *Hale* v. *Frost*, Id. 389 (25:419); *Gilman* v. *Illinois & M. Tel. Co.* 91 U. S. 617 (23:410).

Mr. Justice **Harlan** delivered the opinion of the court:

We do not understand upon what principle the court below held that the trustees in the mortgage of May 1, 1877, were entitled, as against both the mortgagor Company and Sage, to claim the net earnings of the road during the receivership. The latter was a judgment creditor of the Company, and it was at his instance, in a suit commenced by him, that its property was put in the hands of a receiver. This was done because in the opinion of the court the appointment of a receiver was necessary "to protect plaintiff's interests and rights." If the grounds set forth in the bill were not sufficient to justify the appointment of a re-

ceiver, they were ample to give a court of equity jurisdiction to do so. In *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434, 458 [29:963, 971] the court said: "The co-plaintiffs with Hervey were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver, in the interest of all the creditors of all four of the corporations, to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshaling of all the debts of all the corporations and their payment and adjustment as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits."

In the present case, it is true, Sage did not sue out execution upon his judgment and have a return of *nulla bona*. But that point has become immaterial. The Railroad Company made no such objection at the time the receiver was appointed. Besides, suing out an execution would, according to the facts and the admission of the parties, have been an idle ceremony, causing useless expense, and bringing no real benefit to the plaintiff. It is true, also, that Sage did not sue in behalf of all the creditors of the Company or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege, under the law, to sue for his own benefit, and it was within the power of the court, for his protection as a judgment creditor, to place the property of the debtor Company in the hands of a receiver, for administration under its orders. We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as matter of right, to have its property put in the hands of a receiver, merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises. All that we say in this connection is that, under the circumstances presented in this case, the appointment of the receiver was within the power of the court. The order appointing him and directing him to operate and manage the property was not a nullity.

But it is contended that the suit instituted by Sage was collusive and an imposition upon the court; that, as held by the circuit judge, when the receiver was discharged, after having served seventeen months, and the property was turned over to the Company, the process of the court was not used "in good faith to collect complainant's judgment, but as a means of placing the property and business of a railroad company in the hands of the court, to be managed through a receiver, to the end that the defendant may not be subject to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant, by agreement between them, through the receiver, to apply all the earnings of the road during a series of years to the improvement and betterment of the property;" and that, consequently, the proceeding was not, in fact, an adversary one. 5 McCrary, 643; 18 Fed. Rep. 571, 573. Whether this characterization of that proceeding be just or not, it is not necessary in the present case, and in the view we take of it, to determine. For if it be just, the court below applied the proper remedy for the abuse of its process; that is, it discharged the receiver and turned the property back to the possession and control of the Company, which, in the view taken of the facts by the circuit judge, ought never to have been disturbed. And the court proceeded, as was its duty, to dispose of the net earnings of the property, while under the management of its officer, acting under its directions.

But did the imposition, if any, practiced upon the court, inducing it to appoint a receiver when one would not have been appointed had it been aware of the exact situation, add anything to the legal or equitable rights of the trustees in the mortgage executed by the Railroad Company? Had the receiver never been appointed, and had the Railroad Company operated the property just as the receiver did, producing the same amount of net earnings that were in the hands of the receiver, at the time of his discharge, would the trustees in the mortgage of May 1, 1877, have been entitled to demand that such earnings be paid over to them? Clearly not. "It is well settled," this court said in *Dow* v. *Memphis & L. R. R. R. Co.* 124 U. S. 652, 654 [*ante*, 565] "that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Galveston, H. & H. R. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459, 483" [20: 199, 207]. See also *Gilman* v. *Illinois & M. Tel. Co.* 91 U. S. 603 [23:405]; *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798 [24:144]; *Kountze* v. *Omaha Hotel Co.* 107 U. S. 378 [27: 609]; *Teal* v. *Walker*, 111 U. S. 242, 250 [28: 415, 418].

The trustees filed their bill of foreclosure June 26, 1883, but they did not intervene as trustees in this suit until February 28, 1884, some time after the discharge of the receiver, and after the property had been surrendered to the Company. Their claim and intervention shows upon its face that no part of the interest accruing upon the bonds secured by their mortgage subsequent to January 1, 1882, had been paid at the time they so intervened. By the terms of that mortgage it was provided that, in case of continuous default by the Railroad Company, for thirty days, after maturity, in paying any of the sums specified in the interest coupons, the principal sums in all the bonds "shall immediately become due and payable," and, thereupon, the trustees, upon the written request of the holders of a majority of said bonds, "shall enter upon and take possession of all and singular the charter, franchises, and property hereby conveyed, and shall and may

sell the same to the highest bidder for cash in hand," etc. There was no moment pending the receivership when these trustees, upon the request of the holders of a majority of the bonds, might not have appeared in this suit, or in a separate suit in the same court, and asked that the receiver hold for them as well as Sage, or that he be discharged and they put in possession of the mortgaged property, for the purposes of sale, pursuant to the mortgage. Neither they nor the bondholders elected to pursue that course. It may be that their action was dictated in part by the fact, found by the master, that the railroad, the principal security for their debts, was being largely improved during the receivership out of the income of the property, and that no part of that income was being diverted to pay Sage's judgment or the debts of the Company. If the trustees, pending the receivership, had intervened and asked possession of the property, they might perhaps have been entitled, as against general creditors, to the income of the property thereafter accruing, upon the principles announced by this court in *Dow* v. *Memphis & L. R. R. R. Co.* (as reorganized), 124 U. S. 652 [*ante*, 565]. But we do not perceive any legal ground upon which they are entitled to the net earnings of the property, while it was in the hands of the receiver, in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was, in effect, an equitable levy for his benefit, upon the net income of the property. Other creditors, who filed their claims, based upon judgments, gain nothing, as between themselves and Sage, by the fact that their judgments were rendered upon coupons which were secured by lien upon the mortgaged property. Neither they nor their trustees, prior to the termination of the receivership, chose to assert this lien. Nor did they, pending the receivership, ask that the receiver should, from and after their appearance, hold for them as well as for Sage. They took action as simple contract creditors, whose claims were reduced to judgment. If the bondholders, when intervening simply as judgment creditors, acquired an interest in the fund, they could not, upon any recognized principles of equity, deprive the creditor, at whose instance and for whose benefit the receiver was appointed, of his priority of right, arising from the institution of suit for the purpose of reaching the income of the debtor's property. The judgments at law obtained by bondholders upon their coupons were all rendered after the receiver took possession of the property; some in the spring of 1888, the larger part of them in October and November of that year, just before the receiver was discharged.

These conclusions are not affected by the fact that Sage, in his bill, alleges that he seeks relief, subject to all the rights and equities of the holders of bonds and of their trustees. It was only meant by this to give assurance that he had no purpose, in asking the relief he did, to affect injuriously their security, or the liens created in their behalf by the mortgages referred to. Taking the allegations of his bill to be true, he sought only, by means of a receivership, to reach the net income of the Railroad Company in satisfaction of his debt.

But it was insisted in argument that the judgment which Sage obtained against the Railroad Company was fraudulent, in that the debt for which it was rendered was fictitious; that he never in fact owned a real note executed by that Company, based upon any valuable consideration whatever. The record not containing the note or a copy of it, some question was also made, in argument, if we did not misunderstand counsel, whether any such note was ever in existence. We could not sustain these propositions without reaching the conclusion that there had been the most shocking perjury upon the part of witnesses in this cause; a conclusion which the evidence does not warrant. The judgment which Sage obtained by confession of the defendant Company, in the Circuit Court of the United States, recites that it appeared to the court, "as well from the promissory notes with the complaint filed as from the said confession and consent, that the defendant is indebted to the plaintiff in the sum aforesaid," etc. The record shows that Sage, under date of June 20, 1882, addressed to the president of the Missouri Pacific Railway Company a communication, offering to give fifty cents on the dollar, payable in ninety days, for its debt and note "against the Memphis and Little Rock Railroad Company (as reorganized), amounting, as I am informed, to the sum of $115,479.08, your company guaranteeing that the said amount is justly due to it from the Memphis and Little Rock R. R. Co." The records of the former company recite that on motion of Mr. Dillon, seconded by Mr. Eckert, that offer was accepted, and that said debt and note "are hereby transferred and assigned to said Sage, and that the president be and he is hereby authorized to execute any further assignment of said debt that counsel may advise, and also to indorse and deliver said note to the said Sage." Sage swears in his deposition that he purchased, held, and brought suit upon said note. The treasurer of the Missouri Pacific Railway Company testifies that his company did, in June 1882, hold the note of the Memphis and Little Rock Company (as reorganized) for $115,479.08, given by the latter Company for advances made by the Missouri Pacific Railway Company to meet coupons of the former company. It is true that, independently of the evidence furnished by the note, it does not clearly appear that the advances made by the Missouri Pacific Railway Company to the other Company aggregated the full amount of the note. But this deficiency in the proof is more than made good by the fact that the note was given and that the Memphis and Little Rock Railroad Company (as reorganized) confessed judgment for its amount, and does not now dispute the debt; although, by its appeal, it claims that the fund in court should be paid to it rather than applied to Sage's judgment.

It is contended that Sage does not show that he has ever paid to the Missouri Pacific Railway Company the amount he agreed to give for the note of the Memphis and Little Rock Railroad Company (as reorganized). Proof of that fact was not vital in the case. After the acceptance of his offer to purchase the note, and after it had been transferred by indorsement to him, he came under a legal obligation, which he recognizes, to pay what he agreed to pay. He cannot escape that obligation.

For the reasons stated we are of opinion that the decree below was erroneous in that it did not, in the order directing the distribution of the fund remaining in court, give a preference to the judgment at law obtained by the appellant Sage.

The decree is reversed and cause remanded, with directions for further proceedings consistent with this opinion.

GEORGE A. BOWMAN ET AL., *Plffs. in Err.*,

v.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 465–524.)

Iowa law, forbidding bringing in intoxicating liquors, unconstitutional—defense to action.

1. Section 1553 of the Iowa Code, as amended by the Act of April 5, 1886, forbidding any common carrier to bring within that State any intoxicating liquors, from any other State or Territory, without first having the certificate therein required, is a regulation of commerce among the States and is void, as repugnant to the Constitution of the United States.

2. Such statute is not an inspection law, nor a quarantine or sanitary law, and is not a legitimate exercise of police power by the State.

3. Such statute constitutes no defense to an action brought against a railroad company for refusing to carry beer into the State of Iowa from another State.

[No. 798.]

Submitted Jan. 10, 1887. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment against the plaintiffs, in an action brought for a refusal to receive for transportation at Chicago and to carry certain barrels of beer into the State of Iowa. *Reversed.*

Statement by *Mr. Justice* **Matthews**:

This action was begun in the Circuit Court of the United States for the Northern District of Illinois, June 15, 1886, on which day the plaintiffs filed their declaration as follows:

"George A. Bowman, a citizen of the State of Nebraska, and Fred. W. Bowman, a citizen of the State of Iowa, copartners, doing business under the name, firm and style of Bowman Bros., at the City of Marshalltown, State of Iowa, plaintiffs in this suit, by Blum & Blum, their attorneys, complain of the Chicago and Northwestern Railway Company, a citizen of the northern district of the State of Illinois, having its principal office at the City of Chicago, in said State, defendant in this suit, of a plea of trespass on the case.

"For that, whereas the defendant, on May 20, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railway, and was a common carrier of goods and chattels thereon for hire, to wit, from the City of Chicago, in the State of Illinois, to the City of Council Bluffs, in the State of Iowa.

"That said defendant was at said time and is now a corporation existing under and by virtue of the laws of the State of Illinois, and that it was and is the duty of said defendant to carry from and to all stations upon its line of railway all freight tendered it for shipment.

"That upon May 20, 1886, the plaintiffs offered to said defendant for shipment over its line of railway, and directed to themselves at Marshalltown, Iowa, five thousand barrels of beer, which they had procured in the City of Chicago, to be shipped from said city to the City of Marshalltown, in the State of Iowa, which is a station lying and being on said defendant's line of railroad between said Cities of Chicago and Council Bluffs, but the defendant then and there refused to receive said beer, or any part thereof, for shipment, to the damage of the plaintiffs of ten thousand dollars, and therefore they bring their suit, etc.

"And for that the plaintiffs, neither of whom is a hotel keeper, a keeper of a saloon, eating house, grocery, or confectionery, on the 7th day of July, 1884, and upon several occasions thereafter, presented to the board of supervisors of Marshall County, Iowa, a certificate signed by a majority of the legal electors of Marshalltown, Marshall County, Iowa, which stated that said Fred. W. Bowman is a citizen of said county; that both of said plaintiffs possess a good moral character, and that they (said electors) believe said plaintiffs to be proper persons, and each of them to be a proper person, to buy and sell intoxicating liquors for the purposes named in section 1526 of the Iowa Code; that at said time and upon several occasions thereafter they and each of them, the said plaintiffs, filed a bond in the sum of three thousand dollars with two sureties, which bond was approved by the auditor of said county, as is provided by section 1528 of the Code of Iowa; that thereupon said board of supervisors refused to grant such permission to either of said plaintiffs, or to them jointly.

"And for that whereas the defendant, on May 20, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railroad and was a common carrier of goods and chattels thereon for hire, to wit, from the City of Chicago, in the State of Illinois, to the City of Council Bluffs, in the State of Iowa.

"That said defendant is a corporation existing under and by virtue of the laws of the State of Illinois; that it was the duty of the said defendant to carry from and to all stations upon its line of railway all freight that might be intrusted to it, and that it was the duty of said defendant to transport from said City of Chicago to said City of Marshalltown the five thousand barrels of beer hereinbefore and hereinafter mentioned, which plaintiffs requested it so to transport; that in the commencement of May, 1886, the plaintiffs purchased, at the City of Chicago, five thousand barrels of beer, at $6.50 per barrel, which beer they intended to send to Marshalltown, Iowa, at which place and vicinity they could have sold said beer at eight dollars per barrel, as the defendant was then and there informed; that on May 20, 1886, said plaintiffs offered for shipment to said defendant Railway Company said five thousand barrels of beer, directed to said plaintiffs, at the City of Marshalltown, in

the State of Iowa, and requested said defendant to ship said beer over its road, with which request the defendant refused to comply, and declined to ship or receive said beer or any part thereof for shipment as aforesaid, the said defendant, by its duly authorized agent, then and there stating that the said defendant Company declined to receive said goods for shipment and would continue to decline to receive said goods or any goods of like character for shipment into the State of Iowa; that on said day, to wit, May 20, 1886, and for a long time theretofore and since, the plaintiffs were unable to purchase beer in the State of Iowa; that said plaintiffs, at said time, could procure no other means of transportation for said beer than said defendant, and that, by reason of the defendant's refusal to transport said beer, plaintiffs were compelled to sell said beer in the City of Chicago at $6.50 per barrel.

"That by reason of said refusal of said defendant to ship said beer plaintiffs have been damaged in the sum of ten thousand dollars, and therefore they bring their suit," etc.

To this declaration the defendant filed the following plea:

"Now comes the said defendant, by W. C. Goudy, its attorney, and defends the wrong and injury, when, etc., and says *actio non*, etc., because it says that the beer in said five thousand barrels in the plaintiffs' declaration and in each count thereof mentioned was, at the several times in said declaration mentioned, and still is, intoxicating liquor, within the meaning of the Statute of Iowa hereinafter set forth; that the City of Marshalltown in said declaration mentioned is within the limits of the State of Iowa; that the said City of Chicago in the said declaration mentioned is in the State of Illinois; that the said beer in said declaration mentioned was offered to this defendant to be transported from the State of Illinois to the State of Iowa.

"That heretofore, to wit, on the 5th day of April, A. D. 1886, the General Assembly of the State of Iowa passed an Act entitled 'An Act Amendatory of Chapter 143 of the Acts of the Twentieth General Assembly Relating to Intoxicating Liquors and Providing for the More Effectual Suppression of the Illegal Sale and Transportation of Intoxicating Liquors and Abatement of Nuisances,' which Act is chapter 66 of the laws of Iowa, passed at the Twenty-First General Assembly of said State, and which is printed and published in the laws of Iowa for the year 1886, at page—; to which Act this defendant hereby refers and makes the same a part of this plea.

"That in and by the tenth section of said Act it was and is provided as follows, to wit:

" 'That section 1558 of the Code, as amended and substituted by chapter 143 of the Acts of the Twentieth General Assembly, be, and the same is hereby, repealed, and the following enacted in lieu thereof:

" 'Sec. 1558. If any express company, railway company, or any agent or person in the employ of any express company or railway company, or if any common carrier or any person in the employ of any common carrier, or any person, knowingly bring within this State for any person or persons or corporation, or shall knowingly transport or convey between points or from one place to another in this State for any other person or persons or corporations, any intoxicating liquors without first having been furnished a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation or person so offending, and each of them, and any agent of such company, corporation or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense, and pay costs of prosecution; and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete, and shall be held to have been committed in any county of the State through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this State to issue the certificate herein contemplated to any person having such permit; and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires, as shown by the county records.'

"And the defendant avers that at the several times mentioned in said declaration, and each of them, the aforesaid section was the law of the State of Iowa in full force and wholly unrepealed, and that the said plaintiffs did not at any time furnish this defendant with a certificate from and under the seal of the county auditor of the County of Marshall, the same being the county in which said City of Marshalltown is located, and the county to which said beer was offered to be transported, certifying that the person for or to whom the said beer was to be transported was authorized to sell intoxicating liquors in said County of Marshall; nor was this defendant furnished with any such certificate by any person whatsoever.

"And the defendant avers that it could not receive said beer for transportation in the manner named and specified in the plaintiffs' declaration without violating the law of the State of Iowa above specified, and without subjecting itself to the penalties provided in said Act, and that this defendant assigned at the time the said beer was offered to it for transportation as aforesaid, as a reason why it could not receive the same, the aforesaid Statute of Iowa, which prohibited this defendant from receiving said beer to be transported into the State of Iowa or from transporting the said beer into the State of Iowa.

"And this the said defendant is ready to verify. Wherefore it prays judgment," etc.

To this plea the plaintiffs filed a general demurrer, and for cause of demurrer assigned that the Statute of Iowa referred to and set out in the plea was unconstitutional and void. The demurrer was overruled, and judgment

entered thereon against the plaintiffs, to reverse which this writ of error is prosecuted.

Messrs. **Louis J. Blum** and **Edgar C. Blum**, for plaintiffs in error:

The power conferred by the Iowa Act is vested exclusively in Congress. The States are precluded from the regulation of commerce of a national or an interstate character.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat, 1, (6: 23); *N. Y.* v. *Miln*, 36 U. S. 11 Pet. 102, (9: 648); *Groves* v. *Slaughter*, 40 U. S. 15 Pet. 511, (10: 823); *Passenger Cases*, 48 U. S. 7 How. 319, (12: 717); *Cooley* v. *Port Wardens*, 53 U. S. 12 How. 319, (13: 1004); *Brown* v. *Md.* 25 U. S. 12 Wheat. 438, 446, (6: 685, 688); *Crandall* v. *Nev.* 78 U. S. 6 Wall. 35–49, (18: 745–749); *State Freight Tax*, 82 U. S. 15 Wall. 232, (21: 146); *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560, (21: 710); *Welton* v. *Mo.* 91 U. S. 282, (23: 350); *Henderson* v. *Mayor of N. Y.* 92 U. S. 259, (23: 543); *Chy Lung* v. *Freeman*, 92 U. S. 275, (23: 550); *Sherlock* v. *Alling*, 93 U. S. 99, (23: 819); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 469, (24: 529); *Guy* v. *Baltimore*, 100 U. S. 434, (25: 743); *Mobile County* v. *Kimball*, 102 U. S. 697, (26: 239); *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, (26: 1067); *Moran* v. *N. O.* 112 U. S. 69, (28: 653); *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196, (29: 158); *Brown* v. *Houston*, 114 U. S. 632, (29: 260).

Section 5258, U. S. R. S., expressly authorizes defendant to ship the beer termed *freight* in that section.

One's will may be expressed either by action or inaction. The inaction of Congress is a declaration of its intention that commerce in commodities unrestricted shall remain free and unimpeded.

Mobile Co. v. *Kimball*, *supra*.

The power sought to be exercised by the Iowa Legislature in this behalf is not within the scope of the police power of the States.

Henderson v. *Mayor of N. Y. supra*.

Liquor is an article of commerce.

Monty v. *Arneson*, 25 Iowa, 385.

The intent of the Legislature, in enacting said law, was, like the effect of the law, to regulate commerce among the States.

Messrs. **W. C. Goudy, Jas. E. Munroe** and **A. J. Baker**, for defendant in error:

The States possess the sole power to adopt and enforce police regulations.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 203–205, 235, (6: 71, 72, 79); *License Cases*, 46 U. S. 5 How. 504, 589, (12: 256, 294); *Mayor of N. Y.* v. *Miln*, 37 U. S. 11 Pet. 102, (9: 648); *State Tax of Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 293, (21: 164, 167); *Sherlock* v. *Alling*, 93 U. S. 99, (23: 819).

The police power of the States extends to the protection of the lives, health and property of its citizens, and to the preservation of good order and the public morals.

Boston Beer Co. v. *Mass.* 97 U. S. 25 (24: 989); *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191; *Boyd* v. *Alabama*, 94 U. S. 645, 650, (24: 302, 304); *Stone* v. *Miss.* 101 U. S. 814, (25: 1079).

State laws prohibiting the manufacture and sale of intoxicating liquors are valid police regulations.

Bartemeyer v. *Iowa*, 85 U. S. 18 Wall. 129, (21: 929); *Com.* v. *Intoxicating Liquors*, 115 Mass. 153; *People* v. *Hawley*, 3 Gibbs (Mich.), 330; *Lincoln* v. *Smith*, 27 Vt. 328; *Santo* v. *State*, 2 Clarke (Iowa), 165; *Littleton* v. *Fritz*, 65 Iowa, 488; *Preston* v. *Drew*, 33 Maine, 559; *State* v. *Paul*, 5 R. I. 185; *Perdue* v. *Ellis*, 18 Ga. 586; *Austin* v. *State*, 10 Mo. 591; *Metropolitan Excise Board* v. *Barrie*, 34 N. Y. 657; *Goddard* v. *Jacksonville*, 15 Ill. 588; Cooley, Const. Lim. 5th ed. 718–721.

The police power of the State may be exercised by refusing the admission into its territory of articles infected with disease, or that may corrupt the morals or endanger the health or lives of its citizens.

Passenger Cases, 48 U. S. 7 How. 400–410, 415, 457, (12: 751–755, 757, 775); *License Cases*, 46 U. S. 5 How. 589, 592, 628, 631, 632, (12: 294, 296, 312, 314); *Gilman* v. *Phila.* 70 U. S. 3 Wall. 730, 731, (18: 101); *Ex parte Ah Fook*, 49 Cal. 403; *Re Ah Fong*, 3 Sawy. 144; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 471, (24: 530).

The laws of Iowa make no discrimination between the productions of the State of Iowa or the property of its people and the productions of other States or the property of people of other States.

Welton v. *Mo.* 91 U. S. 275, (23: 347); *Austin* v. *State*, 10 Mo. 591.

Mr. **A. J. Baker**, *Atty-Gen. of Iowa*, for defendant in error:

The several States have the sole power to enact police regulations.

Wiggins Ferry Co. v. *East St. Louis*, 107 U. S. 374, (27: 423); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, (6: 23); *Mayor of N. Y.* v. *Miln*, 36 U. S. 11 Pet. 102, (9: 648); *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479, (21: 470); *Sherlock* v. *Alling*, 93 U. S. 99, (23: 819).

The police powers comprehend all those general powers of internal regulation necessary to secure peace, good order, health, comfort, morals and quiet of all persons, and the protection of all property in the State. Congress cannot legislate on the internal police of a State, the power of a State over its police regulations being supreme.

N. O. Water Works Co. v. *St. Tammany Water Works Co.* 14 Fed. Rep. 202; *Ex parte Shrader*, 33 Cal. 279; *Phila. W. & B. R. Co.* v. *Bowers*, 4 Houst. 506; *Munn* v. *Ill.* 94 U. S. 113, (24: 77); *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37; *Davis* v. *Central R. & B. Co.* 17 Ga. 328; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129, (21: 929).

The Statute of Nevada, imposing a tax upon merchandise brought into the State, was held constitutional.

Re Rudolph, 2 Fed. Rep. 66.

A tax imposed on sales of merchandise in Alabama was held constitutional.

Woodruff v. *Parham*, 75 U. S. 8 Wall. 140, (19: 887); *Hinson* v. *Lott*, 75 U. S. 8 Wall. 152, (19: 888).

The law of New York, requiring a report as to passengers brought into the State, is a police regulation.

N. Y. v. *Miln*, 36 U. S. 11 Pet. 102, (9: 648.)

Statutes like the Statute of Iowa now under consideration are police regulations, established by the Legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances, and are constitutional.

Cooley, Const. Lim. 581; *Com.* v. *Kendall*, 12 Cush. 414; *Com.* v. *Clapp*, 5 Gray, 97; *Com.* v. *Howe*, 13 Gray, 26; *Santo* v. *State*, 2 Iowa, 202; *Our House* v. *State*, 4 Greene (Iowa) 172; *Zum-*

hoff v. *State*, *Id.* 526; *State* v. *Donahey*, 8 Iowa, 396; *State* v. *Wheeler*, 25 Conn. 290; *Reynolds* v. *Geary*, 26 Conn. 179; *Oviatt* v. *Pond*, 29 Conn. 479; *People* v. *Gallagher*, 4 Mich. 244; *Gill* v. *Parker*, 31 Vt. 610; *Meehmeier* v. *State*, 11 Ind. 482; *Vanderbilt* v. *Adams*, 7 Cow. 351.

A state law prohibiting the manufacture and sale of intoxicating liquor is not repugnant to any clause of the Constitution of the United States.

Boston Beer Co. v. *Mass.* 97 U. S. 33, (24:992); *Foster* v. *Kan.* 112 U. S. 205, (28: 680); *Littleton* v. *Fritz*, 65 Iowa, 488.

The Legislature cannot part with any of the police powers of the State.

Farmers L. & T. Co. v. *Stone*, 20 Fed. Rep. 270; *Allerton* v. *Chicago*, 6 Fed. Rep. 555; *Re Wong Yung Quy*, 2 Fed. Rep. 624.

States may exclude pestilence either to the body or mind.

Holmes v. *Jennison*, 39 U. S. 14 Pet. 568, (10: 593); *Gibbons* v. *Ogden*, and *Mayor of N. Y.* v. *Miln*, *supra*.

Mr. Justice **Matthews** delivered the opinion of the court:

It is not denied that the declaration sets out a good cause of action. It alleges that the defendant was possessed of and operated a certain railway, by means of which it became and was a common carrier of goods and chattels thereon for hire, from the City of Chicago, in the State of Illinois, to the City of Council Bluffs, in the State of Iowa, and that, as such, it was its duty to carry from and to all stations upon its line of railway all goods and merchandise that might be entrusted to it for that purpose. This general duty was imposed upon it by the common law as adopted and prevailing in the States of Illinois and Iowa. The single question, therefore, presented upon the record, is whether the statute of the State of Iowa, set out in the plea, constitutes a defense to the action.

The section of the statute referred to, being section 1553 of the Iowa Code as amended by the Act of April 5, 1886, forbids any common carrier to bring within the State of Iowa, for any person or persons or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell intoxicating liquors in such county.

This statutory provision does not stand alone, and must be considered with reference to the system of legislation of which it forms a part. The Act of April 5, 1886, in which it is contained, relates to the sale of intoxicating liquors within the State of Iowa, and is amendatory of chapter 143 of the Acts of the Twentieth General Assembly of that State "relating to intoxicating liquors and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances." The original section 1553 of the Iowa Code contains a similar provision in respect to common carriers. By section 1523 of the Code, the manufacture and sale of intoxicating liquors, except as thereinafter provided, is made unlawful; and the keeping of intoxicating liquor with intent to sell the same within the State, contrary to the provisions of the Act, is prohibited; and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared to be a nuisance, to be forfeited and dealt with as thereinafter provided. Section 1524 excepts from the operation of the law sales by the importer thereof of foreign intoxicating liquor, imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws; provided that the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities of not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only. The law also permits the manufacture, in the State, of liquors for the purpose of being sold, according to the provisions of the statute, to be used for mechanical, medicinal, culinary or sacramental purposes; and for these purposes only any citizen of the State, except hotel keepers, keepers of saloons, eating houses, grocery keepers, and confectioners, is permitted within the county of his residence to buy and sell intoxicating liquors, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted. It also declares the building or erection of whatever kind, or the ground itself in or upon which intoxicating liquor is manufactured or sold, or kept with intent to sell, contrary to law, to be a nuisance, and that it may be abated as such. The original provisions of the Code (section 1555) excluded from the definition of intoxicating liquors, beer, cider from apples, and wine from grapes, currants and other fruits grown in the State; but by an amendment that section was made to include alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever. It thus appears that the provisions of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other State for delivery at a place within the State of Iowa, is intended to more effectually carry out the general policy of the law of that State with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the State as a nuisance. It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors.

We have had recent occasion to consider state legislation of this character in its relation to the Constitution of the United States. In the case of *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205], it was said: "That legislation by a

State prohibiting the manufacture, within her limits, of intoxicating liquors, to be sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court rendered before and since the adoption of the Fourteenth Amendment. * * * These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and in so doing to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the General Government or violate rights secured by the Constitution of the United States." In *License Cases*, 46 U. S. 5 How. 504 [12: 256], the question was whether certain Statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States by reason of an alleged conflict between them and the power of Congress to regulate commerce with foreign countries and among the several States. The Statutes of Massachusetts and of Rhode Island considered in those cases had reference to the sale within those States respectively of intoxicating liquor imported from foreign countries, but not sold or offered for sale within the State by the importer in original packages. The Statute of New Hampshire, however, applied to intoxicating liquor imported from another State; and the decision in that case upheld its validity in reference to the disposition by sale or otherwise of the intoxicating liquor after it had been brought into the State. That judgment, therefore, closely approached the question presented in this case. The Justices all concurred in the result, but there was not a majority which agreed upon any specific ground for the conclusion; and it is necessary to compare the several opinions which were pronounced in order to extract the propositions necessarily embraced in the judgment. *Chief Justice* Taney was of the opinion that Congress had clearly the power to regulate such importation and sale under the grant of power to regulate commerce among the several States; "Yet, as Congress has made no regulations on the subject," he said, "the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory; and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue". *Mr. Justice* Catron and *Mr. Justice* Nelson agreed with the Chief Justice that the Statute of New Hampshire in question was a regulation of commerce, but lawful, because not repugnant to any actual exercise of the commercial power by Congress. *Mr. Justice* McLean seemed to think that the power of Congress ended with the importation, and that the sale of the article after it reached its destination was within the exclusive control of the State. He said: "If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. * * * But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license." *Mr. Justice* Daniel denied that the right of importation included the right to sell within the State, contrary to its laws. He impliedly admitted the exclusive power of Congress to regulate importation, and maintained, as equally exclusive, the right of the State to regulate the matter of sale. *Mr. Justice* Woodbury concurred in the same distinction. He said, p. 619 [308]: "It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without a license is another and entirely different." The first he thought was within the control of Congress, the latter within the exclusive jurisdiction of the State. He said: "The subject of buying and selling within a State, is one as exclusively belonging to the power of the State over its internal trade as that to regulate foreign commerce is with the General Government under the broadest construction of that power. * * * The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For even under a prohibition to sell, a person could import, as he often does, for his own consumption, and that of his family and plantations; and also, if a merchant extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State or abroad." He also said, p. 625 [311]: "But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, until they have entered the State, and become component parts of its property. Then it has by the Constitution exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce." *Mr. Justice* Grier concurred mainly in the opinion delivered by *Mr. Justice* McLean, and did not consider that the question of the exclusiveness of the power of Congress to regulate commerce was necessarily connected with the decision of the point that the States had a right to prohibit the sale and consumption of an article of commerce within their limits, which they believed to be pernicious in its effects, and the cause of pauperism, disease, and crime.

From a review of all the opinions the following conclusions are to be deduced as the result of the judgments in those cases:

1. All the Justices concurred in the proposition that the statutes in question were not made void by the mere existence of the power to regulate commerce with foreign Nations and among the States delegated to Congress by the Constitution.

2. They all concurred in the proposition that there was no legislation by Congress in pursuance of that power with which these statutes were in conflict.

3. Some, including the Chief Justice, held that the matter of the importation and sale of articles of commerce was subject to the exclusive regulation of Congress, whenever it chose to exert its power, and that any statute of the State on the same subject in conflict with such positive provisions of law enacted by Congress would be void.

4. Others maintained the view that the power of Congress to regulate commerce did not extend to or include the subject of the sale of such articles of commerce after they had been introduced into a State, but that when the act of importation ended, by a delivery to the consignee, the exclusive power over the subject belonged to the States as a part of their police power.

From this analysis it is apparent that the question presented in this case was not decided in the *License Cases, supra*. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned; and the reasoning which justified the right to prohibit sales admitted, by implication, the right to introduce intoxicating liquor, as merchandise, from foreign countries, or from other States of the Union, free from the control of the several States, and subject to the exclusive power of Congress over commerce.

It cannot be doubted that the Law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the States. "Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign Nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign Nations or among the States. * * * Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted." *Case of the State Freight Tax*, 82 U. S. 15 Wall. 232, 275 [21: 146, 161], per *Mr. Justice* Strong. It was, therefore, decided in that case that a tax upon freight transported from State to State was a regulation of interstate transportation, and for that reason a regulation of commerce among the States. And this conclusion was reached notwithstanding the fact that Congress had not legislated on the subject, and notwithstanding the inference sought to be drawn from the fact, that it was thereby left open to the legislation of the several States. On that point it was said by *Mr. Justice* Strong, speaking for the court, as follows, p. 279 [163]: "Cases that have sustained state laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature not strictly of commercial regulations. The subjects were such as in *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 [18: 96], it was said 'can be best regulated by rules and provisions suggested by the varying circumstances of different localities and limited in their operation to such localities respectively.' However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admitting of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley* v. *Port Wardens*, 53 U. S. 12 How. 299 [13: 996]; *Crandall* v. *Nev.* 73 U. S. 6 Wall. 42 [18: 746]. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may; and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from eastern markets, for though it might bear the imposition of a single tax, it would be crushed under a load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal Government."

The distinction between the cases in which Congress has exerted its power over commerce, and those in which it has abstained from its exercise, as bearing upon state legislation touching the subject was first plainly pointed out by *Mr. Justice* Curtis in the case of *Cooley* v. *Port Wardens*, 53 U. S. 12 How. 299, 318, [13: 996, 1004], and applies to commerce with foreign Nations as well as to commerce among the States. In that case, speaking of commerce with foreign Nations, he said, p. 319 [1005]: "Now, the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation." It was, therefore, held in that case that the laws of the several States concerning pilotage, although in their nature regulations of foreign commerce, were, in the absence of legislation on the same subject by Congress, valid exercises of power. The subject was local and not national, and was likely to be best provided for, not by one system or

plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits; and to this it may be added that it was a subject imperatively demanding positive regulation. The absence of legislation on the subject, therefore, by Congress, was evidence of its opinion that the matter might be best regulated by local authority, and proof of its intention that local regulations might be made.

It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign Nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other Nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the Nation. The organization of our state and federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the Government of the United States and its laws and treaties. *Henderson* v. *Mayor of N. Y.* 92 U. S. 259, 273 [23: 543, 549].

The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign Nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet in respect to commerce among the States, it may be for the reason already assigned that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign Nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective States.

We have seen that in the case of the *State Freight Tax*, 82 U. S. 15 Wall. 282 [21: 146], a tax imposed by one State upon freight transported to or from another State was held to be void as a regulation of commerce among the States, on the ground that the transportation of passengers or merchandise through a State, or from one State to another, was in its nature national, so that it should be subjected to one uniform system or plan of regulation under the control of one regulating power. In that case the tax was not imposed for the purpose of regulating interstate commerce, but in order to raise a revenue, and would have been a legitimate exercise of an admitted power of the State if it had not been exerted so as to operate as a regulation of interstate commerce. Any other regulation of interstate commerce, applied as the tax was in that case, would fall equally within the rule of its decision. If the State has not power to tax freight and passengers passing through it, or to or from it, from or into another State, much less would it have the power directly to regulate such transportation, or to forbid it altogether. If in the present case the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States and repugnant to the Constitution of the United States. In point of fact, however, it applies only to one class of articles of a particular kind, and prohibits their introduction into the State upon special grounds. It remains for us to consider whether those grounds are sufficient to justify it as an exception from the rule which would govern if they did not exist.

It may be material also to state in this connection that Congress had legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction on which the present suit is founded. Section 5258 of the Revised Statutes provides that "Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." In the case of *Railroad Company* v. *Richmond*, 86 U. S. 19 Wall. 584, [22: 173], this section, then constituting a part of the Act of Congress of June 15, 1866, was considered. Referring to this Act and the Act of July 25, 1866, authorizing the construction of bridges over the Mississippi River, the court says: "These Acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi; and they were intended to reach trammels interposed by state enactments or by existing laws of Congress. * * * The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation."

Congress had also legislated on the subject of the transportation of passengers and merchandise in chapter 6, title 48 of the Revised

Statutes; sections 4252 to 4289, inclusive, having reference, however, mainly to transportation in vessels by water. But sections 4278 and 4279 relate also to the transportation of nitro-glycerine and other similar explosive substances by land or water, and either as a matter of commerce with foreign countries or among the several States. Section 4280 provides that "The two preceding sections shall not be so construed as to prevent any State, Territory, district, city or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein."

So far as these regulations made by Congress extend they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress. On this point the language of this court in the case of *Mobile County* v. *Kimball*, 102 U. S. 691, 697 [26: 238, 239], is applicable. Repeating and expanding the idea expressed in the opinion in the case of *Cooley* v. *Port Wardens*, 53 U. S. 12 How. 299 [13: 996], this court said: "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. In the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation, shall be free. There would, otherwise, be no security against conflicting regulations of different States, each discriminating in favor of its own products and against the products of citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign Nations and among the States was to insure uniformity of regulation against conflicting and discriminating state legislation." Also 102 U. S. 702 [26: 241]: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible."

The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the State of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that State, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other State into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extraterritorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall* v. *DeCuir*, 95 U. S. 485, 488 [24: 547, 548], is exactly in point. It was there said: "But we think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship.

Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been vested with the exclusive legislative power of determining what such regulations shall be."

It is impossible to justify this Statute of Iowa by classifying it as an inspection law. The right of the States to pass inspection laws is expressly recognized in article I, § 10, of the Constitution, in the clause declaring that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. * * * And all such laws shall be subject to the revision and control of the Congress." The nature and character of the inspection laws of the States, contemplated by this provision of the Constitution, were very fully exhibited in the case of *Turner* v. *Maryland*, 107 U. S. 38 [27:370]. "The object of inspection laws," said *Chief Justice* Marshall in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 203 [6: 23, 71], "is to improve the quality of articles produced by the labor of a country; to fit them for exportation or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose." They are confined to such particulars as, in the estimation of the Legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves. As was said in *Turner* v. *Maryland*, 107 U. S. 38, 55 [27: 370, 376]. "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters." It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.

For similar reasons the Statute of Iowa under consideration cannot be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction into the State of disease, contagious, infectious or otherwise. Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. Upon this point, the observations of *Mr. Justice* Catron in *the License Cases*, 46 U. S. 5 How. 504, 599 [12: 256, 299] are very much to the point. Speaking of the police power, as reserved to the States, and its relation to the power granted to Congress over commerce, he said: "The assumption is that the police power was not touched by the Constitution, but left to the States, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this: whether the prohibited article belongs to, and is subject to be regulated as a part of, foreign commerce, or of commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or in other words is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *Maryland*,

and *New York* v. *Miln*. What, then, is the assumption of the state court? · Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would only be another step to regulate real or supposed extravagance in food and clothing."

This question was considered in the case of *Railroad Company* v. *Husen*, 95 U. S. 465 [24: 527], in which this court declared an Act of the Legislature of Missouri, which prohibited driving or conveying any Texas, Mexican or Indian cattle into the State, between the first day of March and the first day of November in each year, to be in conflict with the constitutional provision investing Congress with power to regulate commerce among the several States, holding that such a statute was more than a quarantine regulation, and not a legitimate exercise of the police power of the State. In that case it was said, p. 472 [530]. "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * * The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. * * * The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The same principles were declared in *Henderson* v. *Mayor of New York*, 92 U. S. 259 [23: 543], and *Chy Lung* v. *Freeman*, 92 U. S. 275 [23: 550]. In the latter case, speaking of the right of the State to protect itself from the introduction of paupers and convicted criminals from abroad, the court said: "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." "It may also be admitted," as was said in the case of *Railroad Company* v. *Husen*, 95 U. S. 465, 471 [24: 527, 530], "that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases*, 48 U. S. 7 How. 283 [12: 702], by *Mr. Justice* Grier, in the sacred law of self-defense. Vide, 3 Sawy. 144. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self defensive. But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to congress by the Federal Constitution. It cannot invade the domain of the National Government. * * * Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution."

It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory of all persons, things, and transactions of strictly internal concern. For the

purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be.

The Statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the State from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States.

Can it be supposed that by omitting any express declarations on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States. "It cannot be too strongly insisted upon," said this court in *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 572 [30: 244, 249], "that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook* v. *Pa.* 97 U. S. 566, 574 [24: 1015, 1018]; *Brown* v. *Md.* 25 U. S. 12 Wheat. 419, 446 [6: 678, 688]. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State, within whose limits a part of the transportation must be done, could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

In *Brown* v. *Houston*, 114 U. S. 622, 630 [29: 257, 260], it was declared that the power of Congress over commerce among the States "is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent; and, where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this court."

The present case is concluded, we think, by the judgment of this court in *Walling* v. *Michigan*, 116 U. S. 446 [29: 691]. In that case an Act of the Legislature of the State of Michigan, which imposed a tax upon persons who, not residing or having their principal place of business within the State, engaged there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but did not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State, was declared to be void on the ground that it was a regulation in restraint of commerce repugnant to the Constitution of the United States. In that case it was said, p. 459 [695]: "It is suggested by the learned judge, who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the Act of 1875 is an exercise, by the Legislature of Michigan, of the police power of the State for the discouragement of the use of intoxicating liquors, and the preser-

vation of the health and morals of the people. This would be a perfect justification of the Act, if it did not discriminate against the citizens and products of other States as a matter of commerce between the States, and thus usurp one of the prerogatives of the National Legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby."

It would be error to lay any stress on the fact that the statute passed upon in that case made a discrimination between citizens and products of other States in favor of those of the State of Michigan, notwithstanding the intimation on that point in the foregoing extract from the opinion. This appears plainly from what was decided in the case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489 [30: 694]. It was there said, p. 497 [697]: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of the *State Freight Tax*, 82 U. S. 15 Wall. 232 [21: 146.]"

In answer to another suggestion in the opinion of the Supreme Court of Michigan, that the regulation contained in the Act did not amount to a prohibition, this court said: "We are unable to adopt the views of that learned tribunal as here expressed. It is the power to regulate commerce among the several States which the Constitution in terms confers upon Congress; and this power, as we have seen, is exclusive in cases like the present, where the subject of regulation is one that admits and requires uniformity, and where any regulation affects the freedom of traffic among the States."

The relation of the police powers of the State to the powers granted to Congress by the Constitution over foreign and interstate commerce, was stated by this court in the opinion in the case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493 [30: 694, 696], as follows: "It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons, and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State mingled with and forming part of the great mass of property therein. But in making such internal regulations the State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad or from another State, and not yet become a part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject. * * * In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon this subject."

The section of the Statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other state regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

It may be said, however, that the right of the State to restrict or prohibit sales of intoxi-

cating liquor within its limits, conceded to exist as a part of its police power implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence; for if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.

It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 25 U. S. 12 Wheat, 419 [6:678], as to foreign commerce, with the express statement, in the opinion of *Chief Justice* Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State.

For these reasons, we are constrained to pronounce against the validity of the section of the Statute of Iowa involved in this case.

The judgment of the Circuit Court of the United States for the Northern District of Illinois is therefore reversed, and the cause remanded, with instructions to sustain the demurrer to the plea, and to take further proceedings therein in conformity with this opinion.

Mr. Justice **Lamar** was not present at the argument of this case and took no part in its decision.

Mr. Justice **Field** concurring:

I concur in the judgment of the court in this case, and in the greater part of the opinion upon which it is founded. The opinion clearly shows, as I think, that the law of Iowa prohibiting the importation into that State of intoxicating liquors is an encroachment on the power of Congress over interstate commerce. That commerce is a subject of vast extent. It embraces intercourse between citizens of different States for purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities. The power to regulate it, which is vested in Congress in the same clause with the power to regulate commerce with foreign Nations, is general in its terms. And to regulate this commerce is to prescribe the conditions under which it shall be conducted; that is, how far it shall be free, and how far subject to restrictions. The defendant is a common carrier engaged in the transportation of freight by railway, not only between places in the State of Illinois, but also between places in different States. In the latter business it is, therefore, engaged in interstate commerce. Whatever is an article of commerce it may carry, subject to such regulations as may be necessary for the convenience and safety of the community through which its cars pass, and to insure safety in the carriage of the freight. The law of Iowa prescribing the conditions upon which certain liquors may be imported into that State is, therefore, a regulation of interstate commerce. Such regulation, where the subject, like the transportation of goods, is national in its character, can be made only by Congress, the power which can act for the whole country. Action by the States upon such commerce is not, therefore, permissible. *Mobile County* v. *Kimball*, 102 U. S. 691, 697 [26: 238, 239].

What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any State. The State possesses the power to prescribe all such regulations with respect to the possession, use, and sale of property within its limits as may be necessary to protect the health, lives, and morals of its people; and that power may be applied to all kinds of property, even that which in its nature is harmless. But the power of regulation for that purpose is one thing, and the power to exclude an article from commerce by a declaration that it shall not thenceforth be the subject of use and sale is another and very different thing. If the State could thus take an article from commerce, its power over interstate commerce would be superior to that of Congress, where the Constitution has vested it. The language of *Mr. Justice* Catron on this subject in *The License Cases*, quoted in the opinion of the court, is instructive. 46 U.S. 5 Howard, 600 [12: 299]. Speaking of the assumption by the State of power to declare what shall and what shall not be deemed an article of commerce within its limits, and thus to permit the sale of one and prohibit the sale of the other, without reference to congressional power of regulation, the learned justice said: "The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and

asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

In *Mugler* v. *Kansas*, recently decided, 123 U. S. 623 [31:205], this court held a statute of that State to be valid which prohibited the manufacture and sale within its limits of intoxicating liquors except for medical, scientific, or mechanical purposes, and made a violation of its provisions a misdemeanor punishable by fine or imprisonment. I agreed to so much of the opinion of the court in that case as asserted that there was nothing in the Constitution or laws of the United States which affected the validity of the statute prohibiting the sale of such liquors manufactured in the State, except under proper regulations for the protection of the health and morals of the people. But, at the same time, I stated, without expressing any opinion on the subject, that I was not prepared to say that the State could prohibit the sale of such liquors within its limits under like regulations, if Congress should authorize their importation; observing that the right to import an article of merchandise, recognized as such by the commercial world, whether the right be given by Act of Congress or by treaty with a foreign Nation, would seem necessarily to carry the right to sell the article when imported. Where the importation is authorized from one State to another a similar right of sale of the article imported would seem to follow. The question upon which I was then unwilling to express an opinion is presented in this case, not in a direct way, it is true, but in such a form as, it seems to me, to require consideration.

A Statute of Iowa contains a prohibition, similar to that of the Kansas Statute, upon the manufacture and sale of intoxicating liquors within its limits, with the additional exception of permission to use them for culinary purposes, and to sell foreign liquors imported under a law of Congress, in the original casks or packages in which they are imported. The law under consideration in this case, prohibiting the importation into Iowa of such liquors from other States, without a license for that purpose, was passed to carry out the policy of the State to suppress the sale of such liquors within its limits. And the argument is pressed with much force that if the State cannot prohibit the importation its policy to suppress the sale will be defeated; and if legislation establishing such policy is not in conflict with the Constitution of the United States, this additional measure to carry the legislation into successful operation must be permissible. The argument assumes that the right of importation carries with it the right to sell the article imported, a position hereafter considered.

The reserved powers of the States in the regulation of their internal affairs must be exercised consistently with the exercise of the powers delegated to the United States. If there be a conflict, the powers delegated must prevail, being so much authority taken from the States by the express sanction of their people; for the Constitution itself declares that laws made in pursuance of it shall be the supreme law of the land. But those powers which authorize legislation touching the health, morals, good order, and peace of their people were not delegated, and are so essential to the existence and prosperity of the States that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise.

How can these reserved powers be reconciled with the conceded power of Congress to regulate interstate commerce? As said above, the State cannot exclude an article from commerce, and consequently from importation, simply by declaring that its policy requires such exclusion; and yet its regulations respecting the possession, use, and sale of any article of commerce may be as minute and strict as required by the nature of the article, and the liability of injury from it for the safety, health and morals of its people.

In the opinion of the court it is stated that the effect of the right of importation upon the asserted right, as a consequence thereof, to sell the article imported is not involved in this case, and therefore it is not necessary to express any opinion on the subject. The case, it is true, can be decided, and has been decided, without expressing an opinion on that subject; but with great deference to my associates, I must say that I think its consideration is presented, and to some extent required, to meet the argument that the right of importation, because carrying the right to sell the article imported, is inconsistent with the right of the State to prohibit the sale of the article absolutely, as held in the *Kansas Case*. With respect to most subjects of commerce, regulations may be adopted touching their use and sale when imported, which will afford all the protection and security desired, without going to the extent of absolute prohibition. It is not found difficult, even with the most dangerous articles, to provide such minute and stringent regulations as will guard the public from all harm from them. Arsenic, dynamite powder, and nitro-glycerine are imported into every State under such restrictions as to their transportation and sale as to render it safe to deal in them. There may be greater difficulty in regulating the use and sale of intoxicating liquors; and I admit that whenever the use of an article cannot be regulated and controlled so as to insure the health and safety of society, it may be prohibited and the article destroyed.

That the right of importation carries with it the right to sell the article imported does not appear to me doubtful. Of course I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased it has ceased to be an article of commerce, and it may be destroyed or its use prohibited. To assert that, under the Constitution of the United States, the importation of an article of commerce cannot be prohibited by the States, and yet to hold that when imported its use and sale can be prohibited, is to declare that the right which the Constitution gives is a barren one, to be used only so far as the burden of transportation is concerned, and to be denied so far as any benefits from such transportation are sought. The framers of the Constitution never intended that a right given should not be fully enjoyed. In *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 447, [6: 688], *Chief Justice* Marshall, in delivering the opinion of the court, speaking of the commercial power of Congress, and after observing that it is coextensive with the subject on which it acts, and cannot be stopped at the exterior boundary of a State, but must enter its interior, said: "If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse;—one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence, of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. * * * The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable." And the Chief Justice added: "We suppose the principles laid down in this case to apply equally to importations from a sister State." 449. [689.]

Assuming, therefore, as correct doctrine that the right of importation carries the right to sell the article imported, the decision in the *Kansas Case* may perhaps be reconciled with the one in this case by distinguishing the power of the State over property created within it, and its power over property imported—its power in one case extending, for the protection of the health, morals, and safety of its people, to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the State. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled.

There is great difficulty in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. The same difficulty was experienced in *Brown* v. *Maryland*, in drawing a line between the restriction on the States to lay a duty on imports and their acknowledged power to tax persons and property. In that case the court said that the two, the power and the restriction, though distinguishable when they did not approach each other, might, like the intervening colors between white and black, approach so nearly as to perplex the understanding as colors perplex the vision, in marking the distinction between them; but as the distinction existed, it must be marked as the cases arise. And after observing that it might be premature to state any rule as being universal in its application, the court held as sufficient for that case that when the importer had so acted upon the thing imported, that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and had become subject to the taxing power of the State; but that while remaining the property of the importer, in his warehouse in the original form or package in which it was imported, a tax upon it was plainly a duty on imports.

So in the present case it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the Federal Government ends and the power of the State to restrict further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown* v. *Maryland*, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the State, and not afterwards. And yet it is evident that the value of the importation will be materially affected, if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can himself be restrained from selling the article imported; and yet the power of the State must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises.

In *The License Cases*, reported in 5 Howard, this court held that the States could not only regulate the sales of imported liquors, but could prohibit their sale. The judges differed in their views in some particulars, but the majority were of opinion that the States had authority to legislate upon subjects of interstate commerce until Congress had acted upon them; and as Congress had not acted, the regulation of the States was valid. The doctrine thus declared has been modified since by repeated decisions. The doctrine now firmly established is that where the subject upon which Congress

can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled. *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 53 U. S. 12 How. 299, 319 [13:996, 1004]; *State Freight Tax Cases*, 82 U. S. 15 Wall. 232, 271 [21:146, 160]; *Welton* v. *Missouri*, 91 U. S. 275–282 [23:347–350]; *R.R. Co.* v. *Husen*, 95 U. S. 465, 469 [24:527, 529]; *Mobile County* v. *Kimball*, 102 U. S. 691, 697 [26:238, 239]; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203 [29:158, 161]; *Brown* v. *Houston*, *Id.* 622, 631 [29:257, 260]; *Walling* v. *Michigan*, 116 U. S. 446, 455 [29: 691, 694]; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 [29:785]; *Wabash etc. R. Co.* v. *Illinois*, 118 U. S. 557 [30:244]; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 [30:694].

It is a matter of history that one of the great objects of the formation of the Constitution was to secure uniformity of commercial regulations, and thus put an end to restrictive and hostile discriminations by one State against the products of other States, and against their importation and sale. "It may be doubted," says *Chief Justice* Marshall, "whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which induced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American Government took, and justly took, that strong interest which arose from a full conviction as to its necessity." *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 446 [6:688]. To these views I may add that if the States have the power asserted, to exclude from importation within their limits any articles of commerce because in their judgment the articles may be injurious to their interests or policy, they may prescribe conditions upon which such importation will be admitted, and thus establish a system of duties as hostile to free commerce among the States as any that existed previous to the adoption of the Constitution.

Mr. Justice **Harlan**, dissenting:

Mr. Chief Justice **Waite**, *Mr. Justice* **Gray**, and myself are unable to assent to the opinion and judgment of the court.

The effect of the Statutes of Iowa is to forbid the introduction of intoxicating liquors from other States for sale, except for medicinal, mechanical, culinary, or sacramental purposes. They may be brought in for such purposes, by any person, or carrier, for another person or corporation, if consigned to some one authorized by the laws of Iowa to buy and sell intoxicating liquors. And these statutes permit the sale of foreign intoxicating liquors, imported under the laws of the United States, provided such sale is by the importer, in the original casks or packages, and in quantities not less than those in which they are required to be imported.

It appears upon the face of the declaration that the plaintiffs—one of whom is a citizen of Iowa—made application to the board of supervisors of Marshall County, in that State, for permission, under the statute, to buy and sell in that county intoxicating liquors for medicinal, culinary, mechanical, and sacramental purposes, and that their application was rejected. They then resorted to the expedient of buying five thousand barrels of beer in Chicago, and tendering them to the Railroad Company for transportation to the same county, without furnishing the certificate required by the laws of Iowa. The refusal of the Company to transport this beer into Iowa, in violation of her laws, is the basis of the present suit. The plaintiffs claim damages upon the ground that they could have sold this beer in that State at a price in advance of what it cost them. As they do not allege that the beer was to be delivered in Iowa to a person authorized by her laws to sell it there, no wrong was done, of which the plaintiffs can complain, unless it be their right, not only to have their beer carried into the State, but to sell it there, in defiance of her laws.

The fundamental question, therefore, is whether Iowa may lawfully restrict the bringing of intoxicating liquors from other States into her limits, by any person or carrier for another person or corporation, except such as are consigned to persons authorized by her laws to buy and sell them for the special purposes indicated. In considering this question, we are not left to conjecture as to the motives prompting the enactment of these statutes; for it is conceded that the prohibition upon common carriers bringing intoxicating liquors from other States, except under the foregoing conditions, was adopted as subservient to the general design of protecting the health and morals and the peace and good order of the people of Iowa against the physical and moral evils resulting from the unrestricted manufacture or sale of intoxicating liquors.

In *Mugler* v. *Kansas*, 123 U. S. 623 [*ante*, 205], it was adjudged that state legislation prohibit-

ing the manufacture of intoxicating liquors, to be sold or bartered for general use as a beverage, did not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States; and that the former decisions to that effect—*License Cases*, 46 U. S. 5 How. 504 [12: 256]; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 [21: 929]; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33 [24: 989, 992]; and *Foster* v. *Kansas*, 112 U. S. 201, 206 [28: 629, 697]—"rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals and safety of their people by regulations that do not interfere with the execution of the powers of the General Government, or violate rights secured by the Constitution. The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 203 [6: 23, 71], reaches everything within the territory of a State not surrendered to the National Government." 123 U. S. 659 [*ante*, 210]. Referring to the suggestion that no government could lawfully prohibit a citizen from manufacturing for his own use, or for export or storage, any article of food or drink, not endangering or affecting the rights of others the court said: "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." 123 U. S. 660, 661 [*ante*, 210].

But it is contended that a statute forbidding the introduction of intoxicating liquors from other States does infringe rights secured by the Constitution of the United States; and that view is sustained by the opinion and judgment in this case. The decision is placed upon the broad ground that intoxicating liquors are merchantable commodities, or known articles of commerce, and that, consequently, the Constitution, by the mere grant to Congress of the power to regulate commerce operates, in the absence of legislation, to establish unrestricted trade, among the States of the Union, in such commodities or articles. To this view we cannot assent. In *Mugler's Case* [*supra*] the court said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country, are, in some degree at least, traceable to this evil." The court also said, that "If, in the judgment of the Legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their view as to what is best and safest for the community, to disregard the legislative determination of that question. * * * Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society, and constitute therefore, a business in which no one may lawfully engage." 123 U. S. 662, 663 [*ante*, 211].

In *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 203, 205 [6: 71, 72], *Chief Justice* Marshall said that "Inspection laws, quarantine laws, and health laws of every description" were component parts of that mass of legislation "not surrendered to the General Government," which "can be most advantageously exercised by the States themselves;" that such laws "are considered as flowing from the acknowledged power of a State to provide for the health of its citizens." To this doctrine the court has steadily adhered. In *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 730 [18: 101], after observing that a state law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of goods imported from a foreign country, is void—*Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 677],—and that a state law which requiring the master of a vessel, engaged in foreign commerce, to pay a certain sum to a state officer on account of each passenger brought from a foreign country, is also void—*Passenger Cases*, 48 U. S. 7 How. 283 [12: 702],—the court said: "But a State, in the exercise of its police power, may forbid spirituous liquor, imported from abroad or from another State, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere for an indefinite period; and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under 'health laws,' and, if it cannot be purged of its poison, may be committed to the flames." In *Sherlock* v. *Alling*, 93 U. S. 99, 103 [23: 819, 820], it was said that "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." In *Hannibal & St. J. Railroad Company* v. *Husen*, 95 U. S. 465, 471 [24: 527, 530], the court adjudged that a Statute of Missouri, prohibiting the introduction into that State of all Texas, Mexican or Indian cattle between May 1 and November 1 of each year, whether diseased or not, and which imposed burdensome conditions upon their transportation through the State,

was void because a regulation of interstate commerce. But it was distinctly declared that the delegation to Congress of the power to regulate commerce with foreign Nations and among the States "was not a surrender of that which may properly be denominated police power," which included, the court said, the power in each State, to adopt "precautionary measures against social evils;" to "prevent the spread of crime or pauperism, or disturbance of the peace;" to "exclude from its limits convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases;" and to exclude "property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases." "All these," it was said, "are in immediate connection with the protection of persons and property against noxious acts of other persons, or such use of property as is injurious to the property of others; they are self defensive." It was only because the Missouri Statute embraced cattle that were free from disease, that it was declared unconstitutional. In *Patterson* v. *Kentucky*, 97 U. S. 501, 505 [24: 1115, 1117], the principle was affirmed that the police power of the States was not surrendered, when authority was conferred upon Congress to regulate commerce with foreign Nations and among the States.

It seems to us that the decision just rendered does not conform to the doctrines of the foregoing cases, and may impair, if it does not destroy the power of a State to protect her people against the injurious consequences that are admitted to flow from the general use of intoxicating liquors. It was said in *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 439, 441 [6: 678, 685, 686]: "There is no difference, in effect, between the power to prohibit the sale of an article and a power to prohibit its introduction into the country. * * * When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." Considering the question in that case, under the power of Congress to regulate commerce, the court said: "Sale is the object of importation, and is an essential ingredient in that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the entire thing, then, as importation. It must be considered as a component part of the power to regulate commerce." p. 447 [688]. Although there was no question in that case as to commerce among the States the court further said: "We suppose the principles laid down in this case to apply equally to importations from a sister State." If therefore, as the court now decides, the Constitution gives the right to transport intoxicating liquors into Iowa from another State, and if that right carries with it, as one of its essential ingredients, authority in the consignee to sell or exchange such articles, after they are so brought in, and while in his possession, in the original packages, it is manifest that the regulation forbidding sales of intoxicating liquors within the State, for other than medicinal, mechanical, culinary or sacramental purposes, and then only under a permit from a board of supervisors, will be of little practical value. In this view, anyone—even a citizen of Iowa—desiring to sell intoxicating liquors in that State, need only arrange to have them delivered to him from some point in another State, in packages of varying sizes, as may suit customers. Or, he may erect his manufacturing establishment, or warehouse, just across the Iowa line, in some State having a different public policy, and thence, with wagons, transport liquors into Iowa, in original packages. If the State arraigns him for a violation of her laws, he may claim—and, under the principles of the present decision, it may become difficult to dispute the claim—that, although such laws were enacted solely to protect the health and morals of the people, and to promote peace and good order among them, and although they are fairly adapted to accomplish those objects, yet the Constitution of the United States, without any action upon the part of Congress, secures to him the right to bring or receive from other States intoxicating liquors in original packages, and to sell them, while held by him in such packages, to all choosing to buy them. Thus, the mere silence of Congress upon the subject of trade among the States in intoxicating liquors is made to operate as a license to persons doing business in one State to jeopard the health, morals and good order of another State, by flooding the latter with intoxicating liquors, against the expressed will of her people.

It is admitted that a State may prevent the introduction, within her limits, of rags or other goods infected with disease, or of cattle or meat or other provisions which, from their condition, are unfit for human use or consumption; because, it is said, such articles are not merchantable or legitimate subjects of trade and commerce. But suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health and the public morals; what authority has Congress or the judiciary to review their judgment upon that subject, and compel them to submit to a condition of things which they regard as destructive of their happiness and the peace and good order of society? If, consistently with the Constitution of the United States, a State can protect her sound cattle by prohibiting altogether the introduction within her limits of diseased cattle, she ought not to be deemed disloyal to that Constitution when she seeks by similar legislation to protect her people and their homes against the introduction of articles which are, in good faith, and not unreasonably, regarded by her citizens as "laden with infection" more dangerous to the public than diseased cattle, or than rags containing the germs of disease.

It is not a satisfactory answer to these suggestions to say that if the State may thus out-

law the manufacture and sale of intoxicating liquors, as a beverage, and exclude them from her limits, she may adopt the same policy with reference to articles that confessedly have no necessary or immediate connection with the health, the morals, or the safety of the community, but are proper subjects of trade the world over. This possible abuse of legislative power was earnestly dwelt upon by the counsel in *Mugler's Case*. The same argument can be, as it often is, made in reference to powers that all concede to be vital to the public safety. But it does not disprove their existence. This court said that the judicial tribunals were not to be misled by mere pretenses, and were under a solemn duty to look at the substance of things whenever it became necessary to inquire whether the Legislature had transcended the limits of its authority; and that "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." 123 U. S. 661 [*ante*, 210]. In view of these principles, the court said it was difficult to perceive any ground for the judiciary to declare that the prohibition by a State of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. *Id.* 662 [210]. In the same case the court sustained, without qualification, the authority of Kansas to declare, not only that places where such liquors were manufactured, sold, bartered or given away, or were kept for sale, barter or delivery, in violation of her statutes, should be deemed common nuisances, but to provide for the forfeiture, without compensation, of the intoxicating liquors found in such places and the property used in maintaining said nuisances.

Now, can it be possible that the framers of the Constitution intended—whether Congress chose or not to act upon the subject—to withhold from a State authority to prevent the introduction into her midst of articles or commodities, the manufacture of which, within her limits, she could prohibit, without impairing the constitutional rights of her own people? If a State may declare a place where intoxicating liquors are sold for use as a beverage to be a common nuisance, subjecting the person maintaining the same to fine and imprisonment, can her people be compelled to submit to the sale of such liquors, when brought there from another State for that purpose? This court has often declared that the most important function of government was to preserve the public health, morals, and safety; that it could not devest itself of that power, nor, by contract, limit its exercise; and that even the constitutional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals, or the safety of the community, as the one or the other may be involved in the execution of such contracts. *Stone* v. *Miss.* 101 U. S. 814, 816 [25:1079]; *Butchers Union Co.* v. *Crescent City Co.* 111 U. S. 746, 751 [28: 585, 587]; *N. O. Gas Co.* v. *La. Light Co.* 115 U. S. 650, 672 [29:516, 524]; *Mugler* v. *Kansas*, 123 U. S. 664 [*ante*, 211]. Does the mere grant of the power to regulate commerce among the States invest individuals of one State with the right, even without the express sanction of Congressional legislation, to introduce among the people of another State articles which, by statute, they have declared to be deleterious to their health and dangerous to their safety? In our opinion these questions should be answered in the negative. It is inconceivable that the well being of any State is at the mercy of the liquor manufacturers of other States.

These views are sustained by *Walling* v. *Michigan*, 116 U. S. 446 [29:691]. It was there held that a Statute of Michigan which imposed a tax upon persons who, not residing or having their principal place of business in that State, engaged there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into Michigan from other States, but which did not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in that State, was a discrimination against the products of other States, and void as a regulation in restraint of commerce. In reference to the suggestion by the state court that the statute was an exercise by the Legislature of the police power for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people, this court said: "This would be a perfect justification of the Act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the National Legislature." The clear implication from this language is that the state law would have been sustained if it had applied the same rule to the products of Michigan which it attempted to apply to the products of other States.

At the argument it was insisted that the contention of the plaintiffs was supported by *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 436 [6: 678, 684], where the question was whether the Legislature of a State could constitutionally require an importer of foreign articles or commodities to take out a license from the State before he should be permitted to sell a bale or package so imported. The indictment in that case charged Brown with having sold one package of foreign "dry goods" without having such a license. The court held the State regulation to be repugnant to that clause of the Constitution declaring that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, as well as to that clause which clothes Congress with power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. Among other things, it said that the right to sell articles imported from foreign countries is connected with the law permitting importation, as an inseparable incident; observing, at the close of the opinion that it supposed the principle laid down to apply equally

to importations from a sister State. It is however, clear from the whole opinion that the court in that observation had reference to commerce in articles having no connection whatever with the health, morals, or safety of the people, and that it had no purpose to withdraw or qualify the explicit declaration, in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 [6: 23], that the health laws of the States were a component part of that mass of legislation, the power to enact which remained with the States, because never surrendered to the General Government. In behalf of Maryland it was insisted that the constitutional prohibition of state imposts or duties upon imports ceased the instant the goods entered the country; otherwise, it was argued, the importer "may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self preservation is denied." To this argument *Chief Justice* Marshall replied: "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly recognize the health laws of a State." This, we understand to have been a distinct readjudication that the police power, so far as it involves the public health, the public morals, or the public safety, remains with the States, and is not overridden by the National Constitution.

In *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 211 [6: 78], it was said by counsel that the Constitution does not confer the right of intercourse between State and State, and that such right has its source in those laws whose authority is acknowledged by civilized man throughout the world. *Chief Justice* Marshall said: "This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it." In the same case he said that this power is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." p. 196 [70]. It may be said, generally, that free commercial intercourse exists among the several States, by force of the Constitution. But as, by the express terms of that instrument, the powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people; and as, by the repeated adjudications of this court, the States have not surrendered, but have reserved, the power to protect by police regulations the health, morals and safety of their people, Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power. Even if Congress, under the power to regulate commerce, had authority to declare what shall or what shall not be subjects of commerce among the States, that power would not fairly imply authority to compel a State to admit within her limits that which, in fact is, or which, upon reasonable grounds, she may declare to be, destructive of the health, morals and peace of her people. The purpose of committing to Congress the regulation of commerce was to insure equality of commercial facilities, by preventing one State from building up her own trade at the expense of sister States. But that purpose is not defeated when a State employs appropriate means to prevent the introduction into her limits of what she lawfully forbids her own people from making. It certainly was not meant to give citizens of other States greater rights in Iowa than Iowa's own people have.

But if this be not a sound interpretation of the Constitution; if intoxicating liquors are entitled to the same protection by the National Government as ordinary merchandise entering into commerce among the States; if Congress, under the power to regulate commerce, may, in its discretion, permit or prohibit commerce among the States in intoxicating liquors; and if, therefore, state police power, as the health, morals and safety of the people may be involved in its proper exercise, can be overborne by national regulations of commerce, the former decisions of this court would seem to show that such laws of the States are valid, even where they affect commercial intercourse among the States, until displaced by federal legislation, or until they come in direct conflict with some Act of Congress. Such was the doctrine announced in *Wilson* v. *Blackbird Creek Marsh Co.* 27 U. S. 2 Pet. 250 [7: 414]. That case involved the validity of an Act of the Legislature of Delaware, authorizing a dam to be built across a navigable stream, in which the tide ebbed and flowed, and in which there was a common and public way in the nature of a highway. The court, speaking by *Chief Justice* Marshall, said: "The Act of Assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it." The counsel having insisted that the statute came in conflict with the power of Congress to regulate commerce with foreign Nations and among the several States, the court said: "If Congress had passed any Act which bore on this case, any Act in execution of the power to regulate commerce, the object of which was to control state legislation over small navigable creeks into which the tide flows, and which abound throughout the Middle and Southern States, we should not feel much difficulty in saying

that a state law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign Nations and among the several States; a power which has not been so exercised as to affect the question." The same principle is announced in many other cases. *Gilman* v. *Phila.* 70 U. S. 3 Wall. 713 [18: 96]; *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [27:442]; *Cardwell* v. *Am. Bridge Co.* 113 U. S. 205 [28: 959]; *Hamilton* v. *Vicksburg R. Co.* 119 U. S. 281 [30: 394]; *Huse* v. *Glover*, 119 U. S. 543 [30: 489.] These were all cases of the erection of bridges and other structures within the limits of States, and under their authority, across public navigable waters of the United States. They were held not to be forbidden by the Constitution, although such structures actually interfered with interstate commerce. In *Gilman* v. *Philadelphia* and *Cardwell* v. *American Bridge Co.* the bridges were without draws, entirely preventing the passage of boats to points, in one case, where the tide ebbed and flowed, and, in both cases, to points where commerce had been previously carried on. In *Hamilton* v. *Vicksburg R. Co.* the court said: "What the form and character of the bridges should be, that is to say, of what height they should be erected, and of what materials constructed, and whether with or without draws, were matters for the regulations of the State, subject only to the paramount authority of Congress to prevent any unnecessary obstruction to the free navigation of the streams. Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation."

But, perhaps, the language of this court—all the judges concurring—which most directly bears upon the question before us is found in *County of Mobile* v. *Kimball*, 102 U. S. 691, 701 [26: 238, 241], reaffirming *Wilson* v. *Blackbird Creek Marsh Company*. It was there said: "In the *License Cases*, 46 U. S. 5 How. 504 [12: 256], which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of Congress in the absence of congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges; but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subject thus considered." This language is peculiarly significant in view of the fact that in one of the *License Cases—Pierce* v. *New Hampshire*, 46 U. S. 5 How. 504, 557, 578 [12: 256, 280, 289]—the question was as to the validity of an Act of that State, under which Pierce was indicted, convicted, and fined, for having sold, without a local town license, a barrel of gin, which he purchased in Boston, transported to Dover, New Hampshire, and there sold in the identical cask in which it was carried to that State from Massachusetts.

In harmony with these principles the court affirmed at the present term, in *Smith* v. *Alabama*, 124 U. S. 465 [*ante*, 508], the validity of a Statute of that State, making it unlawful for a locomotive engineer, even when his train is employed in interstate commerce, to drive or operate any train of cars upon a railroad in that State, used for the transportation of persons, passengers or freight, without first undergoing an examination by, and obtaining a license from, a board of engineers appointed by the Governor of Alabama. If a train of cars passed through that State to New Orleans, the engineer, however well qualified for his station, if not licensed by that local board, was subject to be fined not less than $50 nor more than $500, and sentenced to hard labor for the county, for not more than six months. The court held that this statute "is not, considered in its own nature, a regulation of interstate commerce;" that "It is properly an Act of legislation within the scope of the admitted power reserved to the States to regulate the relative rights and duties of persons, being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property;" and that "So far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and in the particulars on which it touches those transactions at all it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence." Until Congress, by legislation, prescribed the qualification of locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, Alabama, it was adjudged, could fix the qualifications of such engineers, even when running in that State trains employed in interstate commerce.

It would seem that if the Constitution of the United States does not, by its own force, displace or annul a state law, authorizing the construction of bridges or dams across public navigable waters of the United States, thereby wholly preventing the passage of vessels engaged in interstate commerce upon such waters, the same Constitution ought not to be held to annul or displace a law of one of the States, which, by its operation, forbids the bringing within her limits, from other States, articles which that State, in the most solemn manner, has declared to be injurious to the health, morals and safety of her people. The silence of Congress upon the subject of interstate commerce, as affected by the police laws of the States, enacted in good faith to promote the public health, the public morals and the public safety, and to that end prohibiting the manufacture and sale, within their limits, of intoxicating liquors to be used as a beverage, ought to have, at least, as much effect as the silence of Congress in reference to physical obstructions placed, under the authority of a State, in a navigable water of the United States. The reserved power of the States to guard the health, morals and safety of their people is more vital to the existence of society

than their power in respect to trade and commerce having no possible connection with those subjects.

For these reasons we feel constrained to dissent from the opinion and judgment of the court.

IRA T. CLEMENT, *Plff in Err.*,
v.
ELISHA A. PACKER.

(See S. C. Reporter's ed. 309–336.)

Exception, when not sustained—declarations of surveyors—state decisions control real property—error in charge—surveys—original landmarks—later survey—presumption, how rebutted.

1. Where copies of patents offered in evidence are not in the record, and the court is therefore left uninformed as to their contents or as to their materiality, an exception to a refusal to admit them in evidence cannot be sustained.

2. In Pennsylvania, the declarations of deceased surveyors, in cases of boundaries between private estates, are admissible in evidence, where they spoke from personal knowledge.

3. In a question involving the ownership of real property in Pennsylvania, this court will be controlled by Pennsylvania decisions.

4. It is error for the court to give a charge to the jury, the direct tendency of which is to withdraw from their consideration a very considerable amount of pertinent and important testimony.

5. In Pennsylvania, surveys, constituting a block, are not to be treated as separate and individual surveys; nor can each tract be located independently of the rest by its own individual lines or calls or courses and distances; but such surveys are to be located together as a block, or one large tract. All the lines and corners, marked upon any part of the block, belong to each and every tract of which it is composed.

6. When the original landmarks of a survey have disappeared, the original and well established marks, found upon a later survey, made by the same surveyor, about the same time and adjoining the one in dispute, are admissible to aid the jury in ascertaining the exact location of the older survey.

7. After the lapse of twenty-one years from the return of a survey to the land office, the presumption is that the warrant was located as returned by the surveyor.

8. But this presumption is not conclusive and may be rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances.

[No. 148.]

Argued Jan. 23, 24, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment for the plaintiff in an action of ejectment. *Reversed.*

Statement by *Mr. Justice* **Lamar.**

The plaintiff below, Packer, brought an action of ejectment to recover from the defendant below, Clement, 120 acres of land located in Mount Carmel Township, Northumberland County, Pennsylvania. He claimed this 120 acres as part of a tract of land surveyed in October, 1794, under a warrant dated 26th of November, 1793, issued in the name of William Elliott, the title to which was in him, the plaintiff. On the trial he adduced evidence, showing that this William Elliott tract was one of six tracts of a block of surveys—a term which, under the Pennsylvania land system, means a series of surveys made by one surveyor at the same time upon warrants issued upon the same day, owned by the same person, dependent upon each other in succession, calling for each other, and returned to the land office at the same time, and so located on the ground that the tracts each adjoin the other side by side as a body. In that State the warrant and survey thereon and the return of the survey constituted the legal mode of acquiring lands from the Commonwealth. The block just mentioned was know as the La Fevre block, and the tracts composing it were designated by the names of the persons to whom they were warranted, as follows: The Ebenezer Branham, Nathaniel Brown, Lewis Walker, William Shannon, William Elliott, and the Joseph Tyson, all of which were dated November 26, 1793, surveyed on the 21st and 22d days of October, 1794, and returned into the land office by William Gray, deputy surveyor, February 28, 1795.

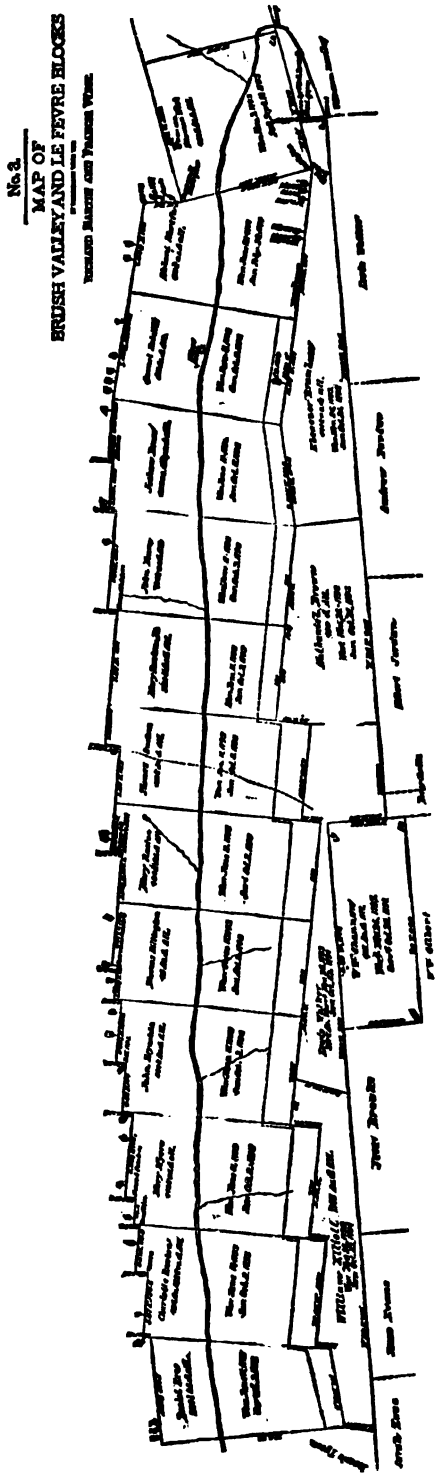
The plaintiff claimed that the northern boundary of this tract was identical with the southern line of the defendant's tracts, and that such southern boundary was about sixty rods further north than that claimed by the defendant, and down to which he was in actual possession. The question in the case, as exhibited by the record, is one of location, the burden of proof being on the plaintiff below to show the location of the northern boundary of the William Elliott tract, and that the 120 acres in dispute are within the limits of that tract.

The plaintiff below produced evidence showing that the tracts claimed and possessed by the defendant lying directly north of the William Elliott tract were known as the Mary Myers and Charlotte Ruston tracts, and were two of a block of eleven tracts, surveyed under warrants, all dated June 11, 1793, granted in the name of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston, Jr., John Young, Joshua Bean, and Samuel Lobdil, surveyed on the 2d and 3d of October, 1793, and returned to the land office by William Gray, deputy surveyor, as one block, on the 8d of March, 1794; and that these eleven tracts of land (which were known as the Brush Valley block) extended along the La Fevre block on the north, and were especially named in the official returns of the surveys of the latter as adjoining on the north.

He contended that the northern line of the William Elliott tract was identical with the southern line of the Charlotte Ruston and Mary Myers tracts; that his right, therefore, extended as far north as the southern line described in the official returns of those tracts; and that the true mode of ascertaining such southern line was to run out the lines of said tracts according to courses, distances, and calls, in the official returns of the original surveys. He showed by the returns and by the evidence of surveyors that the southern line thus located by official courses, distances, and calls would leave the land in dispute outside of the defendant's tracts, and therefore within the limits of the William Elliott tract belonging to the plaintiff below. He produced A. B. Cochran, a surveyor, who in the winter of 1881 and the spring of 1882 had made an examination of the Brush Valley land in connection with that of the La Fevre block.

This witness testified that he found the north-

ern boundary of the Brush Valley block well defined by marks still existing on the ground



made at the time of the original survey in 1798, and many of the living corners (trees) standing in the places designated in the official return; and that the lines of the different tracts corresponded pretty nearly with the official courses and distances, "sometimes a little bit long, and sometimes a little bit short," in one instance as many as 18 rods difference. He stated, very positively, that along the entire southern side of the block there were no marks upon the ground; no living corners, except one hereafter noted; no indication of any work, whatever, by the deputy surveyor in 1798; and that the official returns of the survey called only for posts for corners, with the exception just mentioned, which fact he stated was regarded by surveyors as evidence that the line had never been actually located on the ground, but simply protracted on paper. He stated further that there were no division lines actually run between any of the tracts of this Brush Valley block, except one, and that line was between the John Reynolds and the Thomas Billington tracts, which he stated was well marked upon the ground to a stone heap, which very nearly corresponded by course and distance with the corner called for in the official return of the surveys of these two tracts, and designated therein as a small maple tree, at the southeast corner of the Reynolds tract, and the southwest corner of the Billington tract. This stone heap had been made as a mark in 1847, and located as the maple corner thus called for, by David Rockefeller, a surveyor, since deceased.

The deposition of David Rockefeller, taken on a former trial, was then read in evidence to show the location of this small maple tree called for as the common corner of the Reynolds and Billington tracts (southeast of the one and southwest of the other), in which Rockefeller testifies that in surveying these lands in 1847 he found the line between these two tracts (the Reynolds and the Billington) well defined upon the ground by marks made at the time of the original survey in 1798, and that he found in running from the northern corner, according to the official courses, at the end of the official distance, a small maple stump and maple sprouts growing around it, and a small maple tree lying on the ground, the trunk of which was burned entirely away for 6 or 7 feet, so that no surveyor's mark could be found upon it. The testimony of Cochran and others was to the same effect, and they all gave it as their opinion that this was the true location of the maple tree called for as the common corner of the Reynolds and Billington tracts.

He also showed, by the testimony of these and other witnesses, that if this maple stump was the true location of the maple tree called for as the southeast corner of the Reynolds and the southwest of the Billington, it would establish the southern line of the whole Brush Valley block; and by running it east and west from that point, according to the courses and distances, the land in controversy would be outside of the Mary Myers and Charlotte Ruston tracts owned by the defendant below, and within the limits of the Elliott tract belonging to the plaintiff below.

The plaintiff below further contended that in case the maple stump, which he claimed to

have proved to be the maple tree called for in the official return, was not proved to be such corner, then the whole southern boundary was protracted on paper without any actual survey being done upon the ground; and in the absence of any marks whereby such southern boundary could be definitely fixed, the true mode of ascertaining its location, as determined by the deputy surveyor in 1793, was to start from the well marked boundary on the north, and run out the lines according to the official courses and distances.

In reply, the defendant contended that the true mode of ascertaining the lines of a survey was to run them according to the marks and monuments on the ground made by the surveyor at the time of the survey, along with the lines and distances of the official return, when these latter corresponded with such marks and monuments upon the ground; but in case of a conflict or variance, the original marks and monuments were to prevail and determine the location of the survey.

He denied that the southern line of the Brush Valley block had been platted on paper, and alleged, on the contrary, that it was run at the time of the original survey, and marked upon the ground far enough south of the line contended for by the plaintiff to include the 120 acres in dispute within the limits of the Charlotte Ruston and Mary Myers tracts. He introduced M. B. Trescott, and several other surveyors, who testified that the point located by Rockefeller, as the maple tree corner called for at the end of the Reynolds and Billington dividing line, was several perches north of the official distance, and several perches outside of of the official courses. He had read from the deposition of Rockefeller, already offered by the plaintiff, the statement that he, Rockefeller, had been county surveyor of Northumberland County for sixteen or eighteen years, and that he knew from the official papers in his hands, during that period, that one Henry Donnel was at the time these surveys were made a regular deputy surveyor of William Gray, and that his (Donnel's) district embraced all this side of the river, including the Shamokin and Mount Carmel coal regions, where the surveys are that are involved in this controversy.

To show the true location of the maple at the common corner of the Reynolds and Billington tracts to be 60 rods south of where Rockefeller had claimed to locate it, he offered in evidence the deposition of John Fisher, deceased, taken in several cases pending in the Common Pleas Court of Northumberland County, between the plaintiff in error and the Northumberland Coal Company in 1878, it having been admitted that John Fisher was dead. This deposition was offered to prove by John Fisher that in 1815 Henry Donnel was surveying the Brush Valley lines, and he, Fisher, was with him as chain carrier. That when they were running the line between the Billington and Reynolds tracts, and were at a point about 60 rods south of the stump located by Rockefeller at a swamp, they found a stone corner—"stones piled up." Donnel said: "This is the corner; here is where we located these warrants 21 or 22 years ago."

The plaintiff below objected to the admission of these declarations of Henry Donnel. The court sustained the objections and rejected those portions of the deposition embraced in brackets, and sealed the bill of exceptions at the instance of the defendant.

The portions rejected are as follows: Donnel said: ["While there at the corner, 21 or 22 years ago, we located these warrants." When we got to the corner, Mr. Donnel said: "Here is the corner," pointing to it.] [All Donnel said was: "This is the corner; here is where we located these warrants 21 or 22 years ago." This was when we were running the line between the Billington and Reynolds. Donnel said it was the line. I knew it was the line.] And again: [At the time Henry Donnel said he located these warrants, 21 or 22 years ago, he was surveying the Brush Valley lands—I mean the Ira Clement lands.]

The defendant also introduced several surveyors who testified to the fact of original marks east of and in a direct line with the point at which he claimed the maple stood, and also to two other line trees bearing the marks of the survey of 1793, showing that the southern boundary of the Brush Valley lands is from thirty to sixty rods below that contended for by the plaintiff below.

In confirmation of this being the true location of the line in question, the defendant below showed from the evidence elicited on cross examination of a witness for the plaintiff, and also by numerous surveyors who appeared as witnesses for the defendant, that the Ebenezer Branham (which was the extreme eastern and controlling warrant of the La Fevre block) had still existing on its northern boundary authentic and original marks and monuments made at the time of the survey, and answering to the official calls thereof; nearly all of whom testified that these marks thus defining the northern boundary of the Ebenezer Branham tract were sufficient to establish the entire northern boundary of the La Fevre block, which northern boundary, they stated, would be identical with the southern line of the Brush Valley block, located as claimed by the defendant.

To give additional support to his theory of constructing the dividing line in question he put in evidence the location of two surveys outside of the Brush Valley block, made by the same surveyor about the same time, whose established lines and corners he proposed to show were in perfect harmony with the location of the Brush Valley block contended for by the defense. It appeared in evidence that the first of these surveys was warranted to one Francis West, surveyed on the 10th day of September, 1793, located east and within a mile of the Brush Valley block, and that its lines, boundaries, corners, and calls were established by original undisputed monuments on the ground. It was also proved that the other tract was warranted to one Richard Martin, and surveyed on the 23d day of February, 1794, and called to adjoin the Francis West on the east and the Samuel Lobdil on the west; this last being the extreme eastern track of the Brush Valley block. It also appeared in evidence that the eastern line of the Lobdil and the western of the Martin were reported by the return to be of the same length.

The surveyors, hereinbefore referred to as

witnesses for the plaintiff, state that the Francis West and the Richard Martin have a common corner the southwest of the former, and southeast of the latter; that this corner is also called for as a mark on the northern line of the Ebenezer Branham, as above noted; that, starting from this recognized corner, called for by the three surveys (the Francis West, the Richard Martin, and the Ebenezer Branham), and following the southern line of the Richard Martin (which is also the northern line of the Ebenezer Branham tract, and which all the surveyors, on both sides, testify is marked by monuments counting back to 1793, for a distance of 150 perches), in its official courses and distances, it intersects the common line between the Lobdil and Martin tracts extended 32 perches south of its official length: that at this point of intersection there is a well established corner common to the Martin and Lobdil tracts; that if the southern line of the Brush Valley block was run, starting from this southeast corner of the Lobdil tract, according to the official courses and distances, it would be carried actually upon the line claimed by the defendant below, indicated by the marked line trees and monuments, and strike the point at which he claimed the maple corner was located in the edge of the swamp; and therefore would place the land in controversy without the Elliott tract, and within the Charlotte Ruston and Mary Myers surveys.

He also introduced evidence to show that the eleven surveys of the Brush Valley block and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office before the return of the Brush Valley lands, stating that its western line was 320 rods in length, and three days after returned the Samuel Lobdil, giving it the same course and length of line.

These witnesses expressed the opinion, from their experience as surveyors, that the northern line of the Richard Martin was run on the ground at the same time as the Brush Valley block of surveys; that the dividing line between the Brush Valley block and the La Fevre block of surveys should be located from the work done by the same deputy surveyor on the adjoining surveys; and that these monuments pointed out the line run by the deputy surveyor in 1793. The defendant below therefore contended that what the surveyor did, in locating the Richard Martin and the Francis West surveys, should be considered with all the other evidence in the case, in determining the question whether the southern line of the Brush Valley block was actually run upon the ground or not, and, if so, where it was run.

The plaintiff below offered rebutting testimony tending to show that the trees relied on by the defendant below, as line trees and original monuments of the survey in 1793, bore no such marks, and that no such monuments for the southern boundary of the Brush Valley block could be found, or ever existed on the ground. He contended also that the Martin, being a junior survey to that of the Brush Valley block, could not be used for the purpose of locating the southern line of the latter.

Numerous exceptions were taken during the trial, and exceptions were also taken to the charge of the court. The jury returned a verdict for the plaintiff below, upon which judgment was rendered. The defendant below then sued out this writ of error.

Messrs. **S. P. Wolverton** and **Franklin B. Gowen**, for plaintiff in error:

When the location of a tract of land or a block of surveys is in dispute the declarations of a deceased surveyor, made while running the lines, are always admissible.

Kennedy v. *Lubold*, 88 Pa. 246; *Kramer* v. *Goodlander*, 98 Pa. 366; *Bender* v. *Pitzer*, 27 Pa. 365; *Caufman* v. *Cedar Spring Congregation*, 6 Binn. 59; *Hamilton* v. *Menor*, 2 Serg. & R. 70; *McCausland* v. *Fleming*, 68 Pa. 38; *Penny Pot Landing* v. *Philadelphia*, 16 Pa. 91; *Sample* v. *Robb*, Id. 319; 1 Whart. Ev. § 191; *Birmingham* v. *Anderson*, 40 Pa. 506.

The opinions of expert surveyors are constantly received.

Northumberland Coal Co. v. *Clement*, 95 Pa. 126; Whart. Ev. § 444; *Davis* v. *Mason*, 4 Pick. 156; *Forbes* v. *Caruthers*, 3 Yeates, 527; *Ormsby* v. *Ihmsen*, 34 Pa. 462; *Peterborough* v. *Jaffrey*, 6 N. H. 464; *Ardesco Oil Co.* v. *Gilson*, 68 Pa. 146; *Price* v. *Powell*, 3 N. Y. 322; *Fowler* v. *Middlesex County*, 6 Allen, 92; *Detweiler* v. *Groff*, 10 Pa. 378; 1 Greenl. Ev. § 440; *Jameson* v. *Drinkald*, 12 Moore, 148; *S. C.* 22 Eng. C. L. 636; *Pennsylvania R. R. Co.* v. *Henderson*, 51 Pa. 315; *Kellogg* v. *Krauser*, 14 Serg. & R. 137; *Brown* v. *Corey*, 43 Pa. 495.

Where several tracts of land were originally made and returned into the land office in a block, they must be located on the ground in a block.

Northumberland Coal Co. v. *Clement*, 95 Pa. 126; *Hagerty* v. *Mathers*, 31 Pa. 348, 355; *Darrah* v. *Bryant*, 56 Pa. 69; *Walters* v. *Hagarty*, 37 Pa. 64; *Boynton* v. *Urian*, 55 Pa. 151; *Fritz* v. *Brandon*, 78 Pa. 351; *Mock* v. *Astley*, 18 Serg. & R. 382; *Stevens* v. *Hughes*, 3 Watts & S. 465; *Collins* v. *Barclay*, 7 Pa. 78; *Hole* v. *Rittenhouse*, 25 Pa. 491; *Malone* v. *Salada*, 48 Pa. 425; *Pruner* v. *Brisbin*, 98 Pa. 202; *Christ* v. *Thompson*, 2 Cent. Rep. 528.

However well marked these lines may have been in 1793 and 1794, or even in 1814, at the time of the trial few original marks would have been expected to be found by any surveyor.

Kennedy v. *Lubold*, 88 Pa. 255; *Glass* v. *Gilbert*, 58 Pa. 291.

Slight evidence of marks found upon the ground corresponding with the date of survey ought to have great weight in repelling the charge of its being a mere chamber survey.

Lambourn v. *Hartwick*, 13 Serg. & R. 121; *Marte* v. *Hartley*, 4 Watts, 263, 264; Sergeant's Land Law of Pa. 128.

A practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground were intended as monuments or boundaries.

Whart. Ev. § 444; *Davis* v. *Mason*, 4 Pick. 156; *Forbes* v. *Caruthers*, 3 Yeates, 527; *Ormsby* v. *Ihmsen*, 34 Pa. 462; *Sweigart* v. *Richards*, 8 Pa. 436; *Caul* v. *Spring*, 2 Watts, 394; *Covert* v. *Irwin*, 3 Serg. & R. 288.

A survey made under legal authority is presumed to be correctly made.

Eister v. *Paul*, 54 Pa. 196; *Dreer* v. *Carskadden*, 48 Pa. 38.

A deputy surveyor in locating a junior warrant should adopt the marks of an older survey.

Caul v. *Spring*, 2 Watts, 390; *Martz* v. *Hartley*, 4 Watts, 261; *Schnable* v. *Doughty*, 3 Pa. 392; *McBarron* v. *Gilbert*, 42 Pa. 279; *Bellas* v. *Cleaver*, 40 Pa. 267; *Pennsylvania Canal Co.* v. *Kunkel*, 38 Leg. Int. 339; *Hughes* v. *Stevens*, 43 Pa. 202.

The work of the same deputy surveyor on adjoining surveys made about the same time, and the declarations of the deputy surveyor who located these tracts, as to where he had originally established the southern line, were clearly evidence of location.

Messrs. **James Ryon** and **John W. Ryon**, for defendant in error:

The warrant, when made out, was dated on the day the application for it was entered.

Brown v. *Galloway*, Pet. C. C. 291; *Lewis* v. *Meredith*, 3 Wash. 81; *Oliphant* v. *Ferren*, 1 Watts, 57; *Boynton* v. *Urian*, 55 Pa. 152.

Even if the patents were competent evidence, the warrant would have been cumulative only, and this court would not reverse for excluding the evidence.

Cannon v. *Pratt*, 99 U. S. 619 (25: 446).

If the wrong party receives the patent, he is always treated as holding in trust for the warrantee or the true party under him.

Delaware & H. Canal Co. v. *Dimock*, 47 Pa. 397; *Manhattan Coal Co.* v. *Green*, 78 Pa. 310.

A patent which embraces land not included in the survey is void for the excess.

Kelly v. *Graham*, 9 Watts, 116.

Though a patent conveys the legal estate against the Commonwealth, it will not prevail over a prior estate by warrant and survey.

Maclay v. *Work*, 5 Binn. 154; *Gonzalus* v. *Hoover*, 6 Serg. & R. 118; *Woods* v. *Wilson*, 37 Pa. 379; *Hagerty* v. *Mathers*, 31 Pa. 348; *Urket* v. *Coryell*, 5 Watts & S. 60.

A patent is not operative against the rights of a third person existing before the issuing of the patent.

Balliot v. *Bauman*, 5 Watts & S. 155; *Smith* v. *Vasbinder*, 77 Pa. 180; *Woods* v. *Wilson*, 37 Pa. 382; *Lewis* v. *Bradford*, 10 Watts, 76; *Duer* v. *Boyd*, 1 Serg. &. R. 203; *Maclay* v. *Work*, *supra*; *Gingrich* v. *Foltz*, 19 Pa. 40.

The rule that allows the proof that a public officer has acted notoriously, as a public officer, without the proof of his appointment is applicable only to the case of public officers as such.

1 Greenl. Ev. § 83; 1 Phill. Ev. 4 Edw. ed. 592 and note; *Wilcox* v. *Smith*, 5 Wend. 231; *Short* v. *Lee*, 2 Jac. & W. 464.

In *Barclay* v. *Howell*, 31 U. S. 6 Pet. 504 (8: 479) this court held that the declarations of a surveyor which contradict his official return are clearly not evidence.

Woods v. *Ege*, 2 Watts, 333.

Declarations respecting a private boundary are only admissible as *res gestæ*.

Ellicott v. *Pearl*, 35 U. S. 10 Pet. 412 (9: 475); *Hunnicutt* v. *Peyton*, 102 U. S. 333 (26: 118).

To be admissible, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries.

Bartlett v. *Emerson*, 7 Gray, 174; *Daggett* v. *Shaw*, 5 Met. 223; *Long* v. *Colton*, 116 Mass. 414; *Mima Queen* v. *Hepburn*, 11 U. S. 7 Cranch, 290 (3: 348); *Bonnet* v. *Devebaugh*, 3 Binn. 175; *Sample* v. *Robb*, 16 Pa. 319; *McCausland* v. *Fleming*, 63 Pa. 38; *Caufman* v. *Cedar Spring Congregation*, 6 Binn. 62, 63; *Buchanan* v. *Moore*, 10 Serg. & R. 281; *Bender* v. *Pitzer*, 27 Pa. 335.

This court, in passing upon the questions presented in a bill of exceptions, will not look beyond the bill itself.

Norris v. *Jackson*, 76 U. S. 9 Wall. 125 (19: 603); *Lincoln* v. *Claflin*, 74 U. S. 7 Wall. 186 (19: 108); *Leftwitch* v. *Lecanu*, 71 U. S. 4 Wall. 187 (18: 388); *Russell* v. *Ely*, 67 U. S. 2 Black, 580 (17: 260).

An abstract proposition of law this court is not required to consider.

Jones v. *Buckell*, 104 U. S. 554 (26: 841); *Dunlop* v. *Monroe*, 11 U. S. 7 Cranch, 270 (3: 339); *Worthington* v. *Mason*, 101 U. S. 149 (25: 848); *Zeller* v. *Eckert*, 45 U. S. 4 How. 289 (11: 979); *McNair* v. *McLennan*, 24 Pa. 384.

Calls for adjoiners and other fixed boundaries invariably govern the calls for courses and distances.

Brolaskey v. *McClain*, 61 Pa. 163; *Mackentile* v. *Savoy*, 17 Serg. & R. 104; *Murphy* v. *Campbell*, 4 Pa. 485; *Cox* v. *Couch*, 8 Pa. 147; *Petts* v. *Gaw*, 15 Pa. 218; *Mathers* v. *Hegarty*, 37 Pa. 64; *Speakman* v. *Forepaugh*, 44 Pa. 372; *Bellas* v. *Cleaver*, 40 Pa. 260; *Manhattan Coal Co.* v. *Green*, 78 Pa. 310; *Watson* v. *Jones*, 85 Pa. 125.

Lines of older surveys, adopted by the surveyor for the younger, become the line and boundary of the younger.

Elster v. *Paul*, 54 Pa. 198; *Parshall* v. *Jones*, 55 Pa. 158; *Dreer* v. *Carskadden*, 48 Pa. 88; *Caul* v. *Spring*, 2 Watts, 390.

After the lapse of twenty-one years, the presumption of law is conclusive that the surveys were actually made upon the ground as returned by the deputy surveyor.

Nieman v. *Ward*, 1 Watts & S. 79; *Mock* v. *Astley*, 13 Serg. & R. 382; *Lambourn* v. *Hartswick*, Id. 113; *Bellas* v. *Levan*, 4 Watts, 300; *Schnable* v. *Doughty*, 3 Pa. 395; *Mathers* v. *Hegarty*, *supra*; *Covert* v. *Irwin*, 3 Serg. & R. 283; *Quinn* v. *Heart*, 43 Pa. 337; *Cosby* v. *Buchanan*, 90 U. S. 23 Wall. 420 (23: 138).

Evasive answers afford strong presumptive evidence against the respondent.

Agawam Woolen Co. v. *Jordan*, 74 U. S. 7 Wall. 583 (19: 177); *Bryant* v. *Stilwell*, 24 Pa. 314.

The lines actually marked upon the ground constitute the survey.

Hall v. *Tanner*, 4 Pa. 244; *Thompson* v. *McFarland*, 6 Pa. 478; *Thomas* v. *Mowrer*, 15 Pa. 139.

The lines marked on the ground control the return of the surveyor, even where that calls for a natural or fixed boundary.

Walker v. *Smith*, 2 Pa. 43; *Burkholder* v. *Markley*, 98 Pa. 40; *Manhattan Coal Co.* v. *Green*, 78 Pa. 310.

It is sufficient evidence of an actual survey that any part of it was made on the ground.

Lambourn v. *Hartswick*, 13 Serg. & R. 113; *Quin* v. *Brady*, 8 Watts & S. 139.

Courses and distances constitute the survey where no lines are found on the ground, except in case of calls for adjoiners.

Boynton v. *Urian*, 55 Pa. 142.

A call for adjoiners will overrule the lines returned by courses and distances, where there are no lines upon the ground.

Caldwell v. *Holler*, 40 Pa. 160; *Darrah* v. *Bryant*, 56 Pa. 69; *Younkin* v. *Cowan*, 84 Pa. 198; *Ormsby* v. *Ihmsen*, Id. 462; *Manhattan Coal Co.* v. *Green*, *supra*; *Pruner* v. *Brisbin*, 98 Pa. 208.

A survey unimpeached for twenty-one years is conclusively presumed to have been regular.

Strimpfler v. *Roberts*, 18 Pa. 299; *Caul* v. *Spring*, 2 Watts, 390; *Nieman* v. *Ward*, 1 Watts & S. 68; *Younkin* v. *Cowan*, and *Caldwell* v. *Holler*, *supra*; *Wagner* v. *Wagner*, 68 Pa. 394.

Mr. Justice **Lamar** delivered the opinion of the court:

The first assignment of error is to the effect that the court below erred in rejecting the offer of the plaintiff in error of six patents issued by the Commonwealth to Peter Graul for the Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham surveys, bearing date the 12th, 13th and 17th of April, 1797, respectively, for the purpose of locating, and showing that the Commonwealth confirmed the location of said surveys as a block, by granting patents to each one of them, and for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys.

Objection by plaintiff below to this was sustained, and exception taken. The plaintiff in error, however, has not embodied copies of these patents in the record returned. The court is therefore left uninformed as to the contents of the patents, or as to their materiality. What effect might have been given to this assignment of errors, had evidence of the contents of the patents mentioned been sent up with the record, we need not consider in disposing of this case. It is sufficient to say that this assignment of error is fatally defective for the reason given above, and it cannot be sustained.

The second specification relates to the rejection by the court of a portion of the deposition of John Fisher, referred to in the above statement. We gather from the brief of counsel that the ground on which these declarations were ruled out was that they were not within any of the exceptions to the general rule that hearsay evidence is inadmissible to establish any specific fact which in its nature is capable of being proved by the testimony of a person who speaks from his own knowledge.

In *Mima Queen* v. *Hepburn*, 11 U. S. 7 Cranch, 290, 296 [3: 348, 350], *Chief Justice* Marshall says: "To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. * * * Also matters of general and public history."

Upon the subject of boundary there is a general agreement that, by the English rule, evidence of the declarations of deceased persons as to the boundary of parishes, manors, and the like, which are of public interest, is admissible, but that such evidence is inadmissible for the purpose of proving the boundary of a private estate, unless such boundary is identical with another of public interest. In many of the States this strict rule has been extended, and these declarations have been admitted to prove the boundaries of lands of private persons. This extension of the rule has, we think, been sustained by the weight of authority in the American State Courts, as justified upon grounds as strong as those on which the original rule rests.

In *Boardman* v. *Reed*, *Mr. Justice* McLean states one of these grounds. He says, 31 U. S. 6 Pet. 328, 341 [8:415,420]: "That boundaries may be proved by hearsay testimony is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials. * * * By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries." This was a case of private boundaries purely; and the declarations were rejected, not upon the ground of hearsay, but because they were considered as immaterial, and not tending to elucidate any question before the jury.

The limitations upon this extension of the original rule are different in different States. We do not deem it necessary, in the present case, to lay down any definite rule applicable to all cases, as to when declarations of deceased persons constitute valid evidence to establish private boundaries.

The question is one involving the ownership of real property in Pennsylvania, and it becomes our duty to ascertain the rule established in that State, especially as respects the admissibility of the declarations of deceased surveyors in cases of boundaries between private estates.

In the case of *Caufman* v. *Cedar Spring Congregation*, 6 Binn. 59, the plaintiff claimed a certain number of acres which were surveyed by one Wilson, an assistant of the deputy surveyor, since deceased. The deputy surveyor returned to the land office a smaller quantity than was contained in Wilson's actual survey. On the trial of the case evidence of what was said by Wilson was objected to by the defendant upon the ground that the official return of the survey was the best evidence of the survey. The evidence was held by the Supreme Court of Pennsylvania to have been rightly received. *Chief Justice* Tilghman said: "It will be recollected that Wilson is dead; otherwise, nothing less than his own oath could have been received. Where boundary is the subject, what has been said by a deceased person is received as evidence. It forms an exception to the general rule. It was necessary for the plaintiffs to show their possession of the lands. * * * It was impossible for the plaintiffs to show the extent of their possession without showing the lines run by Wilson. Those lines were the plaintiffs' boundaries; at least such was their claim. It appears to me, therefore, that what was said by Wilson came within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary."

In *Kennedy* v. *Lubold*, 88 Pa. 246, the declarations of a deceased surveyor, made thirty-

five years before the trial, were allowed to go to the jury, but the court below, in charging the jury as to the nature and force of this evidence, used the following language: "There is evidence of what Herrington, or some surveyor said when he went to this tract corner. That is hearsay evidence, and we admitted that with a good deal of reluctance. We hardly believe it is evidence. We say to you in determining that evidence, it is weak evidence. It is not as strong evidence as that of witnesses who come here upon the witness stand and submit to cross examination, in testifying to what is the true corner from the very necessity of the case." The case being carried up by a writ of error to the Supreme Court of Pennsylvania, *Chief Justice* Agnew delivered the opinion of the court, and said: "These two cases were argued together. They seem to have been tried upon the doctrine of leaving first principles, and going on to perfection. But old surveys are not to be so tested. Most perfect in the beginning, they are constantly undergoing change and decay, until by wind, fire, rottenness, and the acts and frauds of men, their evidences lie only in memory and hearsay. Hence, when the learned judge said of the acts of the surveyors, who forty years before went upon the ground, ran the lines, blocked the trees, counted the growths, found original marks, and pronounced the hickory the numbered corner of donation lot No. 1260, it was mere hearsay, he hardly believed it evidence, admitted it with reluctance, and it was weak evidence in determining, he clearly misled the jury. The reverse is true —the evidence was strong, and ought to prevail unless clearly rebutted, by showing either a mistake of the witness relating the facts, or error in the surveyors making the declaration. * * * The declarations as to the corners when found, blocked, and counted were a part of the *res gestæ*, and so far from being doubtful evidence were competent and always admitted when the transaction is old and the surveyor dead."

In *Kramer* v. *Goodlander*, 98 Pa. 366, the witness having testified that he had owned the land in dispute thirty years before the trial, and employed one Ferguson, a surveyor since dead, to trace the lines, it was offered to prove what Goodlander said as to the lines whilst he was on the ground searching for them. This was rejected as purely hearsay. *Justice* Trunkey, in delivering the opinion of the court said: "From an early day in this State, in litigation respecting boundaries, it has been competent to prove, after the death of a surveyor who had examined a line, what he said respecting it at the time and on the ground. The offer should have been admitted."

In *McCausland* v. *Fleming*, 63 Pa. 38, *Justice* Agnew, delivering the opinion of the court, said: "Pedigree and boundary are the excepted cases, wherein reputation and hearsay of deceased persons are received as evidence. The statements of deceased persons relative to boundaries of which they spoke from actual personal knowledge have been frequently received as evidence in this State."

There is one case in which the principles of this rule of hearsay evidence in respect to boundaries were fully considered in the Circuit Court of the United States. *Conn* v. *Penn*, 1 Pet. C. Ct. 496. The opinion of the court was delivered by *Mr. Justice* Washington, and the substance of it is as follows, p. 511: The courses and distances laid down in a survey, especially if it be ancient, are never, in practice, considered as conclusive, but are liable to be materially changed by oral proof, or other evidence, tending to prove that the documentary lines are those not actually run. Reputed boundaries are often proved by the testimony of aged witnesses, and the hearsay evidence of such witnesses has been admitted to establish such lines, in opposition to the calls of an ancient patent. It is not the lines reported, but the lines which have been actually run by the surveyor, which vests in a patentee a title to the area included within those lines.

These decisions clearly require the admission of the testimony rejected by the court below, and the decisions cited by the counsel for defendant in error also seem to us in harmony with the tenor and effect of them.

The case of *Bender* v. *Pitzer*, 27 Pa. 335, is an interesting case in its examination of the qualifications and some of the aspects of this rule. The declarations of a deceased surveyor who had not made the original survey, nor subsequently examined it, nor run the lines upon the ground, and who was not an adjoining owner, and did not point out the lines at the time of those declarations, were held to be rightfully rejected. But *Justice* Knox, while rejecting the evidence, took especial care to reiterate the principles laid down in the cases heretofore cited. In delivering the opinion of the court he said: "It has long since been settled, both in this country and in England, that ancient boundaries are provable by general reputation, in a question involving public rights. In Pennsylvania a still greater latitude has been allowed in questions of boundary. Here the declarations of a deceased person touching the locality of boundary between adjoining owners have been admitted where the survey was made by the person making the declaration, or where the declaration was made by an adjoining owner who pointed out the boundary line between the tracts to the witness at the time the declarations were made." *Caufman* v. *Cedar Spring Congregation*, 6 Binn. 59; *Hamilton* v. *Menor*, 2 Serg. & R. 70.

To sustain the rejection of the evidence much reliance is placed on the decisions of this court in the cases of *Hunnicutt* v. *Peyton*, 102 U. S. 333 [26: 113], and *Ellicott* v. *Pearl*, 35 U. S. 10 Pet. 412 [9: 475]. But as the question is one of Pennsylvania law, to be controlled by Pennsylvania decisions, the observations of the court in the cases cited are not pertinent.

The first of these cases states the English rule, and summarizes some of the results to be deduced from the decisions of the state tribunals. The court concedes that had the Supreme Court of Texas decided differently, it would have felt constrained to apply the Texas rule to the case in question; but even under the summary of the general law in this country, as it was conceived to exist on the subject at that time, the evidence rejected in the present case ought to have been received. It is not necessary for us to approve or disapprove the departures from the original rule, because the court held that the evidence there offered was

not admissible under any well established exceptions to the rule. The court is particular to say the declarations of Moore were made, not when he was pointing out the boundaries of the Basquez survey, but when he was at a distance from the place of beginning of that survey and from its upper line. That Moore had made the survey, or had ever been upon its upper line, or on the upper line of the reserve, was proved only by his assertion, which the court allowed to be given in evidence. There was no such proof *aliunde*.

The case of *Ellicott* v. *Pearl*, *supra*, was brought to this court by a writ of error to the Circuit Court of the United States for the District of Kentucky. And in the decision here, this court adhered to the English rule, and rejected the evidence of the declaration of a deceased surveyor, as to the boundary of a private estate. In so doing, this court was simply enforcing the rule as it existed in Kentucky at that time. In *Cherry* v. *Boyd*, Litt. Sel. Cas. 8, decided by the Supreme Court of that State in 1800, it was held that evidence of the parol declarations of a surveyor concerning the marks or lines of a private estate were inadmissible. This being the settled law of Kentucky, this court could not have decided otherwise than it did in *Ellicott* v. *Pearl*. But even in that case the court uses the following guarded language: "The doctrine in America, in respect to boundaries, has gone further, and has admitted of general reputation as to boundaries between contiguous private estates."

The remaining assignments of error relate to the answers to the requests by the counsel of the respective parties for instructions to the jury, and to the general charge of the court below. They are so many in number that it would greatly protract this opinion to review them *seriatim*, and in the order of their presentation.

At the request of the plaintiff, the court below said to the jury, "that in the absence of marks on the north made for the William Elliott in 1794, by the deputy surveyor, the William Elliott must go to its calls for adjoiners on the north; that as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and, therefore, the William Elliott will embrace the land in dispute by locating the Mary Myers and Charlotte Ruston, according to the official courses and distances from their northern line, or from the Rockefeller maple corner."

We think the learned judge in giving this charge fell into error. If it was not a positive and imperative direction to the jury to find for the plaintiff, it would be difficult to convince them that this was not the manifest intention of the court. In its logical effect it is a syllogism, the conclusion of which is that the land in dispute is within the limits of the William Elliott, and belongs, therefore, to the plaintiff. Its terms are, *first*, that in the absence of any original marks on the north of the William Elliott, made by the surveyor at the date of the survey, the William Elliott will go to its northern adjoining tracts, to wit, the Mary Myers and Charlotte Ruston; *second*, that there is no evidence of any such original marks on the north of the William Elliott; *third*, that, therefore, the William Elliott must go to its adjoining tracts on the north (the Myers and Ruston), and thus embrace the land in dispute. The direct tendency, if not the avowed purpose, of the statements contained in this charge, is to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defense. It should be borne in mind that the William Elliott is not a single separate tract, but one of a block of several tracts surveyed at the same time, by the same surveyor, under warrants of the same date, and for the same owner, and returned into the land office as one body.

By the settled law of Pennsylvania, applicable to the location of surveys, original marks and living monuments on the ground constitute the survey, and they are the highest proof of its true location. The next most important evidence of location is the calls for adjoining surveys; and in the absence of both of them, and then only, the lines according to courses and distances, returned by the surveyor into the land office, determine the location. But it is equally well settled, by an unbroken current of decisions in that State, that the surveys constituting a block are not to be treated as separate and individual surveys; nor can each tract be located independently of the rest, by its own individual lines or calls or courses and distances; but such surveys are to be located together as a block or one large tract. If lines and corners made for such a block of surveys can be found upon the ground, this fixes the location of the block, even to the disregard of the call for adjoiners. The lines and corners found upon any part of the block of surveys belong to each and every tract of the block, as much as they do to the particular tract which they adjoin.

In *Pruner* v. *Brisbin* the question came before the court below, and the principles just laid down were enunciated in that court; and upon a writ of error to the Supreme Court of Pennsylvania, *Mr. Justice* Sterrett said: "The thirteen tracts having been surveyed in a block and so returned must be located upon the ground as a block; neither of them can be arbitrarily located in disregard of the lines and corners found upon other parts of the block. All the lines and corners marked upon the ground and returned must be considered in ascertaining the proper location of the block. Those found upon any part of the block belong to each and every tract of which it is composed; and if sufficient lines and corners can be found they determine the location of the entire block, without regard to its calls for adjoiners or for waters, if such calls conflict with the lines actually run upon the ground and returned." He added: "It requires neither argument nor citation of authority to show that the learned judge was clearly right in thus instructing the jury." 98 Pa. 210.

In *Fritz* v. *Brandon*, 78 Pa. 351, *Chief Justice* Agnew says: "When one person is owner of all the warrants, they may be surveyed together in a single block by exterior lines, leaving the interior lines to be settled by the owner himself. *Mock* v. *Astley*, 13 Serg. & R. 382; *Stevens* v. *Hughes*, 8 Watts & S. 465; *Collins* v. *Barclay*, 7 Pa. 73; *Hagerty* v. *Mathers*, 31 Pa. 348. The legal effect is that the entire

block is viewed is one tract. Hence, *Chief Justice* Lewis said in *Hole* v. *Rittenhouse*, 25 Pa. 491: 'Under these circumstances it is evident that the whole fifteen surveys adjoining each other in a single block, without interior lines, all made at one time and owned by the same party, were essentially but one tract.' * * * This principle was in the mind of *Chief Justice* Woodward when he said in *Malone* v. *Sallada*, 48 Pa. 425: 'And when we are dealing with blocks of surveys we must remember that the marks on any part of the block belong to each tract in the block.' So *Judge* Strong said, in *Darrah* v. *Bryant*, 56 Pa. 75: 'And if they were surveyed as a block, they must be located as a block.'"

In *Malone* v. *Sallada*, 48 Pa. 419, *Chief Justice* Woodward says: "Located by these adjoiners, Isaac Miller would take the land in dispute, but several of its courses and distances and the configuration of the survey as returned into the land office would essentially be changed. Notwithstanding these consequences, however, the defendants insisted upon its location by its calls. The plaintiffs, on the other hand, contended that the whole block of twenty-five surveys should be located by the marks on the ground, with no other reference to calls for adjoiners than such as would be consistent with the marks on the ground; and that it is immaterial that no marks are found on the Miller survey, since authentic marks are found on other tracts of the block sufficient to locate the whole block, and that these marks apply with decisive effect to Isaac Miller. They deny also that Merrick Starr was called for on the west of Isaac Miller; but if it was, they say it was a mistake, and must be rejected in favor of the courses and distances as returned. In a word, the plaintiffs would locate the Isaac Miller by the marks on the ground of other tracts, in connection with which it was surveyed and returned. * * * And when we are dealing with *blocks of surveys* we must remember that the marks on any part of the block belong to each tract of the block. Interior lines were never run and marks are not to be looked for on them; but if marks are found upon the ground to establish an exterior line of a particular tract of the block, and we find *other tracts returned with that same line*, we are to presume it was adopted as the boundary of these tracts, no less than of the tracts which bear the marks. When the surveyor, for instance, ran from the pine corner of Gilbert and Brooks to the stone corner of Lomison and Paul, his course for more than three hundred perches was south ten degrees east, and his only other course for 89 perches was south 4½° east, and these two courses carried him the whole width of the Gilbert and Miller tracts, and formed the western boundary of these respective tracts. No marks are found on these lines, but the pine and stones are sufficient to locate them."

In *Northumberland Coal Co.* v. *Clement*, 95 Pa. 126, it was held: "When original surveys have been made and returned as a block into the land office, the location of each tract therein may be proved by proving the location of the block. In ascertaining the location of a tract the inquiry is not where a tract should or might have been located, but where it actually was located. Every mark on the ground tending to show the location of any tract in the block is some evidence of the location of the whole block, and therefore of each tract therein."

We think these authorities are conclusive upon this point. The principle itself was invoked by the defendant in error and by the judge below, when, at the request of the former, the judge charged the jury that if the actual position upon the ground of one single maple corner could be established, this would fix the southern line of the whole block of eleven surveys and of every member of the block. If, therefore, any original marks could be found called for and established on the northern line of any tract of the La Fevre Block, that would fix the northern line of the whole block of six surveys.

It was conceded by the plaintiff and defendant below, and stated by the learned judge in his charge to the jury, that the William Elliott was a member of the La Fevre Block, of which the Ebenezer Branham was the leading warrant and controlling survey.

A. B. Cochran, a surveyor produced by the plaintiff below as a witness in his own behalf, testified that the "post by a pine," called for by the Ebenezer Branham as a monument on its northern line, was a well recognized mark on that line; and that he found three other trees on that line west of the "post by a pine" in the line of official courses, for 150 perches. And there were not less than five surveyors, who, as witnesses produced by the defendant, testified that they found five or six trees on the northern line of the Ebenezer Branham, in the official courses of the same line. These marks, if the jury believed the witnesses, must be regarded, according to the authorities, marks and monuments sufficient, if not overcome by the force of rebutting evidence, to fix the entire northern line of the La Fevre block and of each tract composing it, including the William Elliott. For these reasons we consider that the inevitable effect of that portion of the charge in question was to mislead the jury.

In regard to the Francis West and Richard Martin tracts, the location of which the defendant below offered in evidence for the purpose of showing that the southern line of the Brush Valley Block was run at the time of the original survey and marked upon the ground far enough south of the official courses and distances to include the land in dispute, the court charged the jury in these words:

"The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdil and the other members of the Brush Valley Block, which are earlier surveys. The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin. Hence, what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury in connection with all the other evidence in determing the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyors in 1793 to define the southern line for the Brush Valley Block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley Block, but the

eleven surveys of that block must then be located from their fixed corners upon the northern line according to the official courses and distances (unless, indeed, the jury should find in favor of David Rockfeller's location of the maple corner.")

We cannot concur with this charge as a correct application of the general law of the State of Pennsylvania to the facts of this case. It is unquestionably true that a junior survey cannot control or enlarge the dimensions of a senior survey. We understand this to mean that when the location of a survey is or can be ascertained and determined by its own marks upon the ground, its own calls and courses and distances, it cannot be changed or controlled or enlarged or diminished by the marks or lines of an adjoining junior survey; but when, from the disappearance of these original landmarks, caused by time and other agencies, from the senior survey, the location of a particular line, or the identity of a corner, is left in uncertainty or becomes the subject of controversy, then the original and well established marks found upon a later survey made by the same surveyor about the same time, and adjoining the one in dispute, are regarded as legitimate evidence, not to contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering, the exact location of the older survey. In stating to the jury that such marks on the junior survey (the Richard Martin) might be considered in determining the single question whether or not the chestnut oak and gums, relied on by the defendant, were marked by the surveyors in 1798 to define the line for the Brush Valley block, "and that no weight can be attached to the Richard Martin," if the jury find that none of these trees were so marked, the judge committed error. In restricting the operation of this evidence to this one single question, to the exclusion of all other questions connected with the location of the southern boundary of the Brush Valley block, we are of the opinion that he was in direct conflict with the rule laid down by the Pennsylvania courts.

In *Clement* v. *Northumberland Coal Co.* 87 Pa. 291, this very question came up as to the effect of the "post by a pine," and the pitch-pine upon the southern line of the Richard Martin, in fixing the southern line of the Mary Myers. The court below allowed this evidence to go to the jury to be considered in determining the southern line of the Mary Myers. The supreme court affirmed the well established rule that marks upon an adjoining junior survey cannot control or enlarge the dimensions of an earlier survey (even though the junior survey adopts the lines of the older), but that such marks may be submitted to the jury as evidence tending to discover the actual location of the older survey. The court said: "The point, though made in the oral argument against the instruction of the learned court below, we think, is without a sufficient foundation in the charge. The judge very correctly held that a subsequent survey could not control the lines of a former, but he did not leave the case upon this single instruction, by omitting to inform the jury that the subsequent acts of the deputy surveyor in locating a junior warrant and the marks left by him on the ground, might be considered as evidence tending to disprove the actual location of the older survey. On the contrary, he answered the third point of the plaintiff below, which raised the question very plainly, so as to bring the true distinction fairly before the minds of the jury. The point is clear, and he replied: 'Marks found upon adjoining surveys made about the time of the survey are evidence upon the subject of location, but they cannot control or enlarge the dimensions of an earlier survey, even though they may adopt its lines.' Thus the jury was *left to locate the earlier survey by those marks, if they should conclude that they indicated the true place of the earlier location;* and were at the same time informed that the lines of a later survey cannot alter or enlarge the lines of a former survey, although the courses and distances of these former lines may be adopted. Certainly, this was a fair instruction and brought the charge within the precedents cited. The difference between that which is evidence of a fact and an effect which controls the fact is plain. Then, when the judge came to state the evidence of the marks found, he most distinctly referred to the *pitch pine* on the southern line of the Martin tract, and the 'post by a pine' as the material matter in determining the question as to the southern boundary of Mary Myers. In the next paragraph he refers to his answers to the points and *leaves the question of the boundary, as indicated by those marks, to the jury.*"

The phraseology employed in this opinion of the court seems to have been adopted for the special purpose of excluding, by anticipation, the qualification added to the rule in the general charge of the court below. The case just cited says that *the marks* ("post by a pine" and the pitch pine) *on the Martin line were rightly submitted to the jury as material matter in determining the question of the southern boundary of the Mary Myers.* But the learned judge below in this case said that the Richard Martin can have no weight in determining the location of the Brush Valley block, and, therefore, of the Mary Myers, unless the jury finds that certain trees relied on by the defendant bore certain marks.

In the case of the *Northumberland Coal Co.* v. *Clement*, 95 Pa. 126, the Supreme Court of Pennsylvania passed upon this same question as to the effect of marks upon the southern line of the Richard Martin (which marks were "post by a pine" and the pitch pine), as evidence to fix the location of the line that divides the Billington tract from the Walker tract, defining the southern limit of the former and the northern limit of the latter. The court said: "The official survey of the Thomas Billington calls for a small maple as its southwest corner. Maple sprouts are found at the place claimed by the defendant in error to be the southwest corner of the tract. The original surveys of all these tracts were made by Henry Donnel, acting as a deputy surveyor. It is shown that the same Donnel, in 1814, in running the northern line of the Lewis Walker tract, fixed the line between it and the Thomas Billington to be where it is now claimed by the defendant in error. The official survey of the Richard Martin calls for a white pine tree in its south line. That tree is standing and identified. That warrant was located by the same surveyor,

and the return of survey was made three days before the survey of the Billington tract was returned. It calls for the Samuel Lobdil on the west, and the line between the tracts is of the same length in each survey. He had the warrants in his hands at the same time. The location of the latter throws light on the former. The location claimed by the defendant in error for the Billington is not only in harmony with the block of surveys of which it forms a part, but also with the location of the Richard Martin made by the same surveyor soon thereafter." The counsel for the plaintiff below, in their able brief, say that there are some errors of fact in that case which detract very much from it as an authority. We do not discover in it any material errors of fact, but it is hardly necessary to consider the suggesti in view of the general concurrence of authorities in the principle therein laid down. See *Pennsylvania Canal Co.* v. *Kunkel*, 33 Leg. Int. 389. See also *Sweigart* v. *Richards*, 8 Pa. 486; *Bellas* v. *Cleaver*, 40 Pa. 260.

Counsel for defendant in error say in their brief: "This admitted principle of evidence, that the call of the younger was some evidence upon the subject of boundaries upon the location of the older, when both were indicated by the same deputy surveyor, never did have much weight in our court." We see nothing in the cases cited and especially relied on to sustain this assertion, but much to confirm the authority of the rule. The brief cites *Pruner* v. *Brisbin*, 98 Pa. 203, and says "The attempt was made, as was done in the present case, to avoid the conclusiveness of the official return of survey by the calls of a junior survey, and to locate the older surveys by such junior calls." This is not an exact statement of the issue in the case. It is just the reverse. The attempt was made to avoid the conclusiveness of the *original marks of a survey upon the ground* by the calls of its own leading warrant and by the calls of a junior survey. In that case there were original marks sufficient to establish the line of the older survey that was in dispute, and the only contest about that line arose, not from the absence of original marks upon it, but from the marks and calls of junior surveys, and also the marks of older surveys. The court decided that "The jury was properly instructed that the block of 1793, as returned to the land office, *must be located by its own marks*, and not by calls *of later surveys, or by marks found upon the ground younger than 1793.*" The construction put by counsel upon this language would bring the decision of the court into direct conflict with its own holding made at the same term and reported in the same volume.

The learned counsel for the defendant in error argue with great force and ingenuity that the rule is firmly established as the law of Pennsylvania, that after a survey has been returned into the land office for the period of twenty-one years unchallenged by any adverse claimants in the mode required by law, it is a conclusive presumption that the survey was actually made and marked upon the ground as shown by the official return. After a careful examination of the decisions of the supreme court cited by counsel, and some others relating to the subject, we are convinced that they are all in harmony with the conclusions herein announced. After the lapse of twenty-one years from the return of a survey the presumption is that the warrant was located as returned by the surveyor to the land office; and in the absence of rebutting facts the official courses and distances determine the location of the tract warranted. But this presumption is not conclusive, and is rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances. Where younger surveys of fixed lines called for the older the fact is admissible, in the language of the authorities, "to aid the jury in discovering the actual location of the survey."

There are other assignments of error by the counsel for plaintiff in error; but inasmuch as they involve somewhat the principles of the points already passed upon, we do not deem it necessary to consider them further.

The judgment of the Circuit Court is reversed, and the case remanded, with directions to grant a new trial.

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, *Plff. in Err.*, *v.* MISSOURI RIVER PACKET COMPANY.

(See S. C. Reporter's ed. 260-273.)

Act of Congress providing for a bridge across the Missouri—construction of—rule of.

1. Under the Act of Congress of July 25, 1866, providing for the erection of a bridge across the Missouri River at Kansas City, the distance of 160 feet between the piers of the bridge required by said Act should be obtained by measuring along a line between said piers drawn perpendicularly to the faces of the piers and the current of the river.

2. In construing said Act the spirit and reason of it must be regarded; and it must be construed with reference to its evident purpose to connect with the exercise of the privileges therein granted such limitations as will guaranty protection to the navigating interests affected by the proposed legislation.

3. A statute which is a grant of a privilege must be construed most strongly in favor of the grantor.

4. An instruction by a state court to the jury which does not present any federal question will not be considered by this court.

[No. 163.]

Argued Feb. 6, 1888. Decided March 19, 1888.

IN ERROR to the Supreme Court of the State of Missouri, to review a judgment of that court affirming a judgment of the Circuit Court of Jackson County in said State, in favor of plaintiff below, for damages for injuries to plaintiff's steamboats, by a railroad bridge erected and maintained by defendant over the Missouri River at Kansas City, Missouri, the piers of which unlawfully obstructed the navigation of said river. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Wirt Dexter and *John J. Herrick*, for plaintiff in error.

Messrs. John C. Gage and **Sanford B. Ladd**, for defendant in error:

The bridge as run was not a compliance with the Act.

Columbus Ins. Co. v. *Peoria Bridge Asso.* 6

McLean, 70; *Missouri River Packet Co.* v. *Hannibal & St. J. R. R. Co.* 1 McCrary, 281; *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 544 (9:822); *Stourbridge Canal Co.* v. *Wheeley*, 2 Barn. & Ad. 793; *Binghamton Bridge*, 70 U. S. 3 Wall. 75 (18:143).

The rule of construction in this class of cases is that it shall be most strongly against the corporation.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 666 (24:1038); *Rice* v. *Minnesota & N. W. R. R. Co.* 66 U. S. 1 Black, 380 (17:153).

Grants of this nature are to be construed strictly.

Newark Pl. Road Co. v. *Elmer*, 9 N. J. Eq. 789; *Commonwealth* v. *Erie & N. E. R. R. Co.* 27 Pa. 351; *Webb* v. *Manchester & L. R. Co.* 4 Mylne & C. 120.

Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature.

Wilkinson v. *Leland*, 27 U. S. 2 Pet. 662 (7:554); *Oates* v. *First Nat. Bank*, 100 U S. 244 (25:582); *Holmes* v. *Carley*, 31 N. Y. 289.

A thing which is within the letter of the statute is not within the statute, unless within the intention of the makers.

Jersey Co. v. *Davison*, 29 N. J. L. 423; *Smith* v. *People*, 47 N. Y. 336.

Rules for the construction of statutes look to the whole and every part of a statute, to the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law.

Ryegate v. *Wardsboro*, 30 Vt. 749; *State* v. *Paterson*, 35 N. J. L. 197; *State* v. *Clark*, 29 N. J. L. 99; *Lake* v. *Caddo Parish*, 37 La. Ann. 789; *State* v. *Nicholls*, 30 La. Ann. 982; *Jackson* v. *Collins*, 3 Cow. 96; *People* v. *Davenport*, 91 N. Y. 584; *State* v. *Clarksville & R. T. P. Co.* 2 Sneed (Tenn.) 89; Potter, Dwarr Stat. 144.

If the only federal question in the case—that of the construction of the Act of Congress—was properly decided by the state court, no other questions arising upon the record should be considered.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 590 (22:429); *Allen* v. *McVeigh*, 107 U. S. 433 (27:572).

A vessel navigating a river has a right to the unobstructed use of all its natural width.

Newark Pl. Road Co. v. *Elmer*, 9 N. J. Eq. 790; *Georgetown* v. *Alexandria Canal Co.* 37 U. S. 12 Pet. 97 (9:1015); *Pennsylvania* v. *Wheeling & B. Bridge Co.* 54 U. S. 13 How. 564 (14:268); *Arundel* v. *McCulloch*, 10 Mass. 70.

By a violation of the law, the protection of the law has been forfeited.

Dugan v. *Bridge Co.* 27 Pa. 318; *Commonwealth* v. *Church*, 1 Pa. 105; *Commonwealth* v. *Nashua & L. R. R. Corp.* 2 Gray, 54; *Commonwealth* v. *Vermont & M. R. R. Corp.* 4 Gray, 22; *Waring* v. *Clarke*, 46 U. S. 5 How. 464 (12:287).

Mr. Justice **Lamar** delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Missouri to review a judgment of that court affirming a judgment of the Circuit Court of Jackson County in said State against the plaintiff in error. The action was brought in February, 1875, in the Circuit Court of Jackson County, by the Missouri River Packet Company, plaintiff below, against the Hannibal and St. Joseph Railroad Company, defendant below, to recover damages for injuries done to two of the plaintiff's steamboats by a railroad bridge which had been erected and maintained by defendant over the Missouri River at Kansas City, Missouri, the piers of which and two certain structures connected therewith, it is alleged, unlawfully obstructed the navigation of said river.

The petition contained two counts, the first of which was as follows:

"Plaintiff states that it is, and for the five years last past has been, a corporation organized and created under and by virtue of the laws of the State of Missouri, and during said period has been and still is the owner and proprietor of numerous steamboats, including the steamboat named 'Alice,' hereinafter mentioned, with which it has, as such corporation, during said period been engaged in navigating the waters of the Missouri River, and conveying and transporting, by means thereof, passengers and freight between the various towns and cities situated on the banks of said river in the States of Missouri and Kansas.

"That the defendant is and for the last twenty years has been a railroad corporation, organized under and by virtue of the laws of the State of Missouri.

"That the Missouri River, for a long distance above the City of Kansas, in the County of Jackson and State of Missouri, and below said city to the mouth of said river, is a navigable stream; that prior to the 4th day of March, 1874, the defendant had erected, and prior thereto and on said day did keep and maintain, in the said river and the channel thereof, near the southern bank thereof and near the foot of the street known as Broadway, in said City of Kansas, a certain structure composed of heavy timbers and lumber fastened together; and long prior to said day the defendant had erected, kept, and maintained, and did on said day keep and maintain, in the channel of said river, in a point in said Jackson County and opposite said City of Kansas, nearer the center of said river than the structure first above named, a certain other structure to wit, a crib or box built of heavy timbers filled with stone, which said crib or box extended from the bed of said river upward to a height of 30 feet or more above the surface thereof; that both of said structures were and always have been obstacles in the way of vessels passing by the same up and down said river, and have prevented and rendered the navigation of said river dangerous and unsafe; that said structures were so erected, kept, and maintained by the defendant wrongfully, willfully, and in flagrant disregard and violation of the rights of plaintiff and others, to the free and unobstructed use of said river as a highway of commerce; that before the erection of said structures the current of said river, at and above and below the point where the same were located and erected, had been in a line nearly parallel to the faces of said structure, and the navigation of the same easy and safe.

"But plaintiff states that the structure first above mentioned had, on said 4th day of March, 1874, caused the current of the river at that

point, to change, so that it rushed with great velocity from the point of the location of said structure in a direction nearly at right angles to its former course towards and against said crib or box.

"And plaintiff states that on said 4th day of March, 1874, it was, in the course of its business, navigating said river with its said steamboat 'Alice,' and while attempting, in the exercise of due care and caution, to run said boat by and between said structures, said boat was, without any fault of this plaintiff, by the current of the river, so changed as aforesaid, hurled violently against said crib or box, and the waterwheel, wheelhouse and other parts of of said boat broken, injured and damaged.

"That plaintiff was compelled to and did expend large sums of money in repairing said injuries to said boat, and was, on account of the injuries thereto, wholly deprived of the use of the same and of the earnings thereof for the period of thirteen days, to plaintiff's damage in the sum of twenty-five hundred dollars, for which, with interest from the 1st day of April, 1874, plaintiff prays judgment against the defendant."

The second count was in substantially the same form, and alleged an injury to the "St. Luke," another of plaintiff's vessels, occurring on the 15th day of September, 1874, and prayed judgment on account thereof in the sum of $3,000.

To this petition the defendant below first interposed a plea to the jurisdiction of the court, alleging that the structures complained of, and each of them, were, at the time of the injuries alleged in plaintiff's petition, and still are, a part of a bridge across the Missouri River at Kansas City, authorized by the Act of Congress approved July 25, 1866, and constructed under and in accordance with the terms and provisions of said Act by the Kansas City and Cameron Railroad Company, of which the defendant Company below is the successor; that said bridge was wholly situated at the time of the injuries alleged in plaintiff's petition, and still is wholly situated, within the jurisdiction of the District Court of the United States for the Western District of Missouri, and that, by reason of the premises stated, said district court has exclusive jurisdiction over the subject matter of this action.

This plea having been overruled by the court, and exceptions duly saved, the defendant answered. The answer consisted of (1) a general denial, and (2) a special defense, which latter was pleaded as a full and complete bar to the cause of action alleged in the petition, and is in substance as follows: That at the time of the injury complained of in plaintiff's petition, the defendant was, for a long time prior thereto had been, and still is, a corporation duly organized under the laws of the State of Missouri, and, as such corporation, acting as it was authorized to do by the terms of its charter, it had constructed a railroad from the Town of Hannibal, in the State of Missouri, to the Town of St. Joseph, in said State, and has been ever since maintaining and operating said railroad; that the Kansas City and Cameron Railroad Company, a corporation duly organized under the laws of the State of Missouri, as it was authorized to do by the terms of its charter, had constructed a railroad from the north bank of the Missouri River, opposite said City of Kansas, to Cameron, on the Hannibal and St. Joseph Railroad; that Congress, by an Act approved July 25, 1866, authorized the construction of a bridge across the Missouri River at or near Kansas City, and the Kansas City and Cameron Railroad Company, availing itself of this privilege, between the passage of said Act of Congress and the 4th day of July, 1869, did construct such bridge at Kansas City; that the Kansas City and Cameron Railroad Company afterwards, to wit, on the 4th day of February, 1870, consolidated with the defendant company, whereby the defendant became the owner and proprietor of said bridge; that said bridge was and is a pivot drawbridge, with a draw over the main channel of said Missouri River, at an accessible and navigable point, and with spans of 160 feet in the clear on each side of the pivot pier of the draw, and the next adjoining spans to the draw were and are 80 feet above low water mark and 10 feet above high water mark, measuring to the bottom chord of said bridge, and the piers of said bridge were, at the times of location and construction thereof, parallel with the current of the said river; that the obstacles and obstructions (the structures) described in plaintiff's petition, and each of them, were at that time, and still are, parts and parcels of said bridge, and were and are necessary to the safe and secure maintenance of said bridge; that said bridge, ever since its completion, has been a post route; and that, by reason of the premises aforesaid, said bridge, ever since its completion, has been and still is a lawful structure, and, if plaintiff has sustained any damage in consequence thereof, it has been without any fault on the part of defendant, and the defendant is not legally liable therefor.

Plaintiff in its reply specifically denied every material allegation set up in the special defense of the defendant, and upon this state of the pleadings the case was tried by a jury, resulting in a verdict for plaintiff below on the first count in its petition, for $2,400, and on the second, for $2,900—in all $5,300—upon which judgment was rendered.

Plaintiff [in error] thereupon excepted and appealed to the Supreme Court of the State of Missouri, relying mainly upon the question of jurisdiction in the court below, and upon certain alleged improper and illegal instructions given to the jury. The Supreme Court of the State, upon the questions material to a review of the case by this court, held: (1) That the Circuit Court of Jackson County, in which this action was commenced, had concurrent jurisdiction with the District Court of the United States for the Western District of Missouri in the case, and that therefore the plea to the jurisdiction was properly overruled by the circuit court; (2) That, while the piers of the bridge were constructed parallel with the current of the river as required by the Act of Congress, in determining whether the spans of the bridge on each side of the pivot pier were 160 feet in length in the clear, as required by the Act, the measurement should be made at right angles with the current, and not along the structure itself or on the line of the structure, and, inasmuch as the spans so measured were but

153 feet and a fraction in length, that therefore the structure causing the accident was not a lawful one.

The Act of Congress, approved July 25, 1866, giving permission for the construction of the bridge under consideration, is found in volume 14 of the Statutes at Large, page 244, and the sections thereof material to a correct determination of the issue here are quoted in full below.

Section 1 provides for the erection of a bridge across the Mississippi River at Quincy, Illinois, and for the laying of railroad tracks on and over the same, etc. "And in case of any litigation arising from any obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches.

"Sec. 2. *And be it further enacted*, That any bridge built under the provisions of this Act may, at the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans; *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than 250 feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river, and not less than 300 feet in length; *And provided also*, That if any bridge built under this Act shall be constructed as a drawbridge, the same shall be constructed as a pivot drawbridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than 250 feet; and said spans shall not be less than 80 feet above low water mark, and not less than 10 above extreme high water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river; *And provided also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

"Sec. 3. *And be it further enacted*, That any bridge constructed under this Act, and according to its limitation, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

"Sec. 10. *And be it further enacted*, That any company authorized by the Legislature of Missouri may construct a bridge across the Missouri River, at the City of Kansas, upon the same terms and conditions provided for in this Act."

The material facts in this case, as set forth clearly and distinctly in the frank and able brief of counsel for plaintiff in error, are as follows:

"The undisputed evidence showed that the bridge was a pivot drawbridge; that its piers were parallel with the current of the river, but that they were not at right angles with the current, and ranged diagonally across it; that as a consequence the superstructure of the bridge, erected on the piers, ran diagonally across the current of the river at an angle of 18 degrees; that measuring the spans between the piers, along the line or chord of the bridge, gave a distance of over 160 feet; that the open space between the piers, at low water mark, measured on the line of the bridge structure, was also over 160 feet; but that a line measured at right angles with the current was only 153 feet and a fraction. It also appeared that the draw bridge, when swinging open to permit the passage of boats, rested upon two timber structures, called upper and lower draw rests, which had for their foundation cribs sunk in the river and filled with rock. There was also an ice breaker in front of the upper draw rest, and forming a part of it. The draw rests were connected with the pivot pier by cribs sunk in the water. These draw rests, thus connected with the pivot pier, were situated near the middle of the river, parallel with the current, and all taken together extended up and down the river about the length of the draw, and were necessary parts of the structure. The upper draw rest, with its ice breaker attached, was what the petition designated as 'a certain other structure, to wit, a crib or box, built of heavy timbers filled with stone,' and was the structure with which the steamer came in collision. The evidence also tended to show that near the river bank, on the south side of the south draw opening, a row of pontoons was placed, extending from pier No. 1, up the river about 340 feet to the shore; pier No. 1 being about sixty-five feet from the Kansas City shore, and being the pier on which the south end of the draw rested when in position. These pontoons were constructed of a number of flat boats from fifty-three to sixty-five feet in length, and from eighteen to twenty feet in width, chained together, so that their outer edge presented a straight line next to the channel. On the trial it was not claimed that these pontoons were any part of the bridge. They constituted what the petition called 'a certain structure composed of heavy timbers and lumber fastened together,' near the southern bank of the river. It further appeared that the pontoons remained floating and in position until the latter part of the winter of 1873-4, when they sank. The evidence for the plaintiff tended to show that they sank transversely, or in a direction quartering out into the river; that there was a cross current, starting from near the south shore, above the head of the pontoons and running diagonally across the river, in the direction of the upper draw rest; and that while the boats were attempting to pass the drawbridge, in charge of skillful pilots, exercising ordinary care and skill, they were caught by the cross current and hurled against the upper draw rest and injured thereby. On the other hand, the testimony for the defendant tended to show that

no such cross current existed, and that the injury to the boats occurred solely by reason of want of due care and skill of the pilots in the management of the boats."

The Supreme Court of the State of Missouri, in affirming the judgment of the Circuit Court of Jackson County, also ruled clearly that the distance of 160 feet between the piers of the bridge required by the Act of Congress should be obtained by measuring along a line between said piers drawn perpendicular to the faces of the piers, and the current of the river; and that as such line would measure but 153 feet and a fraction, instead of 160 feet as required, the bridge was not a lawful structure within the meaning of the Act.

The substance of the errors assigned and relied on here, relate (1) to the construction given by the state court to the second section of the Act of July 25, 1866; and (2) to the ruling of the Supreme Court of the State, approving the giving of plaintiff's instruction No. 1. The plaintiff in error makes no contention here as to the question of jurisdiction urged in its behalf in the state courts, but, on the contrary, expressly states that it agrees with the decision of the Supreme Court of the State upon that question.

The sole question, therefore, for our decision relates to the construction given by the state court to that part of the Act of Congress defining the manner in which the bridge should be built; *i. e.*, that the distance of 160 feet between the piers of the bridge, required by said Act, should be obtained by measuring along a line between said piers, drawn perpendicularly to the faces of the piers and the current of the river, and that as such line would measure but 153 feet and a fraction, instead of 160 feet as required, the bridge was not a lawful structure.

It is strenuously urged by the counsel for plaintiff in error that the bridge we are considering meets the express requirements of the statute; that the word "spans," as used in the statute, means the structures or parts of the bridge which span the river on each side of the pivot pier, and it is these spans which the statute says shall measure 160 feet in *length* in the clear on each side of the central or pivot pier of the draw; and that the bridge having been constructed according to the requirements of the statute, in its own words, is therefore a legal structure; that the Supreme Court of Missouri, in declaring that "We must look to the spirit and reason of the Act, the purpose of which manifestly was to reserve for the purposes of navigation 160 feet of open space in the clear, wholly unobstructed, and available for the passage of vessels," ignored the plain language of the provision, and inferred an intention contrary to that language; that there was nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear, wholly unobstructed;" and that the Act nowhere defines the precise direction of the bridge, but entrusted that direction to the discretion of the Company.

We do not consider this sound reasoning. The statement that there is nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear wholly unobstructed," is repelled by every provision in the Act specifying the dimensions of the various parts of the structure. The fact that Congress prescribed in said Act such minute details concerning the manner in which the proposed bridge should be built,—the requirement that it should be constructed with a draw over the main channel of the river at an accessible and navigable point, the provision that the piers of said bridge should be parallel with the current of the river, that prescribing the height of the spans above the surface of the water,—and the very rigid directions as to the opening of the draw upon reasonable signals, without delay, for the passage of boats, show how careful Congress was in preserving these navigable rivers as highways of commerce, and in guarding the interests of the public, and especially of those engaged in navigating the rivers that would be spanned by the structures authorized by said Act.

We concur with the court below that we must look to the spirit and reason of this provision of the law, and construe it with reference to its evident purpose to connect with the exercise of the privileges therein granted such limitations as will guarantee protection to the navigating interests affected by the proposed legislation. Can it be said that the object and purpose of the law was simply that a bridge should be built across the Missouri River at Kansas City for the benefit of the Railroad Company alone? Manifestly not, for in that case it would have been only necessary to grant the privilege of building a bridge at the place designated without any limitation or condition as to its mode of construction, except such as the discretion of the Company might determine.

In what we have said we do not wish to be understood as assenting to the proposition that the strict letter of the statute supports the contention of the plaintiff in error. The word "span" does not, even in architecture, always means a part of a structure. It is, perhaps, as often used to denote the distance or space between two columns. Such is the obvious import of the term as used in the Act under consideration, not merely as a part of the structure itself, but the measure of the distance between the piers of the bridge—the measure of the space left open for navigation purposes. A similar provision to this may be found in an Act of the Illinois Legislature authorizing the construction of a bridge across a river, and the word "space" is used, where in this Act we have the word "span."

It is said that the Act nowhere defines the precise direction of the bridge, but leaves that to the discretion of the company. The answer to this is that by the express terms of the Act of Congress the piers of the bridge across the river are required to be placed parallel with the current. To the word "across," unless it is qualified by some prefix as *diagonally* or *obliquely*, there is attached, in ordinary use, but one meaning, and that is a direction opposite to length. This is especially true when it is used in connection with parallel lines. When the piers are placed parallel with the current of the river they are parallel with one another, and the faces of the piers may properly be considered as so many parallel planes. The spans

of the bridge are to be not less than 160 feet in length, *in the clear on each side* of the pivot pier of the draw—that is, from the face of the central pier to the face of the next adjacent pier must be a distance of not less than 160 feet in the clear. Now, it is an elementary principle of mathematics that "the distance between two parallel planes is measured on a perpendicular to both."

But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous to the interests of the government. The statute, being a grant of a privilege, must be construed most strongly in favor of the grantor. *Gildart* v. *Gladstone*, 12 East, 668; *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 544 [9:822]; *Dubuque & P. R. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 [16: 500]; *Binghamton Bridge*, 70 U. S. 3 Wall. 75 [18: 143]; *Rice* v. *Minnesota & N. W. R. R. Co.* 66 U. S. 1 Black, 380 [17: 153]; *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 733 [23: 634]; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 660 [24: 1036].

As persuasive authority in support of the conclusion we have reached with reference to this bridge, may be cited the case of *Columbus Ins. Co.* v. *Peoria Bridge Asso.* 6 McLean, 70; also the case of *Missouri River Packet Co.* v. *Hannibal & St. J. R. R. Co.* 1 McCrary, 281, the latter being a decision of the Circuit Court of the United States for the Western District of Missouri in a case between the identical parties to this suit and concerning this identical bridge.

In this last case *Judge* McCrary says: "If it be granted that a measurement along a line which deviates from a course directly across the channel is the proper one, then it would follow that the actual passage way might be less than that required by the Act. The greater the deviation from such a direct line, the less would be the available space between the piers. Such a construction of the Act would defeat the main purpose which Congress had in view in its enactment."

We are therefore of the opinion that the Supreme Court of the State of Missouri committed no error in its construction of the Act of Congress under consideration.

A reversal of the judgment brought here for review is also asked upon the ground that the Supreme Court of Missouri erred in sustaining the Circuit Court of Jackson County in giving to the jury what is called "Plaintiff's Instruction No. 1." This instruction is as follows:

"The jury are instructed that unless the bridge mentioned in the answer had piers which were parallel with the current of the river, and spans of not less than 160 feet in the clear on each side of the pivot pier, then said bridge is an illegal structure and an unlawful obstruction to the navigation of the Missouri River; and if the jury believe from the evidence that it was not such a bridge, and further believe that the plaintiff's boats, Alice and St. Luke, or either of them, while attempting to pass through the draw of the bridge in charge of pilots exercising usual and ordinary care, struck the draw rest of the bridge, and were thereby damaged, then the jury will find their verdict for the plaintiff as to such boat or boats."

It is said that by sustaining this instruction the Supreme Court of Missouri held that the mere fact that the bridge had not been constructed as required by the statute rendered the Railroad Company liable, irrespective of the question whether the improper construction caused the accident; and it is urged that such holding is erroneous.

This, however, does not present any federal question for the consideration of this court, and therefore we decline to examine into its merits. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 [22: 429]; *Allen* v. *McVeigh*, 107 U. S. 433 [27: 572].

Upon the only questions in this case cognizable by this court, *the judgment of the Supreme Court of the State of Missouri is affirmed.*

AUGUSTA FRIEDENSTEIN, Claimant of Package of Diamonds, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 224-240.)

Declarations of agent, when evidence—objections, when waived—information—allegations in—general verdict.

1. In a suit, brought by the United States, to condemn goods seized as forfeited under the customs revenue laws, declarations in regard to the goods, made by a person having them in possession and offering them for sale, at the time a special agent of the Treasury Department was making an official investigation as to whether they should be seized for forfeiture, were a part of the *res gestæ*, and admissible in evidence as against the person claiming to be the owner of the goods.

2. Objections to the form of the information, not taken in the court below by demurrer, or exception, or motion in arrest of judgment, or by motion to dismiss, must be regarded as having been waived or cured by the verdict.

3. Informations of seizure for forfeitures are civil proceedings *in rem*, and the statute providing that no judgment or other proceedings in civil causes shall be arrested or reversed for any defect or want of form is applicable to them.

4. It is not necessary to aver in such an information that the alleged acts were done with an actual intention to defraud the United States; but a finding to that effect is required to be made on the trial under section 16 of the Act of June 22, 1874, chap. 391, 18 Stat. at L. 189.

5. A general verdict for the informants against the claimant, for the condemnation of the goods mentioned in the information, will be supported if any count of the information is good, against objections which are formal, where the Government was not required to elect on which count it claimed a verdict.

[No. 178.]

Argued Feb. 10, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a decree of that court affirming a decree of the District Court, of condemnation of goods, as forfeited under the customs revenue laws. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Leopold Wallach and **Edwin B. Smith**, for plaintiff in error:

The libel is too defective to found a decree upon.

The Hoppet v. *U. S.* 11 U. S. 7 Cranch, 391–395 (3: 381, 382); *The Caroline* v. *U. S.* Id. 500 (3: 418); *The Anne* v. *U. S.* Id. 570 (3: 442); *U. S.* v. *90 Demijohns of Rum*, 4 Woods, 637; *The*

Edward, 14 U. S. 1 Wheat. 269 (4: 88); *The Mabey* v. *Atkins*, 77 U. S. 10 Wall. 420 (19: 963); *U. S.* v. *Weed*, 72 U. S. 5 Wall. 68 (18: 538).

The prosecution is *quasi* criminal.

Boyd v. *U. S.* 116 U. S. 634 (29: 752); *Coffey* v. *U. S.* Id. 436 (29: 684); *Fisher* v. *McGirr*, 1 Gray, 27; *U. S.* v. *3 Trunks*, 7 Sawy. 366.

Under previous legislation actual fraud was not necessary to be proved, to sustain a forfeiture for breach of the customs revenue laws.

Sinn v. *U. S.* 14 Blatchf. 552, 554; *U. S.* v. *McKim*, 3 Pittsb. L. J. 155; *U. S.* v. *2117 Bushels of Malt*, 8 Fed. Rep. 224; *U. S.* v. *Curtis*, 16 Fed. Rep. 184; *U. S.* v. *Barnes*, 6 Ben. 188.

No fraudulent intent is charged.

Cloutman v. *Tunison*, 1 Sumn. 375; *U. S* v. *Wentworth*, 11 Fed. Rep. 54; *U. S.* v. *1 Oil Painting*, 31 Fed. Rep. 881, 882; *The Snow Drop*, 30 Fed. Rep. 80; *The Purissima Concepcion*, 24 Fed. Rep. 360; *U. S.* v. *Simmons*, 96 U. S. 364 (24: 820); *Commonwealth* v. *Shaw*, 7 Met. 56; *People* v. *Lohman*, 2 Barb. 218; *State* v. *Card*, 34 N. H. 515; *Cragin* v. *Lovell*, 109 U. S. 199 (27: 905); *U.S.* v. *Jackson*, 104 U. S. 43 (26: 652).

Indictment defective unless intent is averred.

U. S. v. *Staats*, 49 U. S. 8 How. 44 (12: 981); *U. S.* v. *Jackson*, 2 Fed. Rep. 504; *U. S.* v *Corbin*, 11 Fed. Rep. 242; *People* v. *Lohman*, and *State* v. *Card*, *supra; Gabe* v. *State*, 6 Ark. 519; *Commonwealth* v. *Morse*, 2 Mass. 128.

Whatever is implied in a penal statute must be alleged.

Commonwealth v. *Slack*, 19 Pick. 304; *U. S.* v. *Brindle*, 110 U. S. 694 (28: 288); *U. S.* v. *Noelke*, 17 Blatchf. 560; *The Hoppet* v. *U. S.* 11 U. S. 7 Cranch, 392 (3: 381); *Moes* v. *Riddle*, 9 U. S. 5 Cranch, 357, 358 (3: 124, 125); *Commonwealth* v. *Morse*, *supra*.

Where the law makes fraud an element, it is error to admit evidence of it unless it has been alleged.

Faure v. *Martin*, 7 N. Y. 218; *Addington* v. *Allen*, 11 Wend. 375; *Star Steamship Co.* v. *Mitchell*, 1 Abb. Pr. N. S. 396; *Noonan* v. *Lee*, 67 U S. 2 Black, 500 (17: 278); *Woodcock* v. *Bennet*, 1 Cow. 734; *U. S.* v. *Jackson*, and *Cragin* v. *Lovell*, *supra*.

It is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements of the offense intended to be punished.

U. S. v. *Carll*, 105 U. S. 612 (26: 1135); *U. S.* v. *Simmons*, 96 U. S 360 (24: 819); *U. S.* v. *Cruikshank*, 92 U. S. 542 (23: 588); *Commonwealth* v. *Clifford*, 8 Cush. 217; *U. S.* v. *Mills*, 32 U. S. 7 Pet. 142 (8: 637); *U. S.* v. *78 Cases Books*, 2 Bond, 278; *People* v. *Wilber*, 4 Park. Cr. Cas. 21; *Commonwealth* v. *Chase*, 125 Mass. 202; *Commonwealth* v. *Miller*, 2 Pars. Eq. Cas. (Pa.) 480; *Pearce* v. *State*, 1 Sneed (Tenn.) 67; *Commonwealth* v. *Thurlow*, 24 Pick. 374; *Bates* v. *State*, 31 Ind. 74; Whart. Cr. Pl. & Pr. §§ 154, 220, 221; *U. S.* v. *Crosby*, 1 Hughes, 454; *Given* v. *Webb*, 7 Robt. 65; *Scofield* v. *Whitlegge*, 49 N. Y. 261.

Plaintiff can recover only according to his allegation as well as his proofs.

The Rhode Island, Olc. 511; *Davis* v. *Leslie*, 1 Abb. Adm. 129; Dunlap, Adm. Pr. 112, 119, 120; *State* v. *Packard*, 4 Oreg. 160; *State* v. *Perham*, Id. 188; *State* v. *Simpson*, 73 N. C. 271; *Commonwealth* v. *Stout*, 7 B. Mon. 248; *State* v. *Jackson*, 7 Ind. 270; *Bates* v. *State*, 31 Ind. 74; *Quinn* v. *State*, 35 Ind. 485; *State* v. *Record*, 56 Ind. 109; *Anthony* v. *State*, 29 Ala. 28; *Danner* v. *State*, 54 Ala. 130.

The first count states no particular vessel, but does say it was by some vessel, name unknown.

White v. *People*, 32 N. Y. 471; *People* v. *White*, 55 Barb. 606; *State* v. *Wilson*, 30 Conn. 507; *U. S.* v. *Stetson*, 3 Wood. & M. 167; *Cameron* v. *State*, 13 Ark. 718; *Reed* v. *State*, 16 Ark. 502; *Blodget* v. *State*, 3 Ind. 404; *Stone* v. *State*, 30 Ind. 116; *Cheek* v. *State*, 38 Ala. 234, 235; *Rex* v. *Robinson*, 1 Holt, N. P. 595; *S. C.* 3 Eng. C. L. 233; *Rex* v. *Walker*, 3 Campb. 264; *Commonwealth* v. *Moore*, 11 Cush. 600.

As to the defective allegation of time.

Rex v. *Holland*, 5 T. R. 607; *Roberts* v. *State*, 19 Ala. 526; *Sanders* v. *State*, 26 Tex. 119; *State* v. *Slack*, 30 Tex. 354; *State* v. *Baker*, 34 Me. 52; *State* v. *Hanson*, 39 Me. 337.

The averments should exclude the idea of the possibility of the goods having been landed in conformity with law.

State v. *Godfrey*, 24 Me. 232; *State* v. *Philbrick*, 31 Me. 401; *People* v. *Gates*, 13 Wend. 311; *U. S.* v. *Britton*, 107 U. S. 670 (27: 525).

The second count states no offense.

U. S. v. *Reese*, 92 U. S. 221 (23: 565); *U. S.* v. *Cruikshank*, Id. 542 (23: 588); *U. S.* v. *Fox*, 95 U. S. 672, 673 (24: 539, 540).

It cannot be presumed, in the face of the record, that an illegal seizure was made, or that some act was done that did not amount to a seizure.

Miller v. *U. S.* 78 U. S. 11 Wall. 294 (20: 141); *Gould* v. *Ray*, 18 Wend. 637; *Winter* v. *U. S.* Hemp. 344; *Watson* v. *Dunlap*, 2 Cranch, C. C. 14; *Lincoln* v. *Fitch*, 42 Me. 467; *Hartley* v. *Hartley*, 8 Met. (Ky.) 60; *Owen* v. *Jones*, 14 Ark. 502.

When the want of jurisdiction is apparent upon the face of the declaration, the defendant may take advantage of such omission at any time before judgment.

Donaldson v. *Hazen*, Hemp. 425; *Hope Ins. Co.* v. *Boardman*, 9 U S. 5 Cranch, 57 (3: 36); *Abercrombie* v. *Dupuis*, 5 U. S. 1 Cranch, 343 (2: 129); *Mollan* v. *Torrance*, 22 U. S. 9 Wheat. 537 (6: 154); *Jackson* v. *Twentyman*, 27 U. S. 2 Pet. 136 (7: 374); *Lanning* v. *Dolph*, 4 Wash. 628; *Harris* v. *Harris*, 10 Wis. 467.

Mrs. Sussman's agency was terminated by the forcible taking from her of these diamonds. With the termination of the agency ends all the power of the agent to affect the principal by declarations.

Story, Ag. § 134; Dunlap, Paley's Ag. 270; *Northwestern Union Packet Co.* v. *Clough*, 87 U. S. 20 Wall. 540, 541 (22: 408); *American L. Ins. Co.* v. *Mahone*, 88 U. S. 21 Wall. 157 (22: 595); *Luby* v. *Hudson River R. R. Co.* 17 N. Y. 133; *Wilson* v. *Bowden*, 118 Mass. 422.

Mrs. Sussman's statements must be taken together.

U. S. v. *Jewelry*, 13 Blatchf. 60; *Dodge* v. *Freedman's Sav. & T. Co.* 93 U. S. 379 (23: 920); *Whetmore* v. *Murdock*, 3 Wood. & M. 385; *Many* v. *Jagger*, 1 Blatchf. 372; *Millick* v. *Peterson*, 2 Wash. 31; *Sherman* v. *Delaware L. & W. R. R. Co.* 9 Cent. Rep. 432, 106 N. Y. 546, 547.

She could not prevent any sale by disparag-

ing or destroying the title of her principal by any statement of a past event.

Bynum v. *Southern Pump & Pipe Co.* 63 Ala. 462; *Henry* v. *Northern Bank*, Id. 537; *Grimshaw* v. *Paul*, 76 Ill. 164.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for the United States:

The verdict cures every defect.

Lincoln Twp. v. *Cambria Iron Co.* 103 U. S. 415 (26: 519); *Confiscation Cases*, 87 U. S. 20 Wall. 104 (22: 322); *The Palmyra*, 25 U. S. 12 Wheat. 12 (6: 534); *Stockton* v. *Bishop*, 45 U. S. 4 How. 167 (11: 923); *The Emily* and *The Caroline*, 22 U. S. 9 Wheat. 381 (6: 116).

Everything required to warrant the forfeiture was passed upon and found by the jury.

U. S. v. *Curtis*, 16 Fed. Rep. 190.

As to the continuity of the several steps resulting in a seizure, see *Four Packages* v. *U. S.* 97 U. S. 411 (24: 1031).

In case the information in a cause should be found deficient, and the evidence sufficient to show breach of the law, the practice has been to remand it to the court below for amendment.

The Caroline v. *U. S.* 11 U. S. 7 Cranch, 500 (3: 418); *The Edward*, 14 U. S. 1 Wheat. 261 (4: 86); *Garland* v. *Davis*, 45 U. S. 4 How. 131 (11: 907); *U. S.* v. *Weed*, 72 U. S. 5 Wall. 62 (18: 531).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit brought by the United States, in the District Court of the United States for the Southern District of New York, to condemn forty-three diamonds, seized as forfeited under the customs revenue laws. The information contains five counts.

The first count is based on sections 2872 and 2874 of the Revised Statutes, and alleges that the goods were brought in a vessel, name unknown, from ———, a foreign port or place, and were, on the —— day of ———, 1882, unladen and delivered from such vessel within the port and collection district of the City of New York, without a permit from the collector and naval officer for such unlading or delivery, contrary to those two sections, and that the value of the goods, according to the highest market price of the same at the said port and district, amounts to $400.

The second count is based on section 3066, and avers that the collector, having cause to suspect a concealment of goods in the building No. 66 Nassau Street, in the City of New York, did, on the 27th of February, 1883, with due warrant therefor, enter the said building, in the daytime, and there search for such goods, and did then and there find the same concealed, and did seize and secure the same for trial, and that the duties had not been paid or secured to be paid thereon, contrary to said section.

The third count is based on section 2802, and avers that the said goods, being articles subject to duty, were, on the 27th of February, 1883, found in the baggage of a person arriving in the United States, and were not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made by the person making the same, contrary to said section.

The fourth count is based on section 2809, and avers that the said goods were, on the —— day of ———, one thousand eight hundred and ——, imported into the United States in the vessel, name unknown, belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from a foreign port or place, and were not included in the manifest, and belonged or were consigned to the master, mate, officers, and crew of such vessel, contrary to said section.

The fifth count is based on section 3082, and avers that on or about the —— day of ———, one thousand eight hundred and ——, an unknown person did fraudulently and knowingly import and bring into the United States, and assist in so doing, the said goods, contrary to law, and did receive, conceal, buy, sell, and in some manner facilitate the transportation, concealment, and sale of such goods after their importation, knowing the same to have been imported contrary to law, contrary to said section.

One Augusta Friedenstein put in a claim to the goods as owner, and answered the information, denying the forfeiture. The case was tried by a jury in the district court, which rendered "a verdict for the informants and against the claimant for the condemnation of the goods mentioned in the information, and that the acts complained of therein were done with intent to defraud the United States." A decree of condemnation was entered thereon, and the claimant took the case by writ of error to the circuit court, which affirmed the decree of the district court and remanded the case thereto for execution of the decree. The claimant has brought the case to this court by a writ of error.

The bill of exceptions shows the following state of facts in regard to the seizure of the goods: On the 27th of February, 1883, one Brackett, a special agent of the Treasury Department, went with two subordinates to the store of Goldsmith & Kuhn, No. 66 Nassau Street, where they found a man and a woman and the package of diamonds. The woman was a Mrs. Sussman. When Brackett reached the store, the diamonds were in the possession of Goldsmith & Kuhn. They told Brackett that Mrs. Sussman had handed the diamonds to them. Mr. Kuhn, who was behind the counter, had the package and handed it to Brackett upon his demand for it. Brackett took it, and requested Mrs. Sussman to accompany him to the custom house, as he wished to make some inquiries about the diamonds. He took them to the custom house, Mrs. Sussman accompanying him. In answer to a question put to Brackett by the counsel for the claimant, on his examination as a witness, as to when he took the diamonds, he said: "I took them at the store and took her down to the custom house with them. If her explanation was satisfactory I did not intend to seize them." The package was opened at the custom house, and the diamonds were examined and appraised, and were then placed in the hands of the officer in charge of the seizure room at the custom house. Brackett was then asked by the district attorney: "When and where did you make the seizure of these diamonds?" To this question the claimant objected, as calling for a conclusion of law; but the court overruled the objection, and the claimant excepted. The witness replied: "The seizure of the diamonds was made

at the custom house in this city after I was through with my investigation."

It appeared that after Brackett and Mrs. Sussman arrived at the custom house, and before the package was there opened, a conversation took place there between him and her. The bill of exceptions says:

"The witness Brackett was recalled, and asked this question by the district attorney: 'Now state the conversation between Mrs. Sussman and yourself which occurred prior to the actual seizure of those diamonds in the custom house, and on the same day when she went in company with you to the custom house with the diamonds.'

"The claimant objected to this question, because Mrs. Sussman's statement, under the circumstances and at that time, could not affect the claimant; also, because the question involved a conclusion of law as to the time when 'actual seizure' took place. The court overruled the objection, admitting the question, and the claimant excepted.

"The witness Brackett, in reply to this inquiry, testified as follows: 'Well, I asked Mrs. Sussman from whom she got the diamonds. She said they belonged to another party, but she could not give the name of the party, neither would she give her own proper name. I told her, 'If you can give a satisfactory explanation, and if these goods have been brought into the port properly, and duties paid, the United States Government don't want them; why do you object?' 'Well,' she says, 'I can't mention the name of the lady to whom these stones belong.' Well, she finally said to me, after some twenty minutes, perhaps, of conversation—there were two other parties in the room, Mr. Cohen sitting outside, and the door open—she said, 'I would like to see you in private.' 'Well,' said I, 'these are my offices here; this is all private—these offices.' 'No,' said she, 'I want to speak to you alone.' Well, I went into the adjoining room with her, and she then said to me, 'These diamonds belong to a lady, as I said before, whose name I won't give. The duty has not been paid on these diamonds. I am ready to go now before the collector and make arrangements to have the duties paid.' 'Well,' said I, 'I cannot do that, madam.' 'Well,' she says, 'I am ready; it can't be over $400.' I then went back to the room and told her that I could not make any such arrangement with her as that; the diamonds were then [not?] under seizure; then I made up my mind to seize them after this conversation. She said the duty would not be over $400; she was ready to go before the collector and make arrangements to pay that duty.' The witness also testified that he sent for Gen. Palmer, and that Mrs. Sussman reiterated to Gen. Palmer what she had said to him, the witness.

"To further sustain the issues the Government then called George W. Palmer, who, after testifying that he was the deputy collector in charge of the seventh division or law department of the custom house, proceeded, under the objection of claimant's counsel, which objection was overruled and an exception to such ruling duly taken, to give in detail a conversation which he had with Mrs. Sussman at that time, of a similar nature to that testified to by Captain Brackett.

"It was also proved for the Government, and acknowledged by Mrs. Sussman, when on the stand on behalf of the claimant, that she, Mrs. Sussman, had been to Europe and had returned from thence and landed at the Port of New York in the latter part of August, 1882."

The ground urged against the admissibility of the conversation with Mrs. Sussman is that, she not being the owner of the diamonds, evidence as to her declarations was not admissible in derogation of the title to them, especially because such declarations were made after she had ceased to have the custody of them; and that it was error to permit Brackett to swear that, although he took physical possession of the property at 66 Nassau Street, before the conversation with Mrs. Sussman, he did not make the actual seizure until he made it at the custom house, after the conversation with Mrs. Sussman.

But we see no objection to the evidence. It is plain, on the testimony, that the goods were not seized for forfeiture until after the conversation, and that the seizure took place at the custom house, after the investigation and examination there, and did not take place at 66 Nassau Street. See *Four Packages* v. *U. S.* 97 U. S. 404, 411 [24:1081]. The second count of the information does not allege that the seizure took place at 66 Nassau Street. Its fair import is that the collector, with a warrant, entered those premises and searched for the goods and there found them, and that he afterwards seized and secured them for trial.

Mrs. Sussman, as appears from other evidence, in the bill of exceptions, had carried the diamonds to the store of Goldsmith & Kuhn for the purpose of selling them to that firm. If they really belonged to the claimant, they had been put by her into the custody of Mrs. Sussman, for the purpose of selling them. Under these circumstances, Mrs. Sussman's declarations to Brackett, in regard to the goods, while he was making an official investigation and examination as to whether they should be seized for forfeiture, were part of the *res gestæ*, and admissible in evidence as against the person claiming to be the owner of the goods in a suit *in rem* for their forfeiture. It was competent for the claimant to contradict the facts stated to Brackett by Mrs. Sussman, in regard to the diamonds; but the minutes of the trial show that although Mrs. Sussman was examined as a witness for the claimant, the claimant herself did not testify as a witness.

We see no objection to the evidence shown by the bill of exceptions to have been admitted under the exceptions of the claimant.

The claimant raises a point as to the sufficiency of the information. The record shows a full compliance with the statute in regard to the finding by the jury that the acts complained of in the information were done with intent to defraud the United States. It does not show that any motion in arrest of judgment was made; nor that any motion was made on the part of the claimant to dismiss the cause for any defect in the information. It is stated in the minutes of trial, which are contained in a paper aside from the bill of exceptions and forming no part of it, that, after the evidence for the United States had been put in, the counsel for the claimant moved to dismiss the case, and the motion was

denied; but it is not stated on what ground the motion was made. Under these circumstances, any defect in the information which could have been availed of by demurrer, or by exception, or by a motion to dismiss at the trial, made on the ground of such defect, or by a motion in arrest of judgment, must be regarded as having been waived, or as having been cured by the verdict. *Coffey* v. *U. S.* 116 U. S. 436 [29:684].

Among the objections covered by the above observations are those to the first count, that it does not name any vessel, that it does not name the foreign port or place or state that its name was unknown, that it does not state any day or month of the unlading, and that it does not state that there was then a naval officer at the port of unlading; that to the second count, that it does not allege that the goods were dutiable or imported; those to the third count, that it does not name the person arriving in the United States, nor allege that his name was unknown, nor when he arrived, nor at what port he arrived, nor who was the collector, nor that these things were unknown, nor, affirmatively, that any entry was made of the baggage in which the goods were found; those to the fourth count, that it avers no day, month, or year, no port, domestic, or foreign, no vessel, no owner, no consignee, and does not affirmatively state the existence of any manifest in which the goods should have been included; those to the fifth count, that it does not name time, place, person, or circumstance in regard to the importation, that it is bad for duplicity, because the importation is distinct from the subsequent dealing with the imported goods, and that it does not state what the illegality was in the importation.

This is a civil cause. In *Snyder* v. *U. S.* 112 U. S. 216 [28:697], it is said that informations under the revenue laws for the forfeiture of goods, seeking no judgment of fine or imprisonment against any person, are civil actions, although so far in the nature of criminal proceedings that a general verdict on several counts in an information is upheld if one count is good. This latter rule was also applied in *Locke* v. *U. S.* 11 U. S. 7 Cranch, 339 [3:364], in *Clifton* v. *U. S.* 45 U. S. 4 How. 242, 250 [11:957, 961], and in *Coffey* v. *U. S.* 116 U. S. 427, 433, 434, 436, 442 [29:681, 683, 684, 686]. In *The Palmyra*, 25 U. S. 12 Wheat. 1, 12 [6:531, 534], it is said that informations of seizure for forfeitures "are deemed to be civil proceedings *in rem*," and the existence of Rule 22 of the Rules of Practice adopted by this court for the courts of the United States, in admiralty and maritime jurisdiction, on the instance side of the court, prescribing the contents of informations on seizures for a breach of the laws of the United States, shows that such seizure cases are regarded as civil suits. The authority to make the Rule was conferred by section 6 of the Act of August 23, 1842, chap. 188, 5 Stat. at L. 518, which relates wholly to the making of rules in suits at common law and in admiralty and equity. The case of *U. S.* v. *Three Parcels of Embroidery*, 3 Ware, 75, relied on by the plaintiff in error, is distinguishable from the present case. There the statute required, in order to forfeit goods, that they should not have been invoiced according to their actual cost, and that that should have occurred with a design to evade the duties thereon; and it was held, on a motion in arrest of judgment, that an information was bad which only alleged the making of an entry with a design to evade the duties, and did not allege the making of a false invoice with such design.

Section 954 of the Revised Statutes, which was always in force as section 32 of the Act of September 24, 1789, chap. 20, 1 Stat. at L. 91, provides, that no judgment or other proceedings in civil causes, in any court of the United States, shall be arrested or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof. This statutory provision applies to many of the objections urged to the information in the present case. These and the other objections mentioned were not taken in the court below by demurrer or exception or motion in arrest of judgment, and there has been a verdict of condemnation. As was said in *Lincoln Twp.* v. *Cambria Iron Co.* 103 U. S. 412, 415 [26:518, 519], if the issue joined be such as necessarily required on the trial proof of the facts defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured. See also *Stockton* v. *Bishop*, 45 U. S. 4 How. 155, 167 [11:918, 923].

There is, however, one objection made to the information which it is proper to notice, as the question is an important one, and arises now for the first time in this court. It is provided as follows by section 16 of the Act of June 22, 1874, chap. 391, 18 Stat. at L. 189: "That in all actions, suits, and proceedings, in any court of the United States now pending, or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any of such provisions, in which action, suit, or proceeding, an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require, upon such proposition, a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

It is contended by the claimant that it is necessary to aver, in an information filed since that statute, that the alleged acts were done with an actual intention to defraud the United States; and that, as no such averment is found in the information in this case, the judgment cannot be supported. But we are of opinion that such averment is not necessary. The sec-

tion relates only to the duty of the court, on a trial by a jury or a trial without a jury, to require or make a special and separate finding as to the actual intention to defraud the United States. This is to be done in every suit of the character specified in the section, in which "an issue or issues of fact shall have been joined;" and the provision applies to suits then pending as well as to those thereafter to be commenced. The fair meaning of the section is that the issue or issues of fact shall have been framed, or shall be framed, in the usual manner theretofore in use. No one of the sections on which the counts of this information are founded prescribes any intent to defraud as an element of the forfeiture denounced in it; and if section 16 of the Act of 1874 is complied with, as it was in this case, at the trial of the cause before the jury, that is all that is required. We do not concur in the view taken in *U. S.* v. *90 Demijohns of Rum*, 4 Woods, 637, so far as such view conflicts with our opinion herein.

Besides, with the knowledge on the part of the claimant and her counsel of the necessity that the United States should prove on the trial that the alleged acts were done with an actual intention to defraud the United States, and that the jury should so find, or no forfeiture could be imposed, it is impossible for the claimant to allege that she did not come to the trial with the understanding that such actual intention was matter to which proof, on the trial, was to be addressed, although there was no allegation to that effect in the information.

It is also objected that the judgment of the district court recites, as its basis, only the verdict of the jury, that it found for the United States, condemning the goods, and that it does not recite the finding by the jury that the acts complained of in the information were done with intent to defraud the United States. But we think that this was not necessary. As it appears by the minutes of the trial that the jury made the finding of the intent to defraud required by the 16th section of the Act of 1874, as a necessary condition precedent to the imposition of the forfeiture, the judgment of forfeiture is justified.

The verdict was a general one, for the informants and against the claimant, for the condemnation of the goods mentioned in the information, and is supported, if any count of the information is good, against the objections now made. *Clifton* v. *U. S.* 45 U. S. 4 How. 242, 250 [11:957, 961]; *Snyder* v. *U. S.* 112 U. S. 216 [28:697]; *Coffey* v. *U. S.* 116 U. S. 427, 433, 436, 442 [29:681, 683, 684, 686]. The bill of exceptions does not state that it sets forth all the testimony given on the trial, and the names of witnesses on both sides are given in the minutes of the trial as having been sworn whose testimony does not appear in the bill of exceptions. There is nothing to show that any motion was made by the claimant that the Government should elect on which of the five counts it claimed a verdict. The third count alleges that the diamonds were articles subject to duty, and is a good count.

On the whole case, we see no error in the record, and the decree of the Circuit Court is affirmed.

Mr. Justice **Bradley** was not present at the argument of this case and took no part in its decision.

Mr. Justice **Field**, dissenting:

I am not able to concur in the judgment of the court in this case. The proceeding is a libel of information for the forfeiture of forty-three diamonds by reason of alleged violations of provisions of the customs revenue statute. The several acts for which a forfeiture is sought are not alleged to have been committed with any actual intent to defraud the United States, and yet the Statute of June 22, 1874, declares that in all actions, suits, and proceedings then pending or thereafter commenced to enforce the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited, by reason of any violation of the provisions of the customs revenue laws, in which issues have been joined, "It shall be the duty of the court on the trial thereof to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed." 18 Stat. at L. 189, § 16.

The statute thus makes the actual intent to defraud the gist of the offense, and an essential element of it, without proof of which no forfeiture can be adjudged. What must be found ought, according to well settled rules of pleading, to be averred. In every suit for penalties or forfeitures what must be proved to entitle the complaining party to judgment against either person or property must be averred in the libel; and its omission will not be cured by any verdict in the case. Defects in matters of substance are not thus cured. *U. S.* v. *Hess*, 124 U. S. 488 [*ante*, 516]. It may be that libels of information for the forfeiture of goods do not require such fullness and particularity of averment as an information for the punishment of a criminal offense, but there is no decision, or even dictum, I have been able to find, that an entire omission of all averment, as to the essential fact to be established, to justify a forfeiture or conviction, is not fatal. If any different rule has prevailed in any portions of the country, I do not think it should be sustained. This singular result would follow: that a defendant or claimant, admitting all the allegations of the libel, would escape forfeiture or punishment, for without proof of something not alleged, neither could be imposed.

In the case of *The Hoppet* v. *U. S.*, decided as far back as 1813, 11 U. S. 7 Cranch, 389, 393 [3:380, 382], a libel of information was held insufficient which contained a general reference to the provisions of the statute alleged to have been violated. And the court, speaking by *Chief Justice* Marshall, said that "A rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is

the object, and cannot be satisfied by a general reference to the provisions of a statute." It was accordingly held in that case that, the information being defective in that respect, the defect was not cured by evidence of the facts omitted to be averred, the court stating that "The accusation on which the prosecution is founded should state the crime which is to be proved and state such a crime as would justify the judgment to be pronounced. The reasons for this rule are: 1. That the party accused may know against what charge to direct his evidence. 2. That the court may see with judicial eyes that the fact alleged to have been committed is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is therefore a maxim of the civil law that a decree must be *secundum allegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts."

In the *U. S.* v. *Three Parcels of Embroidery*, 3 Ware, 75, it was held that the omission in a libel of information for the forfeiture of those articles for violation of the 66th section of the Collection Act of 1799, 1 Stat. at L. chap. 22, p. 627, to allege that the goods were falsely invoiced with a design to evade the duties was a fatal defect in the proceeding, and was not cured by the verdict of the jury. In considering the omission in that case in arrest of the judgment on the ground that the offense was not set out in the information with that clearness and distinctness which is required by the rules of pleading and practice, the court said: "It was long ago held by the Supreme Court that an information to recover a penalty under the Collection Act of 1799 is in the nature of a criminal proceeding. *Locke* v. *U. S.* 11 U. S. 7 Cranch, 339 [3: 364]; *Clifton* v. *U. S.* 45 U S. 4 How. 242 [11: 957]. The description of the offense for which the penalty is demanded must have the same kind and degree of certainty that is ordinarily required in other criminal proceedings; and although it may be true, as is argued by the district attorney, that in the practice of our courts all that technical accuracy of description may not be required, which is held to be essential in indictments, and even in the exchequer practice in England, and that niceties need not be observed which rest on dry precedent, the reason of which has either ceased to exist or cannot now be discovered, it is still indispensable that every circumstance constituting the offense be clearly and distinctly set out in plain and direct averments."

The language of the 66th section of the Act of 1799, under which the libel in that case was filed, declared "that if any goods, wares or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with a design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making the entry, shall be forfeited." And the court held that from this language three facts must concur to complete the offense. First, an entry must be made of the goods. Second, they must be invoiced not according to their actual cost. Third, they must be invoiced with a design to evade the duties thereupon, or upon some part thereof. And that each of these facts must be found in order to entitle the plaintiffs to a verdict, and all of them being necessary to constitute the offense, each should be plainly and distinctly charged in the information. It was charged that the entry of the goods was made with a design to evade the duties, but it was nowhere distinctly and plainly charged that a false invoice was made with that design; and the court said: "Under this section of the statute it appears to me that this design in making the invoice is an essential part of the offense. If it is so, the rules of pleading require that it be distinctly alleged. If it be said that the jury, under the direction of the court, found the fact, it is still true that, by the strict rules of pleading in penal clauses, the plaintiff can recover only according to his allegation, as well as his proofs," and the judgment was arrested. This case, it is true, comes from a district court, and is therefore not a controlling authority here; but the great learning of the district judge, and the ability which marked all his opinions, have deservedly entitled them to great weight and consideration in all the federal courts; and the doctrine declared is sustained by a multitude of decisions.

Much stress is laid upon the fact that an information or other proceeding for the forfeiture of goods for a violation of provisions of the customs revenue Acts is in form a civil action; but I do not perceive that this fact changes the necessity of alleging, as well as proving, the material facts upon which alone a forfeiture can be adjudged. Though the same strictness in pleading is not required in civil as in criminal actions, in neither can that which is essential to be proved be omitted to be averred. As *Chief Justice* Marshall indicates in the quotation above, adherence to this rule would seem to be essential to the due administration of justice in all courts; and it may be added in all proceedings before them, civil or criminal, upon which their judgment is asked.

In the recent case of *Boyd* v. *U. S.* 116 U. S. 634 [29: 752] this court held "that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."

Nor do I perceive that the question of pleading is affected by the fact that the statute, requiring the fraudulent intent to be proved, applied as well to pending actions and proceedings as to such as might be subsequently commenced. That fact, it is true, might in some cases have compelled an amendment of the pleadings in pending actions and proceedings to make their allegations embrace the essential element of the offense for which the forfeiture was sought; and such an amendment, where a fraudulent intent was not already alleged, was, as I think, contemplated. I cannot believe that Congress intended, by making the law applicable to pending cases, to change a long and well established rule of pleading, one founded upon manifest principles of justice, so as to allow a conviction of an offense upon which a forfeiture could be adjudged, without averring the fraudulent intent upon proof of which alone such forfeiture could be claimed.

A jury should not be allowed to find as to any material fact not alleged. Evidence upon such a fact would be evidence upon something out of the case presented. Even in ordinary civil cases such evidence is not admissible. Much more strictly should the rule be enforced in penal cases like this one. In *U. S.* v. *90 Demijohns of Rum*, 4 Woods, 639, the libel of information was for the forfeiture of those goods for a violation of provisions of the customs revenue law. It made no allegation of actual intent to defraud the United States, and it was held that the libel was fatally defective. Referring to section 16 of the Act of June 22, 1874, the court said: "I think it perfectly clear that this section makes intent to defraud the United States a necessary condition to the forfeiture of any goods, etc., for the violation of the customs revenue laws. A libel of information, therefore, which undertakes to state a case for the forfeiture of goods should aver an intent to defraud the United States. Without such averment no case for forfeiture is made. The claimant might well decline to answer a libel in which such averment was wanting, trusting to the court to dismiss the libel for want of necessary averments, when it came to hear the case *ex parte*, and to adjudge thereon as to law and justice should appertain. * * * The libel must set up all the facts necessary to a forfeiture. If it fails to do this it is the duty of the court to dismiss it, whether issue is joined or not."

Concurring fully in these views, I dissent from the judgment of the court.

ARTHUR ORIGET, Claimant, etc., *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 240-247.)

Initials, when not signature—violation of Revenue Act—forfeiture of goods.

1. The initials "A. B." cannot be regarded as the signature of a judge, or as a sufficient authentication of a bill of exceptions, or as sufficient evidence of its allowance by the judge or the court.

2. In a suit *in rem* for forfeiture of merchandise for violation of the 12th section of the Revenue Act of June 22, 1874, a finding of a jury "that the goods were brought in with intent to defraud the United States" is a sufficient finding that the acts alleged in the counts founded on section 12 were done with such intent to defraud.

3. Under said section 12, the forfeiture of the goods for the causes therein mentioned accrues to the United States on the commission or omission of the acts specified, and is no part of the punishment for the offense therein mentioned; the goods are to be forfeited irrespective of any criminal prosecution.

[No. 186.]

Argued Feb. 16, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a decree of that court affirming a decree of the District Court condemning goods as forfeited to the United States for violation of the customs revenue laws. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Stanley, Clarke, and **Edwin B. Smith,** for claimant:

Sections 2839, 2864, R. S., are repealed by the Act of June 22, 1874.

U. S. v. *Auffmordt*, 19 Fed. Rep. 893-909; affirmed in 122 U. S. 197 (30: 1182).

It is only similar, contemporaneous fraudulent transactions that are admissible, as tending to support the charge of fraudulent intent as affecting the subject of litigation.

Clarke v. *White*, 37 U. S. 12 Pet. 198 (9: 1053); *Castle* v. *Bullard*, 64 U. S. 23 How. 186 (16: 428); *Lincoln* v. *Claflin*, 74 U. S. 7 Wall. 138 (19: 109).

The mere amendment of the April invoices would not imply fraud, even if unexplained.

Elizabethport Mfg. Co. v. *Campbell*, 13 Abb. Pr. 92.

The invoices, as originally presented, must not only have been false but fraudulently so.

Hall v. *Naylor*, 18 N. Y. 588; Rev. Stat. § 2900.

The United States is subject to the same rules of law and evidence that affect any other party.

U. S. v. *Throckmorton*, 4 Sawy. 43; 98 U. S. 61 (25: 93); *U. S.* v. *White*, 17 Fed. Rep. 561; 9 Sawy. 125; *U. S.* v. *Beebe*, 17 Fed. Rep. 40, 41; 4 McCrary, 12; *U. S.* v. *Smith*, 94 U. S. 217 (24: 115); *Clark* v. *U. S.* 73 U. S. 6 Wall. 546 (18: 917); *Smoot's Case*, 82 U. S. 15 Wall. 47 (21: 110); *Amoskeag Mfg. Co.* v. *U. S.* 84 U. S. 17 Wall. 592 (21: 715); *U. S.* v. *Barker*, 25 U. S. 12 Wheat. 559 (6: 728); *Mitchel* v. *U. S.* 34 U. S. 9 Pet. 711 (9: 283); *Pierce* v. *U. S.* 74 U. S. 7 Wall. 675 (19: 178); *The Siren*, 74 U. S. 7 Wall. 154 (19: 130); *U. S.* v. *Bostwick*, 94 U. S. 66 (24: 66); *U. S.* v. *State Bank*, 96 U. S. 36 (24: 648); *State* v. *Taylor*, 28 La. Ann. 462; *State* v. *Ober*, 34 La. Ann. 361; *Union Depot Co.* v. *St. Louis*, 76 Mo. 393.

The United States is bound by the same principles as individuals.

Cooke v. *U. S.* 91 U. S. 398 (23: 243); *U. S.* v. *Barker, supra; U. S.* v. *Behan*, 110 U. S. 345-6 (28: 170, 171); *Gilbert* v. *U. S.* 1 Ct. Cl. 37; S. C. 75 U. S. 8 Wall. 358 (19: 303).

It is estopped to deny regular action of its designated agent.

Shirley, Lead. Cas. (Am. ed. 1888); *Oneale* v. *Thornton*, 10 U. S. 6 Cranch, 53 (3: 150); *Alvord* v. *U. S.* 8 Ct. Cl. 369.

What is an estoppel *in pais.*

Dezell v. *Odell*, 3 Hill. 219; *Hill* v. *Epley*, 31 Pa. 334; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483; *Niven* v. *Belknap*, 2 Johns. 589; *Gregg* v. *Von Phul*, 68 U. S. 1 Wall. 281 (17: 587); *Freeman* v. *Cooke*, 2 Exch. 663; *Roe* v. *Jerome*, 18 Conn. 153; *Pickard* v. *Sears*, 6 Ad. & El. 469; *Gregg* v. *Wells*, 10 Ad. & El. 90; *Frost* v. *Saratoga Mut. Ins. Co.* 5 Denio, 157; *Swain* v. *Seamens*, 76 U. S. 9 Wall. 274 (19: 560); *Bronson* v. *Chappell*, 79 U. S. 12 Wall. 682 (20: 437).

He who leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

Dickerson v. *Colgrove*, 100 U. S. 580 (25: 619); *Baker* v. *Humphrey*, 101 U. S. 499 (25: 1067); *Wallace* v. *Loomis*, 97 U. S. 155 (24: 898); *Fleischmann* v. *Stern*, 90 N. Y. 115, 116, citing *Roe* v. *Jerome*, 18 Conn. 138; *O'Leary* v. *N. Y. Board of Education*, 93 N. Y. 5; *Curnen* v. *Mayor of N. Y.* 79 N. Y. 514; *Clarke* v. *Clarke*, 6 Esp. 61.

An estoppel is to preclude one from setting up as a fact that which is contrary to what he has once deliberately accepted, and acted upon, as true, and permitted the other party to act upon as true.

Voorhees v. *Olmstead*, 3 Hun, 754; *Voorhis* v.

Olmstead, 66 N. Y. 113; *Continental Nat. Bank* v. *National Bank*, 50 N. Y. 581, 582; *Blair* v. *Wait*, 69 N. Y. 116; *Gillespie* v. *Carpentier*, 25 How. Pr. 207; 1 Greenl. Ev. § 208.

Admissions are conclusive.

Hawley v. *Griswold*, 42 Barb. 23; 1 Greenl. Ev. § 207; *Calanan* v. *McClure*, 47 Barb. 210; *Banks* v. *American Tract Society*, 4 Sandf. Ch. 438.

Mr. Origet had the right to add whatever he pleased to the invoice value of his entry.

Rev. Stat. § 2900; *Manhattan Gas Light Co.* v. *Maxwell*, 2 Blatchf. 405; *Marriott* v. *Brune*, 50 U. S. 9 How. 619, 685 (13: 282, 289).

If these April invoices were false the articles specified therein were forfeited.

U. S. v. *Auffmordt*, 19 Fed. Rep. 901; *Caldwell* v. *U. S.* 49 U. S. 8 How. 366 (12: 1115); *U. S.* v. *100 Barrels of Distilled Spirits*, 81 U. S. 14 Wall. 44 (20: 815); *U. S.* v. *York St. Flax Spinning Co.* 17 Blatchf. 140; *U. S.* v. *Cigars*, 18 Fed. Rep. 147.

The United States is estopped by this act of its agent.

U. S. v. *White*, 17 Fed. Rep. 565; *Mills* v. *Hoffman*, 92 N. Y. 182, 191.

The very act to which the collector knowingly assented is sought to be proved against us.

McAleer v. *McMurray*, 58 Pa. 135; *Douglass* v. *Mitchell*, 35 Pa. 446; *Wheelton* v. *Hardisty*, 8 El. & Bl. 232; *Kerr* v. *Wonderlich*, 8 Cent. Rep. 422.

Evidence showing previous good character should have been received.

Burton v. *Driggs*, 87 U. S. 20 Wall. 136 (22: 302); 1 Greenl. Ev. §§ 98, 55; *People* v. *Rector*, 19 Wend. 569; *Carter* v. *People*, 2 Hill, 317; *Lewis* v. *State*, 35 Ala. 380; *Prentiss* v. *Roberts*, 49 Me. 137, 138; *Isler* v. *Dewey*, 71 N. C. 14; *State* v. *Roe*, 12 Vt. 93; *George* v. *Pilcher*, 28 Gratt. 299.

Where character is attacked by extrinsic facts, the party so attacked may repel the assault by like evidence.

Stacy v. *Graham*, 14 N. Y. 492; *People* v. *Hulse*, 3 Hill, 309; *Paine* v. *Tilden*, 20 Vt. 554; *Hadjo* v. *Gooden*, 18 Ala. 718; *State* v. *Cherry*, 68 N. C. 495; *March* v. *Harrell*, 1 Jones, L. 329; *Richmond* v. *Richmond*, 10 Yerg. 343; *People* v. *Abbot*, 19 Wend. 195.

The verdict departs from the issue.

Patterson v. *U. S.* 15 U. S. 2 Wheat. 225 (4: 225); *McFerran* v. *Taylor*, 7 U. S. 3 Cranch, 270 (2: 436); *Chesapeake Ins. Co.* v. *Stark*, 10 U. S. 6 Cranch, 278 (3: 220); *U. S.* v. *Buzzo*, 85 U. S. 18 Wall. 128, 129 (21: 813); *Miller* v. *People*, 25 Hun, 474.

The error is palpable upon the record.

Suydam v. Williamson, 61 U. S. 20 How. 427 (15: 978); *England* v. *Gebhardt*, 112 U. S. 505 (28: 812); *Clinton* v. *Missouri P. R. Co.* 122 U. S. 474 (30: 1214); *Casey* v. *Dwyre*, 15 Hun, 153; *Clay* v. *State*, 43 Ala. 350; *State* v. *Custer*, 65 N. C. 339; *Barnes* v. *Williams*, 24 U. S. 11 Wheat. 416 (6: 508); *Pensacola Ice Co.* v. *Perry*, 120 U. S. 319 (30: 663); *Prentice* v. *Zane*, 49 U. S. 8 How. 484 (12: 1166); *Graham* v. *Bayne*, 59 U. S. 18 How. 63 (15: 267); *Hodges* v. *Easton*, 106 U. S. 408 (27: 169).

No forfeiture can be decreed.

The Purissima Concepcion, 24 Fed. Rep. 360.

An importation may be complete without an entry.

U. S. v. *Arnold*, 1 Gall. 354; *Arnold* v. *U. S.* 13 U. S. 9 Cranch, 104 (3: 671); *U. S.* v. *Vowell*, 9 U. S. 5 Cranch, 368 (3: 128); *Meredith* v. *U. S.* 38 U. S. 13 Pet. 494 (10: 262.

The verdict, by finding some intent to defraud in the importation, negatives intent to defraud in the subsequent entry.

1 Chit. Cr. L. 645; *Clay* v. *State*, and *State* v. *Custer*, *supra*; *Settle* v. *Alison*, 8 Ga. 208, [7]; *Biggs* v. *Barry*, 2 Curt. 261.

A special verdict must contain all the facts necessary to sustain a judgment.

Casey v. *Dwyre*, 15 Hun, 153; *Seward* v. *Jackson*, 8 Cow. 413; *Hill* v. *Covell*, 1 N. Y. 522; *Langley* v. *Warner*, 3 N. Y. 329; *Henderson* v. *Allen*, 1 Hen. & M. 249; *Miller* v. *State*, 4 Tex. App. 251; *State* v. *Stewart*, 91 N. C. 566, *Tancred* v. *Christy*, 12 Mees. & W. 323.

The verdict is irresponsive.

Sage v. *Evins*, 32 La. Ann. 1271; *State* v. *Peters*, 37 La. Ann. 730; *State* v. *Blue*, 84 N. C. 807; *Twigg* v. *Treacy*, 104 Pa. 498; *Clay* v. *State*, 43 Ala. 350; *State* v. *Custer*, 65 N. C. 339; *The Purissima Concepcion*, 24 Fed. Rep. 358.

Importer had the benefit of the *locus pœnitentiæ*.

U. S. v. *28 Packages of Pins*, Gilp. 306; *U. S.* v. *Riddle*, 9 U. S. 5 Cranch, 311 (3: 110); *The Robert Edwards*, 19 U. S. 6 Wheat. 187 (5: 238); *Lewey* v. *U. S.* 15 Blatchf. 2; *U. S.* v. *Diamonds*, 30 Fed. Rep. 364; *Patterson* v. *U. S.* 15 U. S. 2 Wheat. 225 (4: 225).

The judgment is wrong, as the verdict now stands.

Allen v. *St. Louis Bank*, 120 U. S. 40 (30: 578); *Fort Scott* v. *Hickman*, 112 U. S. 150 (28: 686); *Clinton* v. *Missouri P. R. Co.* 122 U. S. 474 (30: 1214).

Judgment should have been given for the claimant.

Commonwealth v. *Grimes*, 8 Cent. Rep. 810, 116 Pa. 450; *Allen* v. *St. Louis Bank*, *Clay* v. *State* and *State* v. *Custer*, *supra*; *Nelson* v. *Neely*, 68 Ind. 194.

No prosecuting officer has any right to determine upon confiscation.

U. S. v. *Morin*, 4 Biss. 95, 96; *U. S.* v. *The Reindeer*, 2 Cliff. 68; *U. S.* v. *Grundy*, 7 U. S. 3 Cranch, 338 (2: 459).

The Government can only act through its official agents.

U. S. v. *1960 Bags of Coffee*, 12 U. S. 8 Cranch, 398 (3: 602); *U. S.* v. *The Mars*, Id. 417 (3: 609); *Fontaine* v. *Phœnix Ins. Co.* 11 Johns. 300; *Caldwell* v. *U. S.* 49 U. S. 8 How. 382 (12: 1122).

The forfeiture depends upon the conviction.

Dobbin's Distillery v. *U. S.* 96 U. S. 399 (24: 688); 1 Bish. Cr. L. 6th ed. § 835, note 1; *U. S.* v. *Three Tons of Coal*, 6 Biss. 379; *U. S.* v. *Ebner*, 4 Biss. 119.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for the United States:

Where fraud is of the essence of the charge, the law allows a resort to circumstances.

Castle v. *Bullard*, 64 U. S. 23 How. 187 (16: 428); 1 Stark. Ev. 58; *Green* v. *Van Buskirk*, 74 U. S. 7 Wall. 139 (19: 109); *Baldorff* v. *Farmers Nat. Bank*, 61 Pa. 182; *Simons* v. *Vulcan Oil & M. Co.* Id. 218.

Where a forfeiture is given by a statute, the thing forfeited may either vest immediately or upon the performance of some particular act, at the will of the Legislature.

U. S. v. *Grundy*, 7 U. S. 3 Cranch, 351 (2: 463); *U. S.* v. *1960 Bags of Coffee*, 12 U. S. 8 Cranch,

398 (8:602): *Coffey* v. *U.S.* 116 U. S. 442 (29:686); *The Palmyra*, 25 U. S. 12 Wheat. 1 (6: 531).

The forfeiture imposed by section 12 of the Act of June 22, 1874, is recoverable by this proceeding *in rem*.

U. S. v *Auffmordt*, 122 U. S. 208 (30:1184).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit *in rem*, brought by the United States, in the District Court of the United States for the Southern District of New York, against four cases of merchandise, seized for forfeiture for violations of the customs revenue laws. One of them was imported into the Port of New York on the 6th of March, 1882, and the other three were imported on the 10th of March, 1882. The information proceeds against them for violations of sections 2839 and 2864 of the Revised Statutes, and of the 12th section of the Act of June 22, 1874, chap. 391, 18 Stat. at L. 188. The latter section is in these words: "Sec. 12. That any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall, for each offense, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates; and anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby repealed." As the material questions in the case arise in respect to section 12 of the Act of 1874, it will not be necessary to refer particularly to the counts founded on the sections of the Revised Statutes.

One count, in regard to three of the cases, alleges that on or about the 10th of March, 1882, the owner, importer, consignee or agents of the merchandise, or some other person or persons now unknown to the collector and to the attorney for the United States, with intent to defraud the revenue, made or attempted to make an entry of the merchandise, which was then and there subject to duties, and had been imported into the United States, within the district of the City of New York, from Paris, a foreign place, by way of Havre, in the vessel Amerique, by means of false and fraudulent invoices, affidavits, letters, and papers, and by means of false statements, written and verbal, by means whereof the United States were deprived of the lawful duties or a portion thereof, accruing upon the merchandise, or a portion thereof, embraced and referred to in such invoices, affidavits, letters, and papers, and such false statements, the cases whose contents are proceeded against for forfeiture containing particular articles of merchandise to which said alleged frauds related, contrary to said 12th section.

Another count, in regard to the three cases, alleges that on or about the 10th of March, 1882, the owner, importer, consignee or agents of the merchandise, or some other person or persons now unknown to the collector and to the said attorney, with intent to defraud the revenue, made or attempted to make an entry of the merchandise, which was then and there subject to duties, and had been imported into the United States within said district, from Paris, a foreign place, by way of Havre, in the ship Amerique, and that the said owner, importer, consignee or agents and other person or persons unknown, was and were guilty of certain acts and omissions, whereby the United States were deprived of the lawful duties, or a portion thereof, accruing upon the merchandise, or a portion thereof, affected by said acts and omissions, the cases whose contents are proceeded against for forfeiture containing particular articles of merchandise to which said alleged frauds and said acts and omissions related, contrary to said 12th section.

There were two similar counts in regard to the fourth case.

The counts founded on section 2839 of the Revised Statutes allege a failure to invoice the goods according to their actual cost at the place of exportation, with design to avoid the duties thereon; and those founded on section 2864 allege an entry of, or attempt to enter, the goods by means of false invoices and papers.

A claim was interposed by one Origet, as owner of the goods, and an answer denying that the goods became "forfeited in manner and form as in said information is alleged."

The case was tried by a jury, and the minutes of the trial show that the jury rendered "a verdict for the informants and against the claimant for the condemnation of the goods mentioned in the information, and that the goods were brought in with intent to defraud the United States." Thereupon a decree was entered which set forth that, the jury having "by their verdict found for the United States, condemning the said goods," they were "accordingly condemned as forfeited to the United States." On a writ of error sued out by the claimant from the circuit court, that court affirmed the decree of the district court, and remanded the case to the latter court for the execution of its decree. The claimant has brought the case to this court by a writ of error.

The counsel for the claimant seeks to raise objections to the admission of certain evidence at the trial, and to the exclusion of certain other evidence, upon what appears in a paper found in the record and headed "Bill of Exceptions." But the paper does not bear the signature of the district judge. The trial took place on the 8th of June, 1883. At the foot of the paper referred to appears the following: "Allowed and ordered on file November 22, '83. A. B." This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of review as a bill of exceptions. To make it clear

that a seal to a bill of exceptions was not necessary to its validity, Congress, by section 4 of the Act of June 1, 1872, chap. 255, 17 Stat. at L. 197, now section 953 of the Revised Statutes, enacted as follows: "A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto." This provision merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials "A. B." as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore, the questions purporting to be raised by the paper cannot be considered.

An objection is made to the verdict, founded upon section 16 of the Act of June 22, 1874, chap. 391, 18 Stat. at L. 189, which is in these words: "Sec. 16. That in all actions, suits, and proceedings in any court of the United States, now pending or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any of such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

The objection made is that the verdict states "that the goods were brought in with intent to defraud the United States," and does not state, in the language of section 16, that the acts alleged in the information were done with such intent. But we are of opinion that this objection has no force. It is evident that, under the information and the answer, the question of intent to defraud, submitted to the jury and passed upon by them, must have been as to the intent to defraud in the respects set forth in the information and denied by the answer; and the finding "that the goods were brought in with intent to defraud the United States" must, in respect to the counts founded on section 12 of the Act of 1874, be regarded as a finding that the acts alleged in those counts were done with such intent to defraud. The words "brought in" may fairly be construed as having reference to the entering or attempting to enter the goods by the means specified in those counts, as the entry of the goods is the necessary means, provided by law, for bringing the goods within the control of the importer, so that they may be employed by him for the purposes for which they were imported. There is no count in the information founded upon an unlawful importation or bringing in of the merchandise, in any other sense than that it was entered or attempted to be entered by means of the false papers mentioned in the information.

It is also objected that the judgment of the district court only recites that the jury "found for the United States condemning the said goods," and does not recite any special finding as to an intent to defraud. This objection is overruled for the reasons set forth in the opinion in the case of *Friedenstein* v *U. S.* just decided [*ante*, 736].

It is also made a point, in the brief of the counsel for the claimant, that the district court had no jurisdiction of the cause of action set forth in the information, because the only method of obtaining a condemnation of goods for the causes mentioned in section 12 of the Act of 1874, is in the course of a proceeding by indictment against an offender; that a proceeding against the goods is only authorized by that section as an incident of the prosecution of an offender by an indictment; that the forfeiture of the goods, like the fine and the imprisonment prescribed, is a part of the punishment upon a conviction on a criminal prosecution; that the forfeiture is imposed only as an addition to a fine, where that is imposed, and that the merchandise cannot be forfeited independently of the imposition of the fine. But we are of opinion that this is not the proper construction of the section. The fine, or the imprisonment, or both, are to follow conviction on a criminal prosecution of the owner, importer, consignee, agent or other person who does the act forbidden by the section, with the intent therein mentioned. The section then goes on to say that "In addition to such fine, such merchandise shall be forfeited." The sole meaning of this is that the person owning the merchandise shall lose it by forfeiture, in addition to such possible loss as may come to him by the imposition, if he is the offender, of the pecuniary fine, on the criminal prosecution against him. But the merchandise is to be forfeited irrespective of any criminal prosecution. The forfeiture accrues to the United States on the commission or omission of the acts specified. No condition is attached to the imposition of the forfeiture. The section does not say that the merchandise shall be forfeited only on the conviction of some offender, whether the owner of the merchandise or one of the other persons named in the section. The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent.

The construction contended for by the claimant would require the imposition of the forfeiture only when a fine was imposed; and not only could the forfeiture not be imposed where imprisonment was awarded, but the language would require that, on a criminal conviction of the agent, the merchandise of the principal should be forfeited, in order to allow of the imposition of any fine on the convicted agent. Again, two persons, a consignee and an agent, aside from the owner, might each of them be guilty and each of them be separately prosecuted criminally; and, if the first one convicted

were fined and the goods were forfeited, the second one tried could not, on conviction, be punished by a fine, because, the merchandise having been already forfeited, it could not be a second time forfeited, and so the requirement of the statute that the merchandise should be forfeited, in addition to the imposition of the fine could not be carried out. We conclude, therefore, that the forfeiture imposed by the section is no part of the punishment for the offense.

In the case of *Coffey* v. *United States*, 116 U. S. 436, 443 [29:684, 686], where section 3257 of the Revised Statutes imposed on a distiller for forbidden acts the forfeiture of his distillery, and also a fine and imprisonment, this court held, on the authority of *The Palmyra*, 25 U.S. 12 Wheat. 1, 14, 15 [6: 581, 585], that the forfeiture was to be enforced by a civil suit *in rem*, and the fine and imprisonment in a criminal proceeding.

The decree of the Circuit Court is affirmed.

UNITED STATES, *Appt.*, *v.* SAN JACINTO TIN COMPANY ET AL.

(See S. C. Reporter's ed. 278-309.)

Suit by United States, to annul patent for land—power of attorney-general—when such suit may be brought—purpose of—official fraud—effect of—officers owning shares—evidence of—fraud must be convincing.

*1. A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel, or annul a patent for land issued in its name, on the ground that it was obtained by fraud or mistake.

2. The initiation and control of such a suit lies with the attorney-general as the head of one of the executive departments.

3. But the right to bring such a suit exists only when the Government has an interest in the remedy sought by reason of its interest in the land, or the fraud has been practiced on the Government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the Government to the public requires such action.

4. When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land, and the Government has no interest in the matter, the suit must fail.

5. In the case before us the alleged fraud, for which it is sought to annul the patent, is in the survey of a confirmed Mexican grant, on which the patent was issued; and it is charged that at the time the survey was made the Commissioner of the General Land Office, the Surveyor-General for California, the chief clerk of the latter's office, and the deputy who made the survey, were interested in the ownership of the grant, and by fraud made a false location of the land to make it contain valuable ores of tin not within its limits if fairly surveyed.

6. Of all the officers here charged only Conway, the chief clerk, had any real interest in the claim, and he notified the surveyor-general of his interest, and refused to have anything to do with the survey; it is nowhere shown that he in any manner influenced the location of the survey, and it is denied under oath by all who took part in making it.

7. The fact is much relied on that some of these officers, after the patent was issued, took shares in a joint stock corporation organized to work the mine; but there is no proof that the shares were a voluntary gift, or were for services rendered in locating the survey, and the fairness of the purchase of these shares after the patent issued is sustained by affirmative testimony.

8. The fact that this survey was contested at every step by interested parties, and was returned to the surveyor's office for correction, was twice before that office and twice before the Commissioner in Washington, and finally decided after six months' consideration by the Secretary of the Interior, confirming the decision of the land office, affords very strong evidence of the correctness and honesty of the survey.

9. In the *Maxwell Land Grant Case*, 121 U. S. 325 [30:949], we expressed ourselves fully in regard to the testimony necessary to enable a court of chancery to set aside such a solemn instrument as a patent of the United States. It was there said, "that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." There is no such convincing evidence of fraud in the present case.

*Head notes by *Mr. Justice* MILLER.

[No. 887.]

Argued Jan. 26, 27, 30, 1888. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of California, dismissing a bill to set aside and declare void a patent for land issued by the United States. *Affirmed.*

Opinion below, 28 Fed. Rep. 279.

The facts are fully stated by the court.

Messrs. **G. Wiley Wells** and **G. A. Jenks**, *Solicitor-Gen.*, for the United States, appellant:

Laches is not to be imputed to the Government, and can at no time run so as to bar its rights.

Stoughton v. *Baker*, 4 Mass. 521; *McNamee* v. *U. S.* 11 Ark. 148; *Orane* v. *Reeder*, 21 Mich. 77; *Lindsey* v. *Miller*; 31 U. S. 6 Pet. 666 (8:538).

The fraud in the location and survey of the lands rendered everything connected with the formation and organization of the Company invalid and void.

Each certificate of stock was void, and all persons holding the same, not only took with notice of the fraud, but they acquired no title or rights in the lands in question.

Miller v. *Barber*, 66 N. Y. 558; *Morgan* v. *Skiddy*, 62 N. Y. 319.

The fraud consisted in the willful and wanton disregard of the calls of the grant, as finally confirmed by the decree of the district court, in locating the grant in question, by government officials, whose duty it was to properly locate the same; and this done for their private gain.

U. S. v. *Fossatt*, 62 U. S. 21 How. 445 (16: 186).

Where the grant is of a specified quantity within the exterior limits embracing a larger quantity, the Government is under no obligation to allow the quantity to be selected in accordance with the wishes of the grantee.

U. S. v. *Armijo*, 72 U. S. 5 Wall. 445 (18: 492).

But the land, if selected by the grantee, must be within the limits of the grant; he cannot select himself, nor can the Government for him, outside of those prescribed limits.

Dodge v. *Peres*, 2 Sawy. 645.

Upon the evidence adduced the defendant is not an innocent purchaser in good faith, and for a valuable consideration, of the land now claimed by it as the sobrante San Jacinto.

Civ. Code, Cal. § 19; *Robinson* v. *Williams*, 22 N. Y. 387; *Galland* v. *Jackman*, 26 Cal. 79; *Clark* v. *Troy*, 20 Cal. 220.

Mr. **William M. Stewart,** for appellees:

There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject or controversy, namely, *Interest reipublicæ, ut sit finis litium*, and *Nemo debet bis vexari pro una et eadem causa*.

U. S. v. *Throckmorton*, 98 U. S. 65 (25:95).

When the United States enters a court as a litigant it waives its exemption from legal proceedings and stands upon the same footing with private individuals; and, therefore, if on consideration of all the circumstances of a given case it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, though the United States be the suitor.

U. S. v. *Flint*, 4 Sawy. 43.

Mr. Justice **Miller** delivered the opinion of the court:

The suit in this case, which was a bill in chancery filed April 10, 1883, in the Circuit Court for the District of California, purports to be brought by the attorney-general on behalf of the United States against the San Jacinto Tin Company, the Riverside Canal Company, and the Riverside Land and Irrigating Company. These corporations are alleged to be in possession of a large body of land, nearly eleven square leagues in extent, for which a patent was issued by the United States on the 26th day of October, 1867, to Maria del Rosario Estudillo de Aguirre, and her heirs and assigns. The object of the bill is to set aside this patent, and have it declared void, upon the ground that the land described in the survey, which description is a part of the patent, is not the land granted by the Mexican Government to said Maria, nor that which was confirmed to her under the proceedings before the land commission, and by the judgment of the District Court of the United States, and by this court also on appeal. The essential feature of the grievance relied on by the complainant is that this survey was thus located by fraud to include different and more valuable land than that granted by Mexico and confirmed by the courts, and on account of this fraud it is prayed that the survey and patent be set aside and annulled.

Perhaps the nature of this proceeding cannot be better stated than in the language that heads the brief or printed argument of the appellant, who was plaintiff below. It is as follows:

"This brief is intended to establish the following general proposition, viz.: That the lands hereinafter described as patented to Maria de Rosario de Aguirre, and her heirs and assigns, on the 26th day of October, 1867, were obtained from the United States by a fraudulent survey of the lands described therein in violation of the decree of the court; and that the persons engaged in said fraudulent survey were the beneficiaries thereof; and that, by reason thereof, said patent to the same is void, and should be set aside, vacated, and annulled."

The case was heard in the circuit court on the bill, answer, replication, and voluminous testimony, by the circuit and district judges sitting together, who concurred in the decree dismissing the bill.

The bill sets out a grant to one Maria del Rosario Estudillo de Aguirre of the surplus or "sobrante" of the Ranchos of San Jacinto Viejo y Nuevo, or the overplus which remains in the Ranchos of Old and New San Jacinto, the survey thereof to commence from the boundaries of Don José Antonio Estudillo and Don Miguel Pedrorena. It alleges that this grant was afterwards confirmed by the District Court of California on appeal from the land commission. Upon an appeal taken from that court to the Supreme Court of the United States its judgment was affirmed. The decision of the land commission was to the effect that the claimant was entitled to five square leagues of land within this sobrante or surplus. The district court, however, held that the claimant was entitled to eleven square leagues, if so much should be found within the sobrante, and to all that was found therein if it were less than that amount.

The language of this decree, as set forth in the body of the bill, and affirmed by the Supreme Court of the United States at its December Term, 1868,—*U. S.* v. *D'Aguirre*, 68 U. S. 1 Wall. 311 [17:595],—describes the land confirmed as "the sobrante or surplus lands remaining within the boundaries of the tract of land called San Jacinto, as the same are represented and described in the map of said tract contained in the expediente of Miguel Pedrorena filed in this case and referred to in the grant, over and above certain lands granted to José Antonio Estudillo, and certain other lands granted to Miguel Pedrorena, within the aforesaid boundaries, to the extent of eleven square leagues of land; and if said sobrante or surplus within said boundaries should be less than eleven square leagues, then such less quantity." The bill alleges that the location by survey of the lands confirmed by this decree was not at all within the sobrante of the San Jacinto grant, but that it was located upon other lands than those on which it should have been, because those which were embraced by the survey were valuable as containing ores of tin; and that nearly all the officers engaged in making or establishing it, from and including the Commissioner of the General Land Office down to the deputy surveyors, were interested in the claim at the time.

It is alleged that throughout the whole transaction, from the beginning of the effort to have this survey made until its final completion and the issue of the patent, all the proceedings were dictated by fraud, and all the officers of the Government below the Secretary of the Interior who had anything to do with it were parties to that fraud, and to be benefited by it.

The principal points upon which this fraud is said to rest are: that the land surveyed was not within the larger exterior boundaries out of which the sobrante of San Jacinto Viejo y Nuevo was to be taken, but that said survey described a tract of land of about the same extent, to wit, of about eleven square leagues, situated more than six miles at the nearest point, and more than twenty miles at the farthest point, away from the land in fact granted and conceded by Pio Pico, Governor, to the grantee; that the survey of said land was never made in the field, nor from any actual measurements of distances or observation or determination of courses in the field, as the law of the Land De-

partment required, nor according to the directions of the decree confirming said grant; that the plat and survey were made arbitrarily and without any actual data in the office of the Surveyor-General of the United States for California, under the direction and dictation of that officer and one Edward Conway, then chief clerk in charge of that office, and performing the duties of surveyor-general, and by one George H. Thompson, a deputy surveyor acting under the surveyor-general and the chief clerk; that it was so made up without any reference to the expediente that accompanied the grant or juridical possession given at the time of the grant, or to the decree, but that it was made solely with reference to securing, surreptitiously and fraudulently, letters patent for the land included and described within the said survey and plat, although the same lies outside of the boundaries of the tract called San Jacinto; that the land so surveyed and platted was at that time supposed by said surveyor-general and Edward Conway to contain, and did in fact contain, valuable lodes of tin and other mineral ores, and that all this was well known to the defendant, or to persons composing its stockholders, at the time the patent was issued.

It is further alleged that Upson, the Surveyor-General, Conway, the chief clerk in his office, and Thompson, the deputy who was directed to make the survey and did make the plat, and Joseph H. Wilson, the Commissioner of the General Land Office at Washington, were all interested in and part owners of the claim at the time this survey was made, and at the very time they acted in reference to its final confirmation. Other persons are also said to be inculpated in this fraudulent proceeding, whose names it is not necessary at present to mention.

It will thus be seen that the entire foundation for the relief sought in this case rests upon a fraud alleged to have been committed upon the Government by its own officers, they being interested in the claim to be surveyed and patented. There is no pretense of any mere mistake in the matter, but on the contrary it is asserted that the parties knew exactly what they were doing, and that it was intended to cheat the United States out of valuable mineral ores for the benefit and advantage of those parties and their confederates. The issue is thus narrowed exclusively to the question of fraud.

Another question, however, is raised by counsel for the defendant, which is earnestly insisted upon by them, and which received the serious consideration of the judges in the circuit court, namely, the right of the Attorney-General of the United States to institute this suit.

The question as presented is one surrounded by some embarrassment. But as it is in some form or other of frequent recurrence recently, and if decided in favor of the appellees will require the dismissal of the case without a judgment by this court upon its merits, we feel called upon to give the matter our attention. It is denied that the attorney-general has any general authority under the Constitution and laws of the United States to commence a suit in the name of the United States to set aside a patent, or other solemn instrument issued by proper authority.

It is quite true that the Revised Statutes, in the title which establishes and regulates the Department of Justice, simply declares, in section 346 that "There shall be at the seat of government an executive department to be known as the Department of Justice, and an attorney-general, who shall be the head thereof." There is no very specific statement of the general duties of the attorney-general, but it is seen from the whole chapter referred to that he has the authority and it is made his duty to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of the other departments of the Government. There is no express authority vested in him to authorize suits to be brought against the debtors of the Government, or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits, and all the district attorneys who do bring them in the various courts in the country are placed under his immediate direction and control. And notwithstanding the want of any specific authority to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we cannot believe that where a case exists in which this ought to be done it is not within the authority of that officer to cause such action to be instituted and prosecuted. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the Government.

If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney-General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument. The Constitution itself declares that the judicial power shall extend to all cases to which the United States shall be a party, and that this means mainly where it is a party plaintiff is a necessary result of the well established proposition that it cannot be sued in any court without its consent. There must, then, be an officer or officers of the Government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the attorney-general. How, then, can it be argued that if the United States have been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special Act of Congress in each case, or with-

out some special authority applicable to this class of cases, while all other just grounds of suing in a court of justice concededly belong to the Department of Justice and are in use every day? The Judiciary Act of 1789, in its third section, which first created the office of attorney-general, without any very accurate definition of his powers, in using the words that "there shall be appointed a meet person, learned in the law, to act as Attorney-General for the United States" (1 U. S. Stat. at L. 93), must have had reference to the similar office with the same designation existing under the English law. And though it has been said that there is no common law of the United States, it is still quite true that when Acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law. In all this, however, the attorney-general acts as the head of one of the Executive Departments, representing the authority of the President in the class of subjects within the domain of that department and under his control.

In the case of the *U. S.* v. *Hughes*, 52 U. S. 11 How. 552 [13: 809], one Godbee had entered and paid for land at the United States land office in New Orleans, but had not taken out his patent. Hughes, well knowing this fact, entered, paid for, and received a patent for the same land, the prior entry of Godbee being overlooked by the land officers. The United States having tendered Hughes his purchase money, the attorney-general filed an information on behalf of the United States to repeal the patent. The defendant, Hughes, demurred on the ground that no authority existed for bringing such a suit; but this court, saying that "It cannot be conceived why the Government should stand on a different footing from any other proprietor," overruled the demurrer. When the case afterwards came into this court on appeal from the decree on the final hearing, it said: "It was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the Act of Congress." *Hughes* v. *U. S.* 71 U. S. 4 Wall. 236 [18: 804].

In *U. S.* v. *Stone*, 69 U. S. 2 Wall. 525 [17: 765] *Mr. Justice* Grier, delivering the opinion of the court, said: "A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy."

In the case of *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 440 [20: 859] which was an attempt by a private party to set aside by a bill in chancery a patent for an invention, the court considered the subject rather fully, and said that "The ancient method of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done." The court held that in England "The *scire facias* to repeal a patent was brought in chancery where the patent was of record; and though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the Government," referring to *U. S.* v. *Stone*, above cited. The court denied the right of the private party to sustain a suit to annul the patent, and said: "The general public is left to the protection of the Government and its officers. * * * The reasons for requiring official authority for such a proceeding are obvious. The fraud, if one exists, has been practiced on the Government; and as the party injured it is the appropriate party to assert the remedy or seek relief."

In *U. S.* v. *Throckmorton*, 98 U. S. 70 [25: 96] the court said: "In the class of cases to which this belongs, however, the practice of the English and the American courts has been to require the name of the attorney-general as indorsing the suit before it will be entertained. The reason of this is obvious, namely, that in so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill."

In *Moore* v. *Robbins*, 96 U. S. 533 [24: 850] the court, speaking of the issuing of patents for land by the Government, said: "If a fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured, this is the proper course."

While the cases last cited did not involve directly the power of the attorney-general to institute a suit to set aside a patent of the United States, we have had before us quite recently three cases which did involve that power, brought by the United States for the express purpose of setting aside patents for land issued by the Government, on the ground of frauds or mistakes in their issue. In the first of these—*Moffat* v. *U. S.* 112 U. S. 24 [28: 623]—which was prosecuted by the attorney-general, who appeared in this court by the assistant attorney-general to argue the case, the decree of the circuit court setting aside the patent as having been obtained by the fraud of the officers, of the Land Department was affirmed. No question was made of the right of the attorney-general to institute the suit and conduct it to a successful termination.

In the second case, *U. S.* v. *Minor*, 114 U. S. 241 [29: 113], a suit was brought in the Circuit Court for the District of California to set aside a patent for land issued by the Government to Minor. The bill alleged that the patent was obtained by the fraud of Minor in making false affidavits and procuring others to be made before the officers of the Land Department, by which he obtained the patent for the land in question. Although the case was certified here by the judges sitting in that court on a division of opinion upon several points, one of which was whether a demurrer to the amended bill should be sustained, no question seems to have been made of the right of the Government by

its attorney-general to institute this suit, the appeal on behalf of the United States being argued by the solicitor-general, an officer under the control of the attorney-general.

Some question was, however, made in the opinion in that case in regard to the right of the attorney-general to bring such a suit, where the only result would have been to take the land from Minor and give it to one Spence, who had a claim upon part of it, the court saying that "The Government in that case would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the Government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant." The court said, however, that the question did not arise in that case, because Spence only had a claim to one half of the land covered by the patent. It will be seen that the only question thus suggested did not affect the right of the attorney-general in a proper case to institute and carry on such a suit; and the decree of the circuit court was reversed on the ground that the case presented was one which justified relief.

In the still later case of *Colorado Coal & Iron Co.* v. *U. S.* 123 U. S. 307 [*ante*, 182] the bill was filed in the name of the United States by the attorney-general, to declare void and cancel sixty-one patents for as many distinct pieces of land, situated at different places in Las Animas County, in the State of Colorado, amounting in the aggregate to over nine thousand acres. The allegation in that case was that the patent had been obtained by the fraudulent use of fictitious names as grantees of the land, and the case was fought through with great vigor on both sides. It was thoroughly and elaborately considered, and the court said, in regard to these transactions, that they "undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them," quoting the following language from *U. S.* v. *Minor*, above cited: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value."

If the court had entertained the opinion in these cases that there existed in the attorney-general no right to institute these suits to set aside patents for lands obtained by fraud, it would have been saved the labor of a protracted investigation in each of them into the facts which were supposed to constitute the fraud; and in the two cases first mentioned the court violated its duty in sustaining the Government and setting aside the patents if there existed in its judgment no right in the attorney-general to institute such suits.

We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the Government. Since the title to all of the land in more than half of the States and Territories of the Union depends upon patents from the Government of the United States, it is to be seen what a vast power is confided to the officer who may order the institution of suits to set aside every one of these patents; and if the doctrine that the United States in bringing such actions is not controlled by any Statute of Limitations, or governed by the rule concerning *laches* be sound, of which we express no opinion at present, then the evil which may result would seem to be endless as well as enormous. But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its existence, and if restrictions are to be placed upon the exercise of this authority by the attorney-general it is for the legislative body which created the office to enact them.

We do not think, therefore, that it can be successfully denied that there exists in the attorney-general, as the head of the Department of Justice, the right to institute, in the name of the United States, a suit to abrogate, annul, or set aside a patent for land which has been issued by the Government in a case where such an instrument if permitted to stand would work serious injury to the United States, and prejudice its interests, and where it has been obtained by fraud, imposture, or mistake.

One of the difficulties attending the present case and others of like character which have come before us, in which the authority of the attorney-general to institute the suit has been questioned, is that no specific plea has been filed denying this authority, or alleging that the suit as made by the bill, or established by the evidence, does not come within the class of cases in which that officer can exercise this power.

There is no plea in this case, and all that is said upon this subject in the answer is in the following language: "If said officers" [meaning the President, the Secretary of the Interior, and the Commissioner of the General Land Office, who were such at the time this action was begun] "had consulted the records they would have been easily informed of the truth; but the said attorney-general is now informed and moved and instigated by the same parties who made the contest in the Land Department before the issuing of the said patent, and M. G. Cobb, the same attorney who drew the bill herein, and instigated the suit and conducts the same, was the attorney of said contestants in said proceedings, and has represented said parties as such attorney and counsel from the filing of said objections by said Stearns and Montalva down to the present time."

But we are of opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if

it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence; and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail. In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, together with the beneficial interest in it. It is argued in the brief that this is not true; that in fact the Government is but the instrument of one Baker, who married the widow of Abel Stearns; and that Stearns contested the correctness of this survey with others before the Land Department very actively and energetically, because he had such an interest in the land covered by it that if it was defeated he would become the equitable or beneficial owner of the land. This view is supported by some pretty strong testimony and by the fact that Baker was the man at whose instance the action was begun.

When the attorney-general required that a bond should be given to save the United States harmless with regard to the costs of these proceedings, Baker was the man who furnished the security and signed the bond himself. The condition inserted in that obligation recited "that, whereas, the Attorney-General of the United States of America has this day filed, *at the request of the above named R. S. Baker*, a bill in equity in the name of and on behalf of the United States of America against the San Jacinto Tin Company: * * * Now, therefore, if the said Baker shall well and truly save the United States of America harmless from all costs and expenses which may be incurred by or against them in the prosecution of said suit to its final determination, and pay or cause to be paid on demand all such costs and expenses as may necessarily be incurred in such prosecution, then this obligation to be void." Taking all these circumstances together, it raises a very strong implication that Baker expected that if the patent was set aside his right to the land covered by it, or to a large part of it, would become paramount.

But we are not so entirely satisfied of the want of interest of the United States in the whole or a part of the land which is covered by this patent as to justify us in saying that the bill in the present case ought to be dismissed on that ground.

Coming to the merits of the case, which turn exclusively on the question of fraud in the location of the survey of the grant to the original claimant, we are to observe that the issue is, by the pleadings themselves, as well as by the explicit statement of counsel for appellant, limited to actual fraud in the execution of that survey. There is no denial of the validity of the original grant, nor of its confirmation by the land commission, as well as on appeal by the District Court of the United States for California and by this court. The justice of a claim for eleven square leagues of land within the surplus, technically called "sobrante," of the San Jacinto tract, is not questioned; nor does the decree which is to be carried out by this survey limit the location of the land otherwise than that it shall not be more than eleven leagues, and that it shall be within the outboundaries of this surplus.

There is a statement in the decree that the measurement of the land thereby confirmed is to be commenced from the line of the Estudillo grant as fixed by the act of judicial possession to him, to which reference is made. We consider this last description as nothing more than a statement that the land of Estudillo previously granted within the boundaries of the tract called San Jacinto shall be one of the boundaries of the claim thus confirmed, and that the survey must not cover the grant to Estudillo. Reference is also made to a map contained in the expediente among the papers before the court.

The question presented would naturally divide itself into two parts, if there had been any allegation of an unintentional or accidental mistake in the location of the grant; but the plaintiffs in this case place themselves outside of the benefit of this claim of mistake, except as it may be so gross as to aid the belief of an intentional fraud on the part of those who made it. The main issue, therefore, in the case is on the question of actual fraud committed by those who made and established the survey.

The principal foundation on which this fraud is rested by counsel is that all the officers of the Government, below the Secretary of the Interior, who had anything to do with the making, considering, confirming or ratifying of this survey were interested in the claim; that the motive of the fraud was to include within the survey certain lands which were then known to contain mineral ores, believed to be immensely valuable; and that for this purpose the survey was distorted and wrenched from its proper place in order to cover these mineral deposits. As will be shown hereafter, most of the persons charged with having such interest, and with being in position to influence the location of the land by the surveyor, never had any interest in it at all until after the survey was made and confirmed and the patent issued to the claimant. If this be true of course they were under no temptation to do wrong, and the fraudulent motive attributed to them could have had no existence.

Mr. Edward Conway, who had previously bought the property and received the conveyance of the title from the claimant before the

patent issued, asserts in his testimony that at the time the survey was made and was pending before the land office he was the only owner of the property, and that no one had any interest, equitable or otherwise, in it but himself. After this he organized a corporation, to which the title of the property was conveyed, which undertook to work the tin mines found upon it; and most of these persons so liberally charged with fraud in the survey are those who became stockholders therein.

The main instrument of this fraud, according to the theory of plaintiff's counsel, was Conway, who it is charged owned the whole or at least the predominating interest in the grant at the time the survey was made. At that time he was chief clerk in the office of the Surveyor-General of the United States for California, and during the period when it was under consideration therein, as well as in the general land office and before the Secretary of the Interior. It is charged that he was often the acting surveyor-general, and that this survey was made under his control and direction while he was thus interested as owner of the claim.

It is also charged that George H. Thompson, a deputy surveyor, acting under the surveyor-general and said Conway, entrusted with the duty of making this particular survey, was also interested in the claim with Conway, as well as one Hancock, at some time a clerk in the surveyor-general's office. It is asserted further that the survey was not actually made upon the ground, but as a matter of fact in the office of the surveyor-general by said Conway, Thompson, and Hancock, solely for the purpose of surreptitiously securing letters patent upon the land described and included in the survey and plat, the motive in mislocating said land being that these parties believed that the land so surveyed contained valuable lodes of tin and other mineral ores.

The deposition of Conway was taken during the progress of the suit. He was then sixty years old. He states in that deposition that at the time it was given he had no interest whatever in the San Jacinto Tin Company, or in the lands which were the subject of controversy; that he had long since parted with his shares in the stock of that Company, some of which were sold for assessments which he was unable to pay. He gives a history of his connection with the claim, and with the land office during its pendency before it, and also states the connection that other parties sustained to this transaction who are asserted to have been interested in it during that time. It seems to be a fair and candid statement of all the facts about which he was interrogated. He contradicts himself nowhere during a long examination and cross examination, and he is not anywhere successfully contradicted by other testimony in the case. He appears to have been sincerely anxious to tell the whole truth, and if his statement is to be believed he had no interest to do otherwise.

Mr. Conway states that during the years 1864, 1865, and 1866 he was chief clerk in the office of the United States Surveyor-General for California, in San Francisco; that he entered that office in the fall of 1857, resigned in December, 1866, and again entered it on January 1, 1868, and remained there until December, 1869, his longest service being as chief clerk, although he commenced at a lower grade. He served under Surveyors-General Mandeville, Beale, and Upson, and during the entire terms of the two latter with the exception of the year stated. He testifies that the approval of surveys could only be made by the Commissioner of the General Land Office, who was furnished with the field notes and plats which were certified to be correct by the surveyor-general, who also made a report of his action for the approval or disapproval of that officer; that the first connection he had with the sobrante San Jacinto Viejo y Nuevo was in 1868; that he then told Surveyor-General Beale that he wished to resign his place as chief clerk, as he had offers of other business, amongst which was one from Mr. Hancock, then a major in the army of the United States, who informed him that he had control of this sobrante and also of the Rancho San Jacinto Nuevo—that is of the metals that were in those ranchos, and he wished him to take charge of the business.

Throughout the whole of this story the early connection of Hancock and Conway with the sobrante claim seems to have been under a right purchased by Hancock from Mrs. Aguirre, of the mineral products thereof, without any claim to a general grant of the land. The witness Conway says that Surveyor-General Beale told him, upon being informed of the above facts, that they constituted no objection to his remaining in the office, and that he did not wish to part with him. He says: "I told him I felt a little delicacy about it, and he answered that he would look out for the interest of the United States. When Surveyor-General Upson came into office I informed him of the circumstances; that I was interested, not in the rancho, but in the veins of metals that were supposed to be there; told him that I wished to have nothing to do with the survey—to have no connection with it—and any reports he wished on the matter he must get from other officers. In April, 1866, the owner of the sobrante offered it for sale for $8,000; I think it was $3,000 cash and $5,000 on time on a mortgage."

He then went on to state that he enlisted Mr. Charles Hosmer, who advanced him the money for the cash payment, and he, Conway, then agreed to hold in trust for him one eighth of the estate and repay him his advance out of the first proceeds; that the survey of the sobrante was made in 1864 at the request of the grantee, through her attorneys, Patterson and Stow, acting under the authority of Major Hancock, and in regard to this transaction he testifies as follows:

"Edward F. Beale was the Surveyor-General at the time, and he issued the instructions for the survey. The deputy who was directed to make the survey of the sobrante was George H. Thompson. Neither Surveyor-General Beale nor Thompson had any interest, present or contingent, in the sobrante at that time, or any promise of any interest. I know positively that they had no interest or promise of interest. Surveyor-General Beale has never owned any interest in the sobrante rancho, nor ever owned any stock in the San Jacinto Tin Company, either by himself or in trust, or in any other manner. The survey was made by Thompson in Beale's time and under his instructions."

It farther appears from his testimony that the survey having been forwarded to the department at Washington it was there decided that the Act of June 2, 1862, 12 U. S. Stat. at L. 410, under which the survey was made did not apply to California, and it was returned to the office in San Francisco, with instructions, the Act of July 1, 1864, 13 U. S. Stat. at L. 332, having been passed in the mean time, to have it advertised according to the provisions of that statute. By this Act the survey, with its plat and field notes, were to be open for public inspection for ninety days after the expiration of the four consecutive weeks of publication which was provided for; then if objections were made to the survey within that time by any party claiming to have an interest in the tract embraced by it, or in any part thereof, they were to be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the surveyor-general, together with such affidavits or other proofs as he might produce in support of the objection; and at the expiration of said ninety days the surveyor-general was bound to transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat, with the objections and proofs filed in support of them, and also copies of any proofs produced by the claimant, all of which the commissioner was to examine into, and approve the survey or return the same for correction. All this Conway testifies was done. He says: "Exceptions were taken to the survey by Abel Stearns, the owner of the Sierra Rancho on the north, and of the rancho that he claimed as the Temescal on the west. Surveyor-General Upson ordered the survey reformed in order to leave space on the north for the Sierra, according to the juridical possession, of one league in width from the Santa Ana River." In all this the witness is confirmed by the records of land offices.

The witness stated that he took no part whatever in these proceedings with reference to either survey, and upon being asked if he exercised any control with respect to this sobrante claim or the survey thereof, said: "I simply gave notice to the Surveyors-General, Beale and Upson, of my interest in this rancho, and after that I had nothing to do with it. The report was made by Mr. Hopkins, and I acted in the same manner as a judge would on the bench if he was interested in the case—step down and out." He also says that the instructions in regard to the mode of executing the survey came from the Commissioner of the General Land Office.

The witness then proceeded to state the facts connected with his acquisition of this property, as follows:

"I made my first purchase of an interest in this sobrante on the 3d of April, 1866, the only purchase I made; * * * I purchased it from Manuel Ferrer and his wife, Maria del Rosario Estudillo de Aguirre. She was the original grantee of the rancho. Her husband joined with her in the deed. No person was interested with me in that purchase, either before or upon the receipt of the deed, except Mr. Hosmer, as I before stated. That was the only interest except my own. I had that deed recorded in the office of the county recorder of San Bernardino County on the 30th of April, 1866. From April 3, 1866, until April 30, 1866, I was in San Francisco. The deed was executed in San Diego and sent up to me, and I sent it down for record immediately. * * * In addition to myself and Mr. Hosmer, no person except Jeremiah S. Black and William H. Lowery, attorneys at law, of Washington, were interested in that sobrante subsequent to the date of that deed, April 3, 1866, and prior to the date of that patent."

This was the period during which the survey was pending in the office of the commissioner having charge of public lands, awaiting his approval; and witness says that during that period no interest in the sobrante was held in trust for any other person, to his knowledge, except those mentioned; that Black and Lowery were his attorneys in the case of the Rancho Sobrante San Jacinto before the Commissioner of the General Land Office, and the Secretary of the Interior, and the consideration which they paid for the interest which he, Conway, held for them was their service as attorneys in the matters mentioned. He further says that he resigned his position in the surveyor-general's office about December 10, 1866, and proceeded to Washington, returning in December, 1867. He then goes on to recount his acquaintance in that city with Joseph H. Wilson, Commissioner of the General Land Office, and several other persons mentioned, and to deny that either or any of them were interested with him in any manner whatever in the sobrante, by purchase or otherwise, directly or indirectly, before his return from Washington on that occasion. He proceeds to say in the further history of the matter that when he returned from Washington, in December, 1867, he thought it best to form a corporation for the purpose of working the ores in the mines, and offered interests to gentlemen whom he thought responsible, and calculated to further the joint interests of the Corporation; that on the 3d day of January, 1868, the Corporation was formed, and became the owner of the property; that it agreed to pay off the mortgage, assume the indebtedness to Hosmer and pay him, Conway, $7,500, and allow him to retain a certain number of the shares of its stock, which he afterwards states to be about one sixth of the sum at which it was capitalized; and that all this was done.

Mr. R. C. Hopkins, who is charged as interested in this property and contributing to the successful fraud in the location of the land in controversy, states in his deposition that he was then sixty-seven years of age; that he was in the office of the United States Surveyor-General for California from 1855 until 1879, having charge of the Spanish archives, which included the records of the grants made by the Governments of Spain and Mexico. Of this witness it may be generally stated that he was shown to be a man of very high character, exceedingly useful to the Government on account of his familiarity with and control of these valuable documents, and very much relied on by all persons interested in the location of surveys in that country or in the validity of Mexican grants.

In regard to this particular transaction he states that he was in that office, in the capacity of keeper of the archives, in 1864, when the

survey was made which is the subject of controversy, at which time Mr. Beale was surveyor-general; that he saw the written application made by Hancock, through Patterson, for a survey of the rancho at that time, and probably wrote the instructions for it to be made. Upon being asked who was the deputy surveyor who made the survey, he said that it was George H. Thompson. He was then asked By whom was he selected?" to which he replied, "I don't know, but I presume that the surveyor-general appointed him on his own motion;" and proceeded to say that the instructions were signed by the surveyor-general. He was then asked, "Was there any person in the surveyor-general's office at that time who had any interest in this grant?" to which he replied, "To my knowledge, no." The inquiry was then made, "Do you know of any reason, object, or purpose in locating that grant on the part of anybody in the office other than to locate it according to the decree of confirmation?" to which he answered, "I do not." "Had you any interest in this matter before the issuance of patent?" To this he replied, "No, sir; neither directly nor indirectly." He was then asked if either Upson or Beale, the Surveyors-General, or Wilson, the Commissioner of the General Land Office, or Thompson, the deputy who made the survey, or Whiting, had any interest in the claim prior to the issuance of the patent; to which he answered in each case that they had not.

He was afterwards interrogated about some shares of the stock of this Company, which, he said, he had accepted from Conway as a sort of compensation for previous losses in other speculation, and upon which he paid large assessments and finally gave them up because he was unable or unwilling to continue the payments required. Hancock, Upson, and Wilson, he states, are dead.

He also testifies that, with the fullest knowledge of the surveys and papers, and after an examination of the records in the office at San Francisco, it seems to him that it would be impossible to attempt to locate the rancho in any other way so as to conform to the decree of the court, and that this land is located within the general limits of the tract called San Jacinto, and did conform to that decree. Upon being asked if it was possible for him to be mistaken about this matter, he replied: "I don't think so; it is a question of landmarks that are unmistakable in their location, having historical names; it is hardly a matter in which judgment is to be much exercised, but is a matter of fact; at least, I looked upon it at that time as such, when I made this report." To the question "Was that location made arbitrarily, without reference to courses or distances, or under the direction or dictation of Conway?" he answered: "I think it was made under the instructions of the surveyor-general; I presume, without any dictation from anyone. There were probably some instructions to follow, when public lands were surveyed, the lines of the public surveys. * * * That survey, I presume, was made in accordance with the decree of the district court, and with all the data that could be obtained."

It appears also that Hopkins made the report of the survey to the surveyor general, and that he does not doubt that it was correctly made.

The deposition of Thompson, the deputy who made the survey, was taken, and his examination of several hundred pages is mainly confined to his acts in regard to it and the means which he had for making it correctly. On this branch of the subject it is sufficient to say that his statement is very clear to the effect that the survey was properly located, although he admits that he did not go upon the land but made the location, under directions from the surveyor general, from maps in his office showing the actual objects which constituted the outboundaries of the sobrante and the other locations which had priority to this.

During his examination he was asked what he knew about the ownership of the claim at the time the surveys were made. To this he replied in effect, that he did not know Conway was the owner; that he understood the request for the survey proceeded from Hancock, or from attorneys employed by Hancock, who represented the grantee in the decree of confirmation. He nowhere intimates, nor was he at any time asked, whether he had an interest in the survey at that time; and there is in fact a total failure to establish the allegation that he had any interest whatever, either present or prospective, in the claim when the survey was made by him, or was influenced by anybody who had.

Without going farther into the minutiæ of the testimony on this subject, we are of opinion that there is no evidence that establishes any interest in the claim under consideration prior to the issuance of the patent in any man who was connected with the Land Department of the Government, whether as surveyor-general, deputy surveyor, clerk or otherwise, except Conway; that Conway's interest was well known to the surveyors-general, who at different times had charge of this matter, as well as to the Commissioner of the General Land Office, and the Secretary of the Interior who finally passed upon it, and that he abstained from any interference with the making of the survey or the officers who had it in charge, except that probably while he was in Washington he looked after its confirmation.

The attempt to deduce an inference of fraud, in the establishment of this survey and the final issue of the patent, from the circumstance that, after its issue, and when Conway had become the sole owner of the property, he, with many other persons of distinction, some of whom were engaged in other branches of the government service, and some connected with the Land Department, co-operated to organize a joint stock company for its development and improvement, the shares of which they took and upon which they paid many assessments, and from the further fact that a very few of them may have received such stock as compensation for aid rendered to Conway in his struggle to establish the title, is, we think, entirely repelled by the testimony, which shows that none of these persons had any interest in it at the time the fraudulent transactions are alleged to have occurred. It does not appear that the stock which they got was in any sense a compensation for services rendered in establishing the survey, except in the case of Black and Lowery, who were the attorneys employed for that purpose and received some of its shares

as their compensation. To hold that these parties, such as Hopkins, Thompson, Upson, and perhaps others, when they found the stock of a corporation for sale which had promise of profit in it, by taking its shares became *participes criminis* in a conspiracy to defraud the government of which they knew nothing at the time the fraud is alleged to have been committed, and that the mere fact of their taking these shares of stock is evidence they took part in the conspiracy, is a species of logic on which patents granted by the United States should not be set aside.

We do not hesitate to say that there is a total failure of evidence to establish any participation in this fraud on the part of any of the persons in the service of the Government, who are charged with having been engaged in it. While we do not wish to give countenance to the idea that an officer of the Government, before whom any matter may come for his action, or to be acted upon in his office, should voluntarily acquire an interest in such matter, even though he disclose that interest, but, on the contrary, think that he should accept no such delicate position; nevertheless that circumstance alone should not be permitted to divest the rights of others, unless it be shown that such position was used in the aid of an actual fraud.

As to Conway, who had the principal, if not the sole, interest which could induce an effort to secure the false location of the grant, there is no sufficient evidence in the record to show that he undertook in any way to control the actual survey of this land. His testimony, given at a time when he could have had no pecuniary interest in the result of this suit, and delivered with a candor and apparent readiness to answer promptly all questions put to him, without any of the evasive expressions, such as, "I don't know," or "I cannot remember," so commonly used by false witnesses, commands our confidence.

The strongest argument against the commission of any fraud, and in favor of the correctness of the location of the grant by the survey, is to be found in the fact that it went through all the different offices in the Land Department to which it could possibly be taken from its being filed by Thompson in the office of the surveyor-general up to its consideration by the Secretary of the Interior himself; and in all these offices ample time was given for careful examination, and an actual scrutiny of the matter was made by reason of the contest of Stearns, who succeeded in having the lines of the survey changed, so as to exclude property in which he was interested. After this change was made, it was again brought before the commissioner and argued by counsel on both sides, and considered in the light of all the facts which either party chose to bring before the office, and abundant time was given for its investigation. Mr. Wilson, the commissioner, was a man of many years' experience in the class of cases to which this belongs, and which he was then called upon to decide. He made a full report, which is in the record, to the Secretary of the Interior, Hon. O. H. Browning, a lawyer of eminence and a man accustomed to weighing testimony, who, after having the case under consideration from May 22, 1867, to October 19 of the same year, made the following decision, which he referred back to the Commissioner of the General Land Office for execution:

"Sir: I have received your letter of the 22d May last, submitting for consideration the papers of the private land claim in California known as the 'Sobrante de San Jacinto,' and asking for instructions on the 'application for a patent to issue in accordance with the survey approved by the Surveyor-General of California.' A careful examination of the papers and consideration of the arguments of counsel have led me to concur in your opinion that all the requirements of the law have been complied with, and that a patent should issue in accordance with the survey."

We consider this examination of the case in the office of the commissioner and its re-examination by the Secretary of the Interior as possessing the very strongest probative force in regard to the question of fraud, which was mooted before them, as well as the question of the proper location of the grant. No stronger evidence could be given of the honesty of Commissioner Wilson and his belief in the correctness of the survey than the fact of his reference of the whole matter to the secretary, of his own motion, without any appeal by either party from his decision. They had in the land office abundant materials for the investigation of all the matters in dispute; they had before them the interested parties, with all the evidence which they could collect, the records, the Mexican archives and control of all the papers of the Government since the territory came into the possession of the United States, as well as ample time, more than this court has, to consider all these subjects. Very little that is new or that throws any light upon the questions at issue is now produced on the hearing of this case.

With regard to the question of fraud, we have no hesitation in saying that there is no such case made of intentional fraud, or actual fraud, committed upon the Government of the United States in this transaction as justifies the cancellation of the patent. We have quite recently given our views upon this subject very freely in the *Maxwell Land Grant Case*, 121 U. S. 325 [30:949] in regard to the character of the testimony necessary to set aside such a solemn instrument as a patent of the United States. It was there held, p. 381 [959], "that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal."

So far from there being the satisfactory evidence here pointed out of a fraud against the Government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as "fraud,"

"deceit" and "imposition." If the case stood alone upon the testimony introduced by the Government it would, so far as any fraudulent purpose is concerned, do but little more than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the Government, and not always by the most appropriate means; but when the testimony for the defense is considered it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion of having used underhand and improper means for the accomplishment of their purposes.

As regards the correctness of the location by survey of the grant, whose validity and justice is not questioned, we do not known that we can do better than to copy the language of the circuit judge presiding when the decree was rendered. In his opinion delivered on that occasion, and concurred in by the district judge, he said: "It is confidently assumed on the part of complainant that the location of the lands patented is palpably wholly outside of the exterior limits described in the original petition, Mexican grant, and the decree of confirmation; that this is so obvious that the grant must have been willfully and fraudulently located where it is. This is an assumption that, in our judgment, is wholly without justification in the documentary and other evidence in the case. Upon a careful consideration of the subject we are of the opinion that the most that can be reasonably said against the location is that the record presents a fair case for an honest difference of opinion; that a plausible argument can honestly be made in support of either side of the proposition. An erroneous location is certainly not so obvious as to necessarily stamp it as a fraud."

When we consider the greater facilities possessed by the Land Department of the Government for ascertaining the true location, and their superior fitness for deciding questions pertaining thereto, over those of the judicial department, and when we also remember that this location underwent the scrutiny of the officers in the office of the Surveyor-General for California, as well as those of the General Land Office at Washington, and even of the Secretary of the Interior himself, and was finally approved by them all, we are not disposed to make further inquiry as to whether the location was in all respects in exact accordance with what it might possibly be if a resurvey were made under the additional light, if any, now thrown upon the subject.

The result of all these considerations is that the decree of the Circuit Court is affirmed.

Separate opinion of *Mr. Justice* **Field**:

I concur in affirming the decree of the court below dismissing the bill in this case. The bill was filed to set aside a patent of the United States issued to Maria del Rosario Estudillo de Aguirre, and her heirs, for land situated in Southern California, in what is now known as San Bernardino County, granted to her by the Mexican Government. The grant was of the sobrante, or surplus lands remaining within the boundaries of a tract called San Jacinto, after satisfying two previous grants. The claim under it was presented to the board of land commissioners created by the Act of Congress of March 3, 1851, to ascertain and settle private land claims in California, and was adjudged to be valid to the extent of five leagues. On appeal to the District Court of the United States for the Southern District of California, the claim was confirmed to the surplus land lying within the designated boundaries, not exceeding in extent eleven square leagues. The case being brought to this court, the latter decree was affirmed. The judgment here was rendered at the December Term, 1868. Then followed a protracted contest, accompanied with much feeling, for the location of the claim. There being within the San Jacinto tract a tin mine, then supposed to contain a rich body of metal, every step in the survey was contested. Witnesses were examined, and repeated arguments made by counsel representing the parties for and against the location sought. As there were no boundaries of the sobrante marked, by which the claim could be specifically designated, much was left to the judgment of the surveyor-general, after having examined the topography of the country, and heard the statements of witnesses familiar with it. The limitation made by the grant itself only required that the claim should be located within the exterior boundaries of the San Jacinto, and not encroach upon the land covered by the previous grants. In the determination of the survey and location several years were occupied. The matter was at different times before all officers of the Land Department whose judgment could control any of the several steps of the proceedings, the United States Surveyor-General for the State, the Commissioner of the General Land Office, and the Secretary of the Interior. Every objection now urged against the survey as ground for revoking the patent was taken before them, fully argued, and held to be untenable. At length, on the 26th day of October, 1867, a patent was issued to the claimants, from whom the defendant, the San Jacinto Tin Company, derives its title.

In April, 1883, after the Company had been in possession of the property for nearly sixteen years, and after all the other land within the exterior boundaries of the San Jacinto tract had been patented to the previous grantees, or sold by the United States, so that if the location and survey, on which the patent was issued, could be set aside, there would be no land left to satify the grant without annulling titles which the United States had conveyed to other parties, this suit was brought. And it was not brought upon any new fact produced, nor any new reason assigned why the original survey should be disturbed. All the grounds of complaint presented for the new litigation had been urged, and fully considered before. And, as if convinced that no beneficial result could come to the United States from the reopening of the old controversy, as if afraid that the United States might be cast in the litigation, a bond was taken from one R. S. Baker, with sureties, to keep the United States harmless from all costs and expenses which might be incurred by or against them in the prosecution of the suit. The original contest upon the survey was carried on, and the expenses of it borne,

by one Abel Stearns. Since his death, this R. S. Baker married the widow of Stearns, and has sought to retry the issues as to the survey which were decided and determined in the Land Department years before, when Abel Stearns was living. The bond recites that "The Attorney-General of the United States of America has this day filed, at the request of the above named R. S. Baker, a bill in equity in the name of and on behalf of said United States of America against the San Jacinto Tin Company" to vacate the patent. Not for the interest of the United States, not for the protection of their property, or to vindicate their honor, but at the request of a private litigant, the name and power of the United States are invoked by the attorney-general to set aside a patent issued after a protracted contest upon the survey with the predecessor of this litigant.

If this were a solitary instance where the name and power of the United States have been used to serve the interests of private parties, it might be passed by with the simple statement of the facts. But, unfortunately, it is not a solitary instance. The records of this court show that it has been a frequent practice of the Department of Justice in authorizing suits for the cancellation of patents. In *U. S.* v. *Throckmorton*, 98 U. S. 61 [25: 93], which was here at the October Term, 1878, it appeared that the District Attorney of California was directed by the attorney-general to bring suits to vacate patents for lands in that State, upon security being given by one John B. Howard, or a deposit made by him of a sufficient sum to defray the expenses which might be incurred in the litigation; and the bills filed upon such authority were not sworn to, nor even authenticated by the signature of the attorney-general. In this case the bill bears the signature of the attorney-general in office at the time it was filed. His signature gives some assurance, which was wanting in the *Throckmorton Case*, of his belief in its alllegations, and that the suit is really brought by the United States to protect their rights, and not merely to promote the interests of private individuals. In that and other cases, brought on the authority of the attorney-general, the patents embraced many thousand acres of land, and one of the judges holding the circuit court observed that: "It is not to be supposed that if the attorney-general were persuaded that so large and valuable a property belonged to the United States he would have made the assertion of its rights to depend upon the willingness or ability of private individuals to defray the expense of the litigation." *U. S.* v. *Flint*, 4 Sawy. 88. In the present case the bill seeks, by setting aside a patent of the United States, to restore eleven leagues of land to the public domain. And yet, so doubtful did the attorney-general appear to consider the rights of the United States to this vast tract, that he required from the party, at whose instance the suit was brought, a bond of indemnity against the expenses of the proceeding.

In commenting upon a similar bond, when the case of Throckmorton was here, the court, speaking by *Mr. Justice* Miller, said: "It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the Government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the Government for costs, and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the [name of the] United States to declare the patent void. It is essential, therefore, to such a suit, that, without special regard to form, but in some way which the court can recognize, it should appear that the attorney-general has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause." 98 U. S. 61, 71 [25: 93, 97]. And yet this requirement does not seem to have been potential enough to induce such an examination of the rights of the United States as to justify in the present case the attempt to enforce them without security from private parties.

I cannot admit that the attorney-general can, at the request of private parties, rightfully allow the use of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them. If the United States have not sufficient interest in property to justify the expenses of proper litigation for its maintenance, they had much better let it go. It would seem that Congress designed to put its mark of condemnation upon the practice of obtaining services from private parties, without incurring liabilities for them, such as was adopted in this case, when, on May 4, 1884, it declared that "Hereafter no department or officer of the United States shall accept voluntary service for the Government, or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property." 23 U. S. Stat. at L. 17. The language here used clearly indicates that the Government shall not, except in the emergencies mentioned, place itself under obligations to anyone. The principle condemned is the same, whether the party rendering the service does so without any charge or because paid by other parties. The Government is forbidden to accept the service in either case.

It is not to be supposed that any head of the Department of Justice has or would intentionally lend the name and power of the Government to further private ends, and yet there is no practical difference between that course of procedure and the one adopted in this case. The opinion of the court shows, above all controversy, the utter groundlessness of the charges upon which it is sought to set aside the survey. A very little attention to the proceedings had before the Land Department in the contest upon that survey would have satisfied the attorney-general of the futility of any attempt to disturb it, and it is not probable that he would have authorized any.

But independently of these considerations I cannot assent to the position announced in the opinion of the court, that the attorney-general has unlimited authority by virtue of his office to institute suits to set aside patents issued by the Government. He is the head of the Department of Justice, and as such he is charged with the superintendence and direction of all district attorneys of the United States, and generally of all litigation in which the United

States are interested. He is also the legal adviser of the heads of the executive departments; and if they are fraudulently imposed upon in the discharge of their duties, or have mistaken the law, he may at their request take such legal proceedings as are necessary to correct their errors and revoke their action. The legislation of Congress points out the infinite variety of cases where legal proceedings may be taken on behalf of the United States in the enforcement of their rights, the protection of their property, and the punishment of offenses; and wherever no authority is conferred by statute express or implied for the institution of suits, none in my judgment exists. Whenever Congress has felt it important that patents for lands should be revoked, either because of fraud in their issue, or of breach of conditions in them, it has not failed to authorize legal proceedings for that purpose. In a multitude of cases titles to lands, upon which whole communities live, rest upon patents of the United States. In several instances, cities having more than a hundred thousand people residing within their limits are built on land patented by the Government. I cannot believe that it is within the power of the attorney-general, to be exercised at any time in the future, this generation or the next —as no Statute of Limitations runs against the Government—to institute suits to unsettle the title founded upon such patents, even where there are allegations of fraud in obtaining them. There must be a time when such allegations will not be heeded. The examination into alleged frauds, when the patents are applied for, ought to close all controversy respecting them; clearly so, unless, upon newly discovered evidence of the most convincing character, Congress should direct proceedings to be instituted to set aside the patents, and that result can be obtained without impairing the title of innocent parties. The power of the attorney-general, if admitted when a single person holds title under a patent, may be exercised in cases where a whole community holds under a similar instrument. If, without the authority of Congress, such proceedings may be instituted by him upon the repetition, as in this case, of old charges, or upon the unsupported statements of interested parties, a cloud may at any moment be cast upon the titles of a whole people, and there would be in his hands a tremendous weapon of vexation and oppression. I can never assent to the position that there exists in any officer of the Government a power so liable to abuse and so dangerous to the peace of many communities.

I do not recogize the doctrine that the attorney-general takes any power by virtue of his office, except what the Constitution and the laws confer. The powers of the executive officers of England are not vested in the executive officers of the United States Government, simply because they are called by similar names. It is the theory, and I may add the glory, of our institutions that they are founded upon law, that no one can exercise any authority over the rights and interests of others except pursuant to and in the manner authorized by law.

In the case of the *Floyd Acceptances*, 74 U. S. 7 Wall. 676 [19: 178] speaking of the powers of an officer of the Government—in that case of the Secretary of War—this court said: "When this inquiry arises, where are we to look for the authority of the officer? The answer which at once suggests itself to one familiar with the structure of our Government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."

If the attorney-general possesses the powers ascribed to him, in the absence of any law defining them, we have this singular condition presented, that the owner of property derived from the United States by the most solemn instruments, holds his possession subject to the liability that it may be disturbed at any time by a suit of the Government, brought at the will of that officer, a not very creditable commentary on our institutions; but if the owner can trace his title to some other source, he may have a reasonable degree of certainty that he will not be unnecessarily disturbed.

Aside from the qualifications thus expressed to the views of the court, there is much in the opinion which gives me great satisfaction. It holds that in suits brought by the Government for relief against an instrument alleged to have been obtained by fraud or deceit, or any practice which would justify a court in granting relief, the Government must show, like a private individual, that it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States have no pecuniary interest in the remedy sought, and are under no obligation to the party, who will be benefited, to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of their own, they can no more sustain such an action than any private person could under similar circumstances.

From this ruling some degree of peace and security may come to holders of titles derived by patent from the Government.

From the clear and full statement, in the opinion of the court, of the case and of the controversies before the Land Department, involving the same questions now presented, there can be but one conclusion, and that is that the decree below dismissing the bill was in consonance with justice and right.

RICHARD HOSKIN ET AL., *Appts.*,
v.
FRANK H. FISHER ET AL.

(See S. C. Reporter's ed. 217-224.)

Delay in reissue of patent—laches—expanded claims—claims when waived—omissions in record.

1. The question whether delay in applying for a reissue of a patent has been reasonable or unreasonable is a question of law for the determination of the court.
2. The action of the Patent Office in granting a reissue, and deciding that the applicant had not been guilty of laches, is not sufficient to explain a delay in the application which otherwise constitutes laches.
3. Where a reissue expands the claims of the original patent, and it appears that there was a delay in applying for it, the delay invalidates the reissue unless accounted for and shown to be reasonable.
4. Where it does not appear that any attempt has been made to secure by the original patent the inventions covered by the new claim in the reissue, those inventions must be regarded as having been abandoned or waived, so far as the reissue is concerned.
5. The appellees may bring before this court, by *certiorari*, any necessary part of the record which the appellants have omitted to bring before it.

[No. 169.]

Argued Feb. 7, 1888. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California, awarding to plaintiffs a sum of money as profits derived by defendants from the infringement of reissued letters patent. *Reversed.*

The facts are fully stated by the court.

Mr. **M. A. Wheaton,** for appellants:

To make a combination patentable there must be a joint action of the devices, or elements, which action is different in kind from the individual or aggregate action of the devices when used separately.

Reckendorfer v. *Faber*, 92 U. S. 347 (23:719), and cases cited; Bump, Patents, 77, 78.

A ball and socket joint is defined in Knight's American Mechanical Dictionary: "Ball and Socket Joint." Vol. I, 219.

Complainant can recover the profits due to his invention alone. If the patent covers a part only of the machine which infringes, the recovery must be limited accordingly.

Philp v. *Nock*, 84 U. S. 17 Wall. 460 (21:679); *Bell* v. *Daniels*, 1 Fish. Pat. Cas. 379, 380; *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 650-653 (20:865, 866); *Littlefield* v. *Perry*, 88 U. S. 21 Wall. 228-230 (22:581, 582); *Carter* v. *Baker*, 1 Sawy. 527; *Cass* v. *Brown*, 2 Fish. Pat. Cas. 275; *Wayne* v. *Holmes*, Id. 29, 30; *Cox* v. *Griggs*, Id. 178; *Buerk* v. *Imhaeuser*, 2 Bann. & A. 452, 455-456; *Furbush* v. *Bradford*, 1 Fish. Pat. Cas. 317; *Conover* v. *Mers*, 6 Fish. Pat. Cas. 506; *Cawood Patent*, 94 U. S. 710 (24:243); *Black* v. *Munson*, 2 Bann. & A. 623-625; *Ingels* v. *Mast*, Id. 24; *Jones* v. *Morehead*, 68 U. S. 1 Wall. 165 (17:664); *Magic Ruffle Co.* v. *Elm City Co.* 2 Bann. & A. 511-512; *La Baw* v. *Hawkins*, Id. 561; *Webster* v. *New Brunswick Carpet Co.* Id. 67-71; *Garretson* v. *Clark*, 4 Bann. & A. 536, 539; *Star Salt Caster Co.* v. *Crossman*, Id. 566-568; *Ingersoll* v. *Musgrove*, 3 Bann. & A. 304; *Schillinger* v. *Gunther*, Id. 498.

Damages must be proved.

Robertson v. *Blake*, 94 U. S. 733, 734 (24:246, 247).

Royalties paid for other patents by an infringer are allowed to him in the accounting.

Le Baw v. *Hawkins*, 2 Bann. & A. 565; *American Nicholson Pavement Co.* v. *Elizabeth*, 1 Bann. & A. 461, 462.

The same rule prevails when the infringer owns the patent which covers an invention that has increased the selling price of the infringing machine.

Steam Stone Cutter Co. v. *Windsor Mfg. Co.* 4 Bann. & A. 450.

A final decree for nominal damages only should be entered.

N. Y. v. *Ransom*, 64 U. S. 23 How. 490 (16:516).

Messrs. **John H. Miller** and *J. P. Langhorne*, for appellees:

To determine the extent of the invention secured by a reissued patent, the state of the art at the time the original patent was granted must be considered.

Garneau v. *Dozier*, 102 U. S. 234 (26:134); *Eachus* v. *Broomall*, 115 U. S. 434 (29:421).

It is within the scope of a reissue that it contain a fuller description than the original.

Robertson v. *Seconbe Mfg. Co.* 10 Blatchf. 481.

It will not do for the patentee to wait until other inventors have produced new forms of improvement, and then, with the new light thus acquired, under pretense of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms.

Miller v. *Bridgeport Brass Co.* 104 U. S. 350 (26:783); *Campbell* v. *James*, 104 U. S. 356 (26: 786); *Mahn* v. *Harwood*, 112 U. S. 360-362 (28: 667, 668).

Any unnecessary laches or delay affects the right to reissue the patent.

Wollensak v. *Reiher*, 115 U. S. 96 (29: 350); *New* v. *Warren*, 22 Off. Gaz. 588; *Poppenhusen* v. *Falke*, 2 Fish. Pat. Cas. 218.

A judicial interpretation of the specification or claim of a patent furnishes a proper occasion for a surrender and reissue, when the error was inadvertent.

Doughty v. *West*, 6 Blatchf. 429; *Bliss* v. *Gaylord P. C. & M. Co.* 7 Blatchf. 279.

Change of form is not a substantial change, unless the form is of the essence of the invention.

Winans v. *Denmead*, 56 U. S. 15 How. 330 (14:717); *Murphy* v. *Eastham*, 5 Fish. Pat. Cas. 306; *Re Newall*, 4 C. B. N. S. 269; *Tatham* v. *Le Roy*, 2 Blatchf. 486.

Reversal of parts, not accompanied by a change of function or mode of operation, does not avoid the charge of infringement.

Atlantic Works v. *Brady*, 107 U. S. 192 (27: 438).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the District of California, by Frank H. Fisher and Joshua Hendy against Richard Hoskin and others, for the infringement of reissued letters patent No. 8876, granted to Frank H. Fisher, September 2, 1879, on an application filed March 29, 1879, for an "improvement in hydraulic mining apparatus," the original patent, No. 110,222, having been granted to Fisher, December 20, 1870. This reissue was a second reissue, and it appears that there was a first reissue, No. 5193, dated December 17, 1872, granted on the surrender of the original patent, and that the second reissue was granted on the surrender of the first issue.

The bill of complaint sets forth the fact of

the surrender of the original patent and the granting of the first reissue, and that the first reissued patent is "ready in court to be produced" by the plaintiffs, "or a duly authenticated copy thereof." The bill also sets forth that the second reissue "was issued for the same invention as that described in the original letters patent."

There was only one claim in the original patent, as follows: "The swivel-jointed nozzle and pipes A B D E, combined, as described, with the lever F, working through slotted post *f*, strap *i*, lever *o*, and pawl and ratchet *j k*, for the purpose specified."

The second reissue contains three claims, as follows: "1. The swivel-jointed sections A B and ball and socket jointed section D E, combined, as described, with the lever F, working through slotted posts *f*, strap *i*, lever C, and pawl and ratchet *j* K, for the purpose set forth. 2. A ball and socket joint for connecting the discharge pipe of a hydraulic mining apparatus with the end of a swivel section, B, substantially as above described. 3. The discharge pipe E, having a semi-cylindrical or ball shaped enlargement at its base, in combination with a corresponding cup shaped socket, D, on the end of the horizontally-swiveling section B, substantially as and for the purpose described."

The claim of the original patent and the first claim of the second reissue are substantially alike. It is not alleged that the defendants have infringed the first claim of the second reissue, or that their apparatus would have infringed the claim of the original patent. The contention is that they have infringed claims 2 and 3 of the second reissue.

The answer sets up that the second reissue contains new matter, which was not contained in the original patent, and which describes and claims that of which Fisher "was not the inventor;" that Fisher did not discover or invent or make any hydraulic machine which machine or combination included either a ball and socket joint, or ball and socket jointed sections, or a discharge pipe having a ball shaped enlargement at its base; that his original patent did not contain any description of either of those devices, and did not claim them in any combination or otherwise; that all that is said in the second reissue about a ball and socket jointed section, and ball and socket joints, and a discharge pipe with a ball shaped enlargement at its base, is new matter, which was not contained in the original patent, and was inserted in the second reissue by Fisher fraudulently and for the sake of deceiving and misleading the public, he well knowing that no part of it was his invention, and also knowing that it was not contained in the original patent; and that, by reason of such fraudulent insertion of such new matter, the second reissue is void.

Issue was joined and proofs were taken on both sides, and, on the 17th of March, 1882, the case having been heard by the circuit judge, an interlocutory decree was entered in favor of the plaintiffs, adjudging the second reissue to be valid, and that the defendants had infringed upon the 2d and 3d claims of it, and awarding a decree to the plaintiffs for profits and damages, and ordering a reference to a master to ascertain them, and a perpetual injunction in regard to the second and third claims. Afterward, a rehearing was ordered by the circuit judge to be had upon the same testimony. The rehearing was had before the circuit justice and the circuit judge, and, on the 4th of September, 1882, an interlocutory decree was entered in the same terms as the first interlocutory decree. On the report of the master, a final decree was entered, March 7, 1884, awarding to the plaintiffs a sum of money as profits derived by the defendants from the infringement.

It is to be gathered from the record that Fisher had at some time brought a suit against one or both of the present defendants named Craig, for the infringement of the first reissue, and at the commencement of the taking of evidence on the part of the plaintiffs in the present suit, the following stipulation is found entered on the record: "It is stipulated and agreed by and between the counsel for the respective parties herein, that the evidence taken and on file in this court in the case of *Fisher* v. *Craig*, number 1144, shall be considered in evidence in this case, reserving, however, to each party the right to introduce such additional evidence as they may desire. It is further agreed that in case any exhibits introduced in evidence in said case of *Fisher* v. *Craig* shall be missing from the files, the same may be supplied, each party supplying his own exhibits." It does not appear by the record to what extent the evidence taken and on file in the same court in the case of *Fisher* v. *Craig*, thus referred to, was used on the hearing of the present case. There is found in the record a paper marked "Exhibit No. 5," being a certified copy from the Patent Office, certified March 8, 1878, of the original patent granted to Fisher, with its specification and drawings. There is no separate memorandum in the record of the introduction of this original patent in evidence; but, as it is found in the record, under a certificate of the clerk of the circuit court that it is a part of the record, and of the proceedings in the cause, we must accept it as such, and, if necessary, assume it to have been a part of the evidence taken and on file in the case of *Fisher* v. *Craig*, and covered by the stipulation above referred to. That stipulation was to the effect that the evidence in *Fisher* v. *Craig* should "be considered in evidence in this case."

The first reissue is not found in the record. The plaintiffs do not appear to have put it in evidence, although the bill avers that it is ready in court to be produced by them, or a duly authenticated copy of it. Nor does it appear that the defendants put it in evidence, although, as the suit of *Fisher* v. *Craig* was founded upon it, it is to be inferred that it must have been part of the evidence taken and on file in that case, and which, by the stipulation, was to be considered in evidence in this case. Nevertheless, neither party has brought it before us.

The plaintiffs contend that, in order to determine the validity of the second reissue, that must be compared with the first reissue, on the surrender of which it was granted; that in the absence of the first reissue no such comparison can be made; that, therefore, it must be presumed that the first reissue and the second reissue were both for the same invention; and that it must also be presumed that the second

and third claims of the second reissue were contained in the first reissue. But we are of opinion that, the original patent and the second reissue being properly before us, we have a right to compare them with each other, and that, upon such comparison, the question of the validity of the second reissue must be determined.

Under the proffer in the bill of complaint, it was for the plaintiffs to introduce the first reissue in evidence; and if they desire to show an excuse for the delay of more than eight years and three months after the granting of the original patent in applying for the second reissue, by showing that the first reissue, granted a little less than two years after the date of the original patent, contained substantially claims 2 and 3 of the second reissue, they should have affirmatively made good that excuse, by themselves introducing the first reissue in evidence, or bringing it before us in the record as a part of the evidence taken and on file in the case of *Fisher* v. *Craig*.

Under the allegations contained in the answer, that the original patent did not claim the devices covered by the 2d and 3d claims of the second reissue, and that said 2d and 3d claims are new matter, not contained in the original patent, and that the second reissue is void by reason of such new matter, the question is fairly raised, on the face of the original patent and the second reissue, as to the effect of the delay of more than eight years and three months after the date of the original patent in applying for the second reissue, the case standing, for the purpose of such comparison, as if there never had been any first reissue.

In the case of *Wollensak* v. *Reiher*, 115 U. S. 96 [29: 350], the following propositions were laid down by this court: (1) The question whether delay in applying for a reissue of a patent has been reasonable or unreasonable is a question of law for the determination of the court. (2) The action of the Patent Office in granting a reissue, and deciding that, from special circumstances shown, it appeared that the applicant had not been guilty of laches in applying for it, is not sufficient to explain a delay in the application which otherwise appears unreasonable and to constitute laches. (3) Where a reissue expands the claims of the original patent, and it appears that there was a delay of two years, or more, in applying for it, the delay invalidates the reissue, unless accounted for and shown to be reasonable. These principles are applicable to the present case, and require that the decree of the circuit court should be reversed. The delay is not accounted for by the plaintiffs, nor shown to be reasonable.

The descriptive parts of the specifications of the original patent and the second reissue are substantially alike, and the drawings of the two are the same; but claims 2 and 3 of the second reissue are not found in the original patent. The claim in that patent to the swivel-jointed nozzle and pipes A B D E, combined with the other parts of the machine, and to nothing else, was, under the decisions of this court, an abandonment and dedication to the public of subcombinations less than the whole combination, after an unexplained delay such as that in the present case. The 2d and 3d claims of the second reissue are claims to such subcombinations. It was not indicated in the specification of the original patent that Fisher considered his invention as consisting in anything less than a combination of all the elements embraced in the combination claimed in that patent.

In the recent case of *Parker & Whipple Co.* v. *Yale Clock Co.* 123 U. S. 87 [*ante*, 100], it was held that what was suggested or indicated in the original specification, drawings, or Patent Office model is not to be considered as a part of the invention intended to have been covered by the original patent, unless it can be seen from a comparison of the original and the reissued patents that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specification, drawings, or Patent Office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent; and that, where it did not appear that any attempt had been made to secure by the original patent the inventions covered by the new claims in the reissue, those inventions must be regarded as having been abandoned or waived, so far as the reissue was concerned.

The plaintiffs contend that it appears from the testimony of Fisher that it was the result of the suit of *Fisher* v. *Craig*, brought on the first reissue, which convinced him that that reissue was inoperative, and that he took out the second reissue to remedy the defect in the first; and that the delay in taking out the second reissue is explained by the fact that the suit on the first reissue was pending. But we have not before us the proceedings in the suit of *Fisher* v. *Craig*, to such an extent as to be able to form any intelligent judgment upon the question as to how far the proceedings in that suit bear upon the question of the delay in taking out the second reissue. If the plaintiffs desired to avail themselves of those proceedings to show such excuse, it was their duty to have brought them before us, if they were a part of the evidence in this case under the stipulation above referred to. Although the defendants did not incorporate them in the record, and although the clerk of the court below, in making his return to this court, certifies that what is contained in the transcript is a "full, true and correct copy of the record (excepting models), and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause," such certificate being entitled in the present cause, it was perfectly competent for the plaintiffs to have brought before this court, and it was their duty to have done so, by *certiorari*, any necessary parts of the record which the defendants had omitted to bring before us.

The decree of the Circuit Court is reversed, and the case is remanded to the Circuit Court for the Northern District of California, with a direction to dismiss the bill, with costs.

JOHN F. HARTRANFT, Collector of Customs for the DISTRICT OF PHILADELPHIA, *Plff. in Err.*,

v.

JOSEPH B. SHEPPARD ET AL.

(See S. C. Reporters' ed. 337, 338.)

Duty on quilts.

Quilts composed of cotton and eider-down, or silk and eider-down, the eider-down in each case being the component material of chief value, are chargeable with the duty of 20 per centum *ad valorem* under section 2513, Act of March 3, 1883, 22 Stat. at L. 523, rather than 35 per centum as a manufacture of cotton, or 50 per centum as a manufacture of which silk is the component material of chief value.

[No. 191.]

Argued Feb. 17, 1888. Decided April 2, 1888.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment for plaintiff, in a suit to recover back duties illegally paid. *Affirmed.*

The facts are stated in the opinion.

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error.

Mr. Frank P. Prichard, for defendants in error.

The following opinion, prepared by *Mr. Chief Justice* **Waite,*** was delivered by the court as its opinion:

The single question in this case is, whether quilts composed of cotton and eider-down, or silk and eider-down, the eider-down in each case being the component material of chief value, are dutiable, on importation into the United States, as manufactures of cotton or of silk, not enumerated, at 35 per centum ad valorem if of cotton, and at 50 per centum ad valorem if of silk, or at 20 per centum ad valorem as manufactured articles not enumerated, the latter being the amount admitted to be due by the importer in his protest. The Collector demanded the highest rates, which were paid; and this suit was brought to recover back the difference between these amounts and a duty of 20 per cent.

The case depends upon the effect to be given the following provisions of the Act of March 3, 1883, chap. 121, 22 Stat. at L. 488: "Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not specially enumerated or provided for in this Act, and corsets, of whatever material composed, thirty-five per centum ad valorem." § 2502, schedule I, p. 506. The quilts made of cotton and eider-down were assessed under that provision.

"All goods, wares, and merchandise, not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." *Id.* schedule L, p. 510. Those of silk and eider-down were assessed under that provision.

"There shall be levied, collected, and paid, on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and all articles manufactured, in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem." § 2513, p. 523. The claim of the importer was that the articles should be assessed at twenty per centum under that section.

By § 2499, p. 491, it was provided as follows: "And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates; *Provided,* That nonenumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

Quilts are nonenumerated manufactured articles, composed of two or more materials. Eider-down is on the free list. § 2503, p. 518. As eider-down is the component material of chief value in the quilts involved in this suit, and that is free, it follows that they are manufactured articles not provided for, and therefore chargeable with the duty of 20 per centum ad valorem under § 2513, rather than 35 per centum as a manufacture of cotton, or 50 per centum as a manufacture of which silk is the component material of chief value.

As such was the opinion of the court below, its judgment to that effect is *affirmed.*

JOHN C. SPENCER, *Plff. in Err.*,

v.

CAROLINE L. MERCHANT, EXRX. of JOHN MERCHANT, Deceased.

(See S. C. Reporter's ed. 345–361.)

Federal question—legislative power to tax—decision final—Act, when constitutional—exorbitant sum—validity of assessment.

1. Where plaintiff in the state court contended that a statute of the State was unconstitutional and void because it was an attempt by the Legislature to validate a void assessment without giving the owners of the lands assessed an opportunity to be heard upon the assessment, the adverse judgment of such court, affirmed by the court of appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review.

2. The Legislature may commit the ascertainment of the sum to be raised by a tax, and of the benefited district, to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is conclusive and beyond review.

3. The question of special benefit, and the property to which it extends, is of necessity a question of fact; and when the Legislature determines it in a case within its general power, its decision is final.

4. Where a hearing is given by the taxing Act as to the apportionment among the land owners, which furnishes to them an opportunity to raise all pertinent and available questions, and to dispute their liability, or its amount and extent, such hearing was sufficient and the Act, in that respect, was constitutional.

5. Where the work is one which the State has the authority to do, and to pay for by assessment on the property benefited, objections that the sum raised is exorbitant, and that part of the property assessed was not benefited, present no question under the Fourteenth Amendment to the Constitution upon which this court can review the decision of the state court.

* Died March 23, 1888. [Ed.]

6. It is no objection to the validity of a new assessment made by the Legislature that it includes interest upon the unpaid part of an old assessment and part of the expense of levying that assessment.

[No. 872.]

Submitted Jan. 10, 1887. Submission set aside and case restored to docket for argument before full bench, Mar. 7, 1887. Resubmitted Feb. 7, 1888. Decided April 2, 1888.

IN ERROR to the Supreme Court of the State of New York, to review a judgment of that court, for the defendant, in regard to the validity of an assessment, upon an agreed state of facts. *Affirmed.*

Reported below, 1 Cent. Rep. 741, 100 N. Y. 585.

Statement by *Mr. Justice* **Gray**:

This case was submitted to the general term in Kings County of the Supreme Court of the State of New York under section 1279 of the Code of Civil Procedure, without process, upon an agreed statement of facts signed by the parties, the substance of which, and of the statutes therein referred to, was as follows:

On June 20, 1883, the parties made a contract in writing, by which the plaintiff agreed to sell to the defendant a parcel of land in the Town of New Lots in that county, and to execute and deliver a deed thereof, with full covenants of warranty, and free of all incumbrances, in consideration of the sum of $8,000, part of which was paid, and the rest was payable on delivery of the deed. Upon examination, the defendant discovered that there remained unpaid on the land an assessment of $1,221.78, with interest from November 8, 1881, and demanded that the plaintiff should pay it, but he refused. The assessment was made under the following circumstances:

By the Statute of the State of New York of 1869, chapter 217, as amended by the Statute of 1870, chapter 619, it was enacted in § 1, that the supreme court held in the County of Kings should, upon the application of one or more freeholders of the Town of New Lots, appoint three commissioners, who, by § 2, should immediately proceed to lay out in that town a street or avenue in continuation of Atlantic Avenue in the City of Brooklyn, and by § 3, take the land lying within the boundaries of the avenue so laid out, and after public notice in two or more newspapers of the county, "at least twenty days before meeting for that purpose, of their intention to proceed to make the award and assessment required by this Act, and of the time when and the place where they will meet for that purpose, at which meeting all persons interested may appear and be heard in relation to the said award and assessment," award damages to the owners of those lands, and assess the amount of the award and the attendant expenses upon the lands lying within three hundred feet on either side of the avenue, which in their judgment should be benefited by opening and extending it, and report such award and assessment to the court for confirmation, after public notice that all persons having any objection to it might be heard before the court; and that upon its confirmation the amount of the assessment should be added by the county supervisors to and made part of the annual taxes for three years, one third each year, with interest on the portions unpaid, and, when collected, be paid over to the owners of the lands taken.

The Statute of 1869, as amended by the statute of 1870, further provided, in § 4, that upon the confirmation of the report as to the opening of the street, the commissioners should be authorized to enter upon the land taken, to cause it to be regulated, prepared and graded for public travel, and to assess the expense of such regulating, grading and preparing for travel "upon the lands and premises which, in their judgment, shall be benefited by such improvement, in proportion to the benefit accruing to them by reason thereof, the district of assessment to extend back as provided heretofore in this Act;" and that the amounts so assessed, together with interest at the rate of 7 per cent a year from the making of the assessment, should be added to and made a part of the annual taxes for the ensuing year upon the lands assessed, and, when collected, be applied to the payment of bonds issued under that statute.

The commissioners were appointed, laid out the street, and regulated, graded and prepared it for travel, and made the award and assessments, as directed by the statutes aforesaid. The assessment made under § 4 for the expense of regulating, grading and preparing the street for travel, amounted to more than $100,000. The sums so assessed upon some lots were paid; but the sums assessed upon other lots remained unpaid, the owners of these lots contesting the validity of the assessment. The principal amount of the unpaid part of that assessment, being $40,664.96, was returned for five years as uncollected by the treasurer of Kings County to the comptroller of the State, and, together with interest thereon at the yearly rate of 5 per cent and amounting to $8,293.33, was paid or credited in account by the State to the treasurer of Kings County. On June 18, 1878, the court of appeals declared that assessment void. *Stuart* v. *Palmer*, 74 N. Y. 183. On January 29, 1879, the comptroller of the State canceled the unpaid assessment, and charged the county with the amount thereof, being $40,664.96, together with the interest thereon to February 1, 1879, amounting to $8,293.33.

On August 12, 1881, the Legislature of New York, by the Statute of 1881, chapter 689, directed the board of supervisors of Kings County to levy on the assessment roll of the Town of New Lots for 1881, upon the lands, the assessment made upon which, under § 4 of the Act of 1869, had been so cancelled by the comptroller, and charged to the County of Kings, "a sum equitably apportioned among the several parcels comprising said lands, which shall be sufficient to refund to the State of New York the sum its due by reason of such cancellation, which sum, amounting to $40,664.96, was duly credited August 28, 1876, by the comptroller of said State to the treasurer of Kings County, and the interest charged thereon by said comptroller, as required by law, to February 1, 1879, amounting to $8,293.33, together with further interest thereon, at 6 per centum per annum from February 1, 1879, to the date of such levy. Before proceeding to levy such sums, the said board shall apportion

the same among the several parcels of land hereinbefore mentioned, and said board shall give ten days' notice of the time and place when they will meet to make such apportionment, which notice shall be published daily in a newspaper published in the County of Kings; and all parties interested in said lands shall be entitled to be heard before said board, upon the question of said apportionment." The Statute of 1881 further provided that the sums so levied should be collected by the collector of taxes in the Town of New Lots, and paid over to the county treasurer, and by him applied "to pay the amount so due the State of New York by reason of such cancellation."

Under and pursuant to this statute, the supervisors of Kings County added to the aforesaid sums of $40,664.96, being the unpaid balance of the previous assessment, and $8,293.83, being the interest thereon to February 1, 1879, further interest thereon at the yearly rate of 6 per cent from that date to November 3, 1881, the day of the final conclusion of their report, and assessed and levied the aggregate sum of $55,653.52 upon the plaintiff's and other lots.

The lots so assessed were isolated parcels, not contiguous, and many of them not fronting on the avenue. Most of the territory benefited as fixed by the Statute of 1869, and a great portion of the original assessment, was not included in the Statute of 1881, nor directed to be taken into consideration in making the new assessment. But this assessment included a proportionate part of the expenses of the former assessment, which had been declared void by the court of appeals.

The case stated by the parties, after setting forth the foregoing facts, continued and concluded as follows:

"The plaintiff claims that said assessment of 1881 in question is not a lien or cloud on the title to said premises; and the defendant refuses to pay the balance of said consideration until the plaintiff allows it to be deducted from the consideration money or pays the same, neither of which is the plaintiff willing to do; and the plaintiff also claims that the Statute of 1881, chapter 689, is unconstitutional, and therefore void, for the reason that it is an attempt made by the Legislature of this State to validate a void assessment (and to do the same without giving the property holders an opportunity to be heard as to the total amount of the assessment, only providing for a hearing on the apportionment), which was levied upon said premises under and pursuant to chapter 217 of the laws of 1869, as amended by chapter 619 of the laws of 1870; and that the Statute of 1881 is clearly void for the further reasons that the defect in the former assessment was jurisdictional, and it has been so declared and decided by the court of appeals in the case of *Stuart* v. *Palmer*, 74 N. Y. 183, and is special and invidious, and unjustly and illegally apportioned upon certain individuals without reference to a uniform standard, and is an arbitrary exaction, and is levied on an individual or individuals to the exclusion of others in the same district. The defendant doubts the said claim of the plaintiff. The question submitted to the court upon this case is as follows:

"Is the assessment levied on the property in 1881 in question a good and valid lien or cloud on said property?

"If this question is answered in the affirmative, then judgment is to be rendered in favor of the defendant and against the plaintiff, requiring the plaintiff to pay said assessment and to deliver a deed according to contract.

"If it be answered in the negative, then judgment is to be rendered in favor of the plaintiff, requiring the defendant to take title to said premises in accordance with the contract above mentioned without the plaintiff paying said assessment or tax, and without deducting the same out of the consideration money."

The Supreme Court of New York gave judgment for the defendant, and the plaintiff appealed to the court of appeals, which affirmed the judgment and remitted the case to the supreme court. 100 N. Y. 585 [1 Cent. Rep. 741]. The plaintiff sued out this writ of error, and assigned for error that it appeared by the record that both those courts held that the Statute of 1881, chapter 689, and the proceedings under it were constitutional and valid, "whereas, the said courts should have decided that the said statute and the proceedings thereunder were in violation of the Constitution of the United States and were void, for the reason that they deprived the said plaintiff and the other persons assessed thereunder of their property without due process of law."

Messrs. **Matthew Hale** and **Albert Day**, for plaintiff in error:

The canceled assessments referred to were originally imposed under chapter 217 of the Laws of 1869, as amended by chapter 619 of the Laws of 1870, which Act, so far as it authorized the assessment in question, was held to be unconstitutional and void, as depriving the parties assessed of their property without due process of law, by the Court of Appeals of the State of New York.

Stuart v. *Palmer*, 74 N. Y. 183; *Horn* v. *New Lots*, 83 N. Y. 100.

These decisions of the court of appeals have been cited with approval in the courts of the United States.

R. R. Tax Cases, 18 Fed. Rep. 753, 763, 764; *Santa Clara County* v. *Southern Pac. R. Co.* 18 Fed. Rep. 410; *Burns* v. *Multnomah R. Co.* 15 Fed. Rep. 177, 188.

This court has jurisdiction of the case. The validity of the New York Statute, chapter 689 of the Laws of 1881, and of the authority exercised thereunder, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the state court was in favor of its validity.

Chicago L. Ins. Co. v. *Needles*, 113 U. S. 574 (28: 1084).

The statute in question was unconstitutional and void.

Stuart v. *Palmer*, and *Horn* v. *New Lots*, *supra*.

The Legislature cannot validate an unconstitutional Act or any Act which it might not have previously authorized.

Cooley, Const. Lim. 881, 4th ed. 477; *Albany City Nat. Bank* v. *Malter*, 9 Fed. Rep. 884, 885.

Chapter 689 of 1881 violates each and every of the principles stated above.

The sums attempted to be levied on the lands

in question are so levied without reference to special benefits to the lots assessed.

People v. *Gold & Stock Tel. Co.* 98 N. Y. 67, 79, 80; *Lane County* v. *Oregon*, 74 U. S. 7 Wall. 71, 80 (19: 101, 105); Hill. Tax. 16; *Camden* v. *Allen*, 26 N. J. L. 398; *Peirce* v. *Boston*, 3 Met. 520; *Shaw* v. *Peckett*, 26 Vt. 482; 1 Desty, Tax. 9.

Interest could be charged in any case only as damages for a failure to meet a valid obligation.

O'Brien v. *Young*, 95 N. Y. 428.

Mr. **Walter E. Ward,** for defendant in error:

The statute complained of, to wit, chapter 689 of the Laws of 1881, is constitutional and valid.

Due process of law is a restraint upon the legislative as well as the executive and judicial powers of the government.

Murray v. *Hoboken Land & I. Co.* 59 U. S. 18 How. 272 (15: 372).

Levying of an assessment without any notice to the property owners is the taking of property, under the Constitution, without due process of law.

Cooley, Tax. 265; *Overing* v. *Foote*, 65 N. Y. 263; *Philadelphia* v. *Miller*, 49 Pa. 440; *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616), 17 Alb. L. J. 223.

Before an assessment can be laid and property taken by due process of law, some notice must be given. It is, however, the province of the Legislature to prescribe the kind of notice and the mode in which it may be given. It cannot dispense with all notice.

Stuart v. *Palmer*, 74 N. Y. 184.

The Legislature of the State of New York had power, upon providing for the giving of notice as above set out, to place any tax upon property for public purposes that it saw fit. Its power of taxation to that extent is unlimited.

Weismer v. *Douglas*, 64 N. Y. 91; *Re Van Antwerp*, 56 N. Y. 261.

It may be that exaction in such matters may be oppressive and unjust, still it is unlimited.

Litchfield v. *Vernon*, 41 N. Y. 123; *People* v. *Brooklyn*, 4 N. Y. 427; *Horn* v. *New Lots*, 83 N. Y. 100.

Mr. Justice **Gray** delivered the opinion of the court:

The leading facts of this case are as follows: The original assessment of the expenses of regulating, grading and preparing the street for travel was laid by commissioners, as directed by § 4 of the Statute of 1869, upon all the lands lying within three hundred feet on either side of the street, and which, in the judgment of the commissioners, would be benefited by the improvement. After the sums so assessed upon some lots had been paid, the Court of Appeals of the State declared that assessment void, because the statute (although it made ample provision for notice of and hearing upon the previous assessment for laying out the street under § 3), provided no means by which the landowners might have any notice or opportunity to be heard in regard to the assessment for regulating, grading and preparing the street for travel under § 4. *Stuart* v. *Palmer*, 74 N. Y. 183. The lots, the sums assessed upon which had not been paid, were isolated parcels, not contiguous, and some of them not fronting upon the street. By the Statute of 1881, a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the Legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff.

The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the Statute of 1881 was unconstitutional and void, because it was an attempt by the Legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, § 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the supreme court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. *Bridge Propr.* v. *Hoboken Land & I. Co.* 68 U. S. 1 Wall. 116, 142 [17: 571, 575]; *Murray* v. *Charleston*, 96 U. S. 432, 442 [24: 760, 761]; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44, 56 [19: 370, 375]; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 579 [28: 1084, 1086].

The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the state court, so far as it depended upon the Constitution of the State. *Provident Sav. Institution* v. *Jersey City*, 113 U. S. 506, 514 [28: 1102, 1105]. Yet, as the words of the two Constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight. The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by *Judge* Finch in delivering the opinion of the court of appeals, as follows:

"The Act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the Legislature, whose action cannot be reviewed in the courts, upon the ground that it acted unjustly or without appropriate and adequate reason. *Litchfield* v. *Vernon*, 41 N. Y. 123, 141; *People* v. *Brooklyn*, 4 N. Y. 427; *People* v. *Flagg*, 46 N. Y. 405; *Horn* v. *New Lots*, 83 N. Y. 100; Cooley, Tax. 450. The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do

so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the Act of 1881, the Legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it neccessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact; and when the Legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the Law of 1881 was imposed without reference to special benefits. The Legislature practically determined that the lands described in that Act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. *Weismer* v. *Douglas*, 64 N. Y. 91. Certainly, if the Acts of 1869 and 1870 had never been passed, but the improvement of Atlantic Avenue had been ordered, the Legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In *Re Van Antwerp*, 56 N. Y. 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property owners. The Legislature made a reassessment, imposing two thirds of the expense upon a benefited district and one third upon the city at large. The Act was held valid as a new assessment and not an effort to validate a void one.

"These views furnish also an answer to the objection that the only hearing given to the landowner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the Legislature, or be of any avail to review or change it. A hearing is given by the Act as to the apportionment among the landowners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the landowners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the Legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power we cannot criticise the reasons or manner of its action. The landowners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the landowner an opportunity to assail the constitutional validity of the Act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions, of the mode and amounts of the apportionment itself. We think the Act was constitutional." 100 N. Y. 587-589.

The general principles, upon which that judgment rests, have been affirmed by the decisions of this court.

The power to tax belongs exclusively to the legislative branch of the government. *U. S.* v. *New Orleans*, 98 U. S. 381, 392 [25:225]; *Meriwether* v. *Garrett*, 102 U. S. 472 [26:197]. In the words of *Chief Justice* Chase, condensing what had been said long before by *Chief Justice* Marshall: "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected." *Veazie Bank* v. *Fenno*, 75 U. S. 8 Wall. 533, 548 [19:482, 487]; *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316, 428 [4:579, 606]; *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514, 563 [7: 939, 956]. See also *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 497 [25:558, 561]. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire. *Kelly* v. *Pittsburgh*, 104 U. S. 78, 80 [26:658, 659].

The Legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 81 U. S. 14 Wall. 676 [20:719]; *Davidson* v. *New Orleans*, 96 U. S. 97 [24:616]; *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704 [26:238, 241, 242]; *Hagar* v. *Reclamation District*, 111 U. S. 701 [28:569]. If the Legislature provides for notice to and hearing of each proprietor, at some stage

of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen* v. *Anderson*, 95 U. S. 37 [24:335]; *Davidson* v. *New Orleans* and *Hagar* v. *Reclamation District*, above cited.

In *Davidson* v. *New Orleans* it was held that if the work was one which the State had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant and that part of the property assessed was not benefited presented no question under the Fourteenth Amendment to the Constitution, upon which this court could review the decision of the state court. 96 U. S. 100, 106 [24:618, 620].

In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited.

In determining what lands are benefited by the improvement, the Legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.

In section 4 of the Statute of 1869, the assessment under which was held void in *Stuart* v. *Palmer*, 74 N. Y. 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within three hundred feet on either side of the street, were actually benefited, was delegated to commissioners.

But in the Statute of 1881 the Legislature itself determined what lands were benefited and should be assessed. By this statute the Legislature, in substance and effect, assumed that all the lands within the district defined in the Statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the Legislature. The Statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

It is objected to the validity of the new assessment that it included interest upon the unpaid part of the old assessment, and a proportionate part of the expense of levying that assessment. But, as to these items, the case does not substantially differ from what it would have been if a sum equal to the whole of the original assessment, including the expense of levying it, and adding the interest, had been ordered by the Statute of 1881 to be levied upon all the lands within the district, allowing to each owner, who had already paid his share of the original assessment, a credit for the sum so paid by him, with interest from the time of payment.

Judgment affirmed.

Mr. Justice **Matthews**, dissenting:

I am unable to agree with the judgment of the court in this case, and will state very briefly the ground of my dissent.

In *Stuart* v. *Palmer*, 74 N. Y. 188, the Court of Appeals of the State of New York declared the Statute of the State of New York of 1869, chapter 217, as amended by the Statute of 1870, chapter 619, and the assessment made in pursuance thereof, to be unconstitutional and void. In the opinion of the court in that case, delivered by Earl, *Judge*, and which was the unanimous opinion of the court, the ground of its judgment was stated as follows, p. 188: "I am of opinion that the Constitution sanctions no law imposing such an assessment without a notice to, and a hearing or an opportunity of hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done. The Legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." And, on page 190, it was further said: "The Legislature can no more arbitrarily impose an assessment, for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law,' has its foundation in this

rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitutions. It is a limitation upon an arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the Legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. *Weimer* v. *Bunbury*, 30 Mich. 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

Accordingly, the assessment for the expense of regulating and grading the avenue under the Act of 1869, as amended by the Act of 1870, was declared null and void as against parties refusing to pay.

Subsequently, by the Statute of 1881, chapter 689, the Legislature of New York directed the levy to be made upon the lands, the assessment made upon which under the Act of 1869 had been declared void and canceled, of the same sum which had been assessed under the Act of 1869, together with interest thereon to February 1, 1879, amounting to $8,298.33, and further interest thereon at 6 per cent per annum from February 1, 1879, to the date of such levy. This Act required the Board of Supervisors of Kings County to apportion this sum among the several parcels of land mentioned, after giving ten days' notice of the time and place when they would meet to make such apportionment, to the parties interested in said lands, who should be entitled to be heard before the board upon the question of the apportionment. It is to be observed, however, that this apportionment is only to be made as between the lands in respect to which the prior assessment had been canceled as being void. The question of the original apportionment between those lands and the remaining lands, on which the owners had paid the first assessment, was not left open under the Act of 1881. By this Act, therefore, the owners of the lands in question were deprived of the opportunity of being heard upon the question whether the apportionment as between them and the other landowners, embraced within the original assessment district for the same improvement, was equitable and fair. They were, therefore, deprived by the Act of 1881 of the very thing of which they were deprived by the Act of 1869, on account of which the Court of Appeals of New York held the latter Act to be unconstitutional and void. It is impossible for me, therefore, to reconcile the opinion of the Court of Appeals of New York now under review and the opinion of the same court in the case of *Stuart* v. *Palmer*. The same objection applies to both statutes with equal force. As I think the court of appeals was right in its judgment upon the first statute, I am of opinion that its judgment upon the Act of 1881, involved in this writ of error, should be reversed.

The argument against this conclusion, which seems to be chiefly relied on, is, that in the Act of 1881 the Legislature made a new assessment upon a new assessment district created for that purpose by the statute, and fixed the whole amount to be raised, leaving the question of apportionment open as between the parties, upon notice and a hearing; and that all this was within the admitted competency of the legislative power of the State, the exercise of which cannot be construed as depriving the parties of their property without due process of law. But it seems to be a mere evasion to say that this was an original assessment upon a district created by law for that purpose, consisting of the lands adjudged by the Legislature to be benefited by the improvement. The improvement was ordered by the Act of 1869, and the assessment district was created by it; and so far as the laying out of the street and the appropriation of private property for that purpose, and awarding damages to the owners thereof, and assessing the amount of such awards, and the attendant expenses upon the lands lying within three hundred feet on either side of the avenue, which in the judgment of the commissioners should be benefited by opening and extending the street, that Act and what was thus far done under it were not invalidated, but were held to be in conformity with the Constitution. In the Act of 1881, the Legislature of New York did not profess to undo anything which had been done under the Act of 1869, and certainly did not begin *de novo* in dealing with the improvement. On the contrary, they took that portion of the old assessment for the expense of regulating, grading, and preparing the street for travel which remained unpaid, and which had been declared to be void, and revived it by a mere Act of legislation as against the parties who had been judicially declared not to be bound by it, adding interest upon it from the time when it was first charged to the State by virtue of the cancellation, as well as a part of the expenses incurred in making the original assessment. Such an Act of the Legislature seems to me to be in violation of that provision of the 14th Amendment to the Federal Constitution which declares that no State shall deprive any person of his property without due process of law.

I am authorized by *Mr. Justice* **Harlan** to say that he concurs in these views.

STATE OF MISSOURI, *ex rel.* JOHN R. WALKER, *Plff. in Err.*,

v.

JOHN WALKER, State Auditor.

(See S. C. Reporter's ed. 339-345.)

Agency, when revocable—interest coupled with a power.

1. Where the fund commissioners of a State were authorized to and did employ an agent to prosecute claims of the State against the United States, and such agent gave security for the faithful performance of his duties, and it was agreed that he should receive certain commissions on the amount collected as full compensation for his services and expenses incurred, such agency was not irrevocable, as being coupled with an interest in the thing to be collected; but the State could revoke it, at its will, by an Act repealing the Act under which he was employed.

2. The interest coupled with a power, to make it irrevocable, must be an interest in the thing itself, and not an interest in that which is to be produced by the exercise of the power.

[No. 910.]

Submitted Feb. 15, 1888. Decided April 2, 1888.

IN ERROR to the Supreme Court of the State of Missouri, to review a judgment of that court denying a writ of *mandamus* on the Auditor of that State to require him to deliver to an agent of the State a demand for collection. *Affirmed.*

Reported below in 2 West. Rep. 512, 88 Mo. 279.

The facts are fully stated in the opinion.

Mr. **William M. Williams,** for plaintiff in error:

A State can no more impair the obligation of its own contract than it can one between individuals.

Davis v. *Gray*, 83 U. S. 16 Wall. 203 ((21: 447); *Hall* v. *Wisconsin*, 103 U. S. 5 (26:302); Story, Const. 4th ed. §§ 1385, 1386.

The employment of an attorney to collect a claim, the attorney to be paid a certain part of the proceeds collected, is a power coupled with an interest; and even the death of an administrator who made the contract cannot terminate the employment. The administrator's successor is bound by the contract.

Jeffries v. *Mutual L. Ins. Co.* 110 U. S. 305, 310 (28:156, 158); *Hunt* v. *Rousmanier*, 21 U. S. 8 Wheat. 174 (5:589).

What is implied in a contract, pleading, or statute, is as much a part of it as what is expressed.

U. S. v. *Babbit*, 66 U. S. 1 Black, 55 (17:94).

The object of construction is to find out what the parties intended to do.

Chesapeake & O. Canal Co. v. *Hill*, 82 U. S. 15 Wall. 94 (21:64).

Statutes are to be construed as operating prospectively.

Cooley, Const. Lim. 3d ed. p. 63; *State* v. *Grant*, 79 Mo. 119; *State* v. *Greer*, 78 Mo. 188.

Where power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, then, unless there is an express stipulation that it shall be revocable, it is irrevocable, whether it is expressed to be so on the face of the instrument conferring the authority or not.

Story, Ag. 9th ed. § 477; *Jeffries* v. *Mutual L. Ins. Co. supra; U. S.* v. *Linn*, 40 U. S. 15 Pet. 315 (10: 751); *McConnell* v. *Brayner*, 63 Mo. 464, 465; *Marsiou* v. *Pioche*, 8 Cal. 535, 536; *Walker* v. *Denison*, 86 Ill. 142; *Bruce* v. *Schuyler*, 9 Ill. 278.

This cause coming to this court under the 25th section of the Judiciary Act, only the questions mentioned in the Act can be reviewed here.

Rector v. *Ashley*, 73 U. S. 6 Wall. 143 (18: 733).

Mr. **B. G. Boone,** *Atty-Gen. of Missouri*, for defendant in error:

A principal who employs an agent may revoke the appointment at any time.

Story, Ag, 9th ed. § 463; *Walker* v. *Denison*, 86 Ill. 142; *Blackstone* v. *Buttermore*, 53 Pa. 266; *Peacock* v. *Cummings*, 46 Pa. 434; *Chambers* v. *Seay*, 73 Ala. 372.

It is only when the agent's power is coupled with an interest that it is irrevocable.

Hunt v. *Rousmanier*, 21 U. S. 8 Wheat. 174 (5: 589); *Hartley's Appeal*, 53 Pa. 212; *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 305-310 (28: 156-158); *Brown* v. *Pforr*, 88 Cal. 550; *Hutchins* v. *Hebbard*, 34 N. Y. 24.

A power coupled with an interest is a power which accompanies or is connected with an interest in something then in existence. If the interest is in that which is produced by the exercise of the power then it is not a power coupled with an interest.

Barr v. *Schroeder*, 32 Cal. 609; *Coffin* v. *Landis*, 46 Pa. 426; *Gilbert* v. *Holmes*, 64 Ill. 548; *Attrill* v. *Patterson*, 58 Md. 226.

A mere power to collect money and receive property, the agent to have one half of the net proceeds as compensation, is not a power coupled with an interest, and is revocable.

Bancroft v. *Ashhurst*, 2 Grant, Cas. 518.

The interest which an agent must have, in order to render his power irrevocable, must be an interest in the property on which the power is to be exercised, and not an interest in the money to be derived from the sale of property.

Blackstone v. *Buttermore*, 53 Pa. 266.

If the property is money and the agent's interest has been fixed by agreement with the principal before any power is attempted to be exercised, it will be irrevocable.

Jeffries v. *Mutual L. Ins. Co.* 110 U. S. 305 (28:156).

The relation which plaintiff in error sustained to the State of Missouri was that of a mere agent.

Act March 19, 1881; Sess. Act Mo. 163; *State* v. *Walker*, 2 West. Rep. 512, 88 Mo. 279.

In the case at bar, the power granted not being coupled with an interest, no contract right was impaired by the repeal of the Act.

Simpson v. *Carson*, 11 Oreg. 361; *Phillips* v. *Howell*, 60 Ga. 411.

Similar cases: *East Saginaw Salt Mfg. Co.* v. *East Saginaw*, 80 U. S. 13 Wall. 373 (20: 611); Cooley, Const. Lim. 5th ed. § 284; *Durkee* v. *Board of Liquidation*, 103 U. S. 646 (26: 598); *Bishop's Fund* v. *Rider*, 13 Conn. 87; *Simpson* v. *Carson*, *supra; Lord* v. *Thomas*, 64 N. Y. 107; *People* v. *Banvard*, 27 Cal. 470; *Bryan* v. *Cattell*, 15 Iowa, 538.

There was no stipulation or provision that any contract or employment that might be entered into under this Act should remain in perpetuity.

Newton v. *Mahoning County*, 100 U. S. 548 (25: 710); *Butler* v. *Pennsylvania*, 51 U. S. 10 How. 402 (13: 472); *Conner* v. *Mayor of N. Y.* 2 Sandf. 369; *Pott* v. *Sheboygan County*, 25 Wis. 506; *Head* v. *Curators of Univ.* 47 Mo. 221.

The following opinion, prepared by *Mr. Chief Justice* **Waite,** was delivered by the court as its opinion:

On the 10th of March, 1881, a statute was enacted by the General Assembly of Missouri, authorizing and empowering the Fund Commissioners of the State, if they deemed it expedient, to employ a competent agent to prosecute to final settlement before Congress and the proper departments at Washington certain specified claims of the State against the Government of the United States. The agent thus appointed was to give security for the faithful performance of his duties. He was to prosecute the claims at his own expense, and receive, as full compensation for his services, such commissions on the amount collected by him as might be agreed upon between himself and the

Fund Commissioners, not exceeding 5 per cent on claims for money that had already been paid out by the State, and 15 per cent on the others. The officers of the United States were authorized to pay the agent his agreed commissions; but all other payments by the United States must be made to the treasurer of the State. Section 3 of this Act is as follows: "Sec. 3. With a view to the prompt and satisfactory settlement of the claims of this State against the Government of the United States, and referred to in this Act, the Adjutant-General, State Auditor, and other officers of the State having in their possession any papers, accounts, pay rolls, orders, receipts, vouchers, or other evidences of indebtedness necessary to the establishment of said claims, shall, upon the written order of the Governor, deliver to such agent all such papers, documents, pay rolls, receipts, vouchers, or other evidences of indebtedness (or authenticated copies of the same, where such copies will answer), and take his receipt for the same; and in all cases wherein it is held by the Government of the United States to be necessary to the establishment of said claims, that such original papers, pay rolls, vouchers, receipts, or orders, etc., should be filed in the departments at Washington, it shall be the duty of the agent, and he is hereby authorized, to deliver the same to the proper authorities to be so filed; but before delivering the said original papers he shall withdraw from file all authenticated copies of the same heretofore filed by this State, or the agents thereof; and in all cases wherein copies shall not have been made of such original papers, etc., as it may be necessary to file as aforesaid, it shall be the duty of said agent to prepare, or cause to be prepared, and properly authenticate, copies of the same, which copies so made, together with those heretofore made and by him withdrawn from file, as hereinabove provided for, shall be returned by such agent to the proper state officers of this State; and the fact of the return of such copies shall be by said officers, respectively, certified to the Governor of this State."

On the 28th of November, 1884, the Fund Commissioners, acting under the authority of this statute, employed John R. Walker as the agent of the State in that behalf, and agreed that he should receive for his services and expenses the maximum of compensation provided for. Walker accepted the employment, furnished the necessary security, and agreed, in consideration of the compensation specified, to proceed without delay to the prosecution of the claims. It is averred in the petition, that thereafter "he entered upon the discharge of the duties of his said employment, and has continued therein ever since, and has incurred large expense and expended a great deal of time, in and about the collection of said claims under his contract, and has faithfully demeaned himself in the prosecution of the same, and in the transaction of the business so entrusted to him;" but it does not appear, either in the pleadings or the proof, that any specific claim has ever been put in his hands for collection, or that anything has been done by any officer of the State under § 3 of the statute to furnish him the means of proceeding under his employment.

On the 28th of March, 1885, the Act of March 19, 1881, was repealed without any saving clause, and on the same day another statute was passed, providing for the authentication and payment of certain claims against the State for military service, and which were of the class in respect to which Walker had been employed as agent. The Act then provided for the delivery of these claims "to the agent for the collection of the claims of the State against the Government of the United States." Then followed section 8, of which this is a copy: "Sec. 8. It shall be the duty of the said agent of the State to prepare, present, and prosecute to settlement, the demands of the State for reimbursement by the Government of the United States, of such sums of money as may be paid out under the provisions of this Act; and as full compensation for such services, said agent shall receive the amount of his expenses actually incurred in the prosecution of said work; and when such collection shall have been made, said agent shall file a statement of his said expenses, verified by his oath, with the State Auditor, who shall thereupon draw his warrant upon the State Treasurer in favor of said agent for the amount of said bill of expense; *Provided, however*, That the amount paid on said bill of expense shall not exceed five per cent of the amount of the collection so made for the State."

Under this statute the claim of James P. Haynes, public administrator of Ray County, having in charge the estate of John King, deceased, was presented and allowed to the amount of $466.59; and Walker demanded it from the Auditor of State for collection from the United States under his employment as agent pursuant to the Act of 1881, but this was refused because that Act had been repealed. Thereupon Walker applied to the Supreme Court of the State for a mandamus on the auditor to make the delivery, his position being that the repealing Act of 1885 impaired the obligation of his contract with the State under the Act of 1881, and to that extent was void. The court denied the writ, and in so doing decided that the employment of Walker was "one of agency, pure and simple," which the State could revoke at its will, as it did by the repealing Act. For a review of a judgment based on that decision this writ of error was brought.

The Fund Commissioners were only authorized to employ an agent for the State, and to agree with him as to the commissions he should receive on the amount collected, as full compensation for his services, and all expenses incurred by him in that behalf. This they did, and there can be no doubt that the agency thus created was withdrawn by the repealing Act of 1885, unless a consideration was given for it, or it was so coupled with an interest in the subject matter of the agency, that is to say, in the claims to be collected, as to make it irrevocable.

There was no consideration in money paid for the employment. The agreement to prosecute the claims faithfully is no more than would be implied in law from the acceptance of the appointment; and the provision for the payment of expenses is only a declaration that the commissions stipulated for shall be in full for services and disbursements. There is noth-

ing, therefore, in the consideration for the employment to prevent this agency from being revoked like any other.

The interest coupled with a power, to make it irrevocable, must be an interest in the thing itself. As was said by *Chief Justice* Marshall, in *Hunt* v. *Rousmanier*, 21 U. S. 8 Wheat. 174, 204 [5:589, 597], "The power must be engrafted on an estate in the thing. The words themselves seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it." Such is undoubtedly the rule.

Here there was no actual assignment of the claims or any part of them. Walker had no authority, under his employment, to take the money from the United States except to the extent of his commissions. The vouchers and evidences of debt were not turned over to him. All he could do was to present the claims in the name of the State and as its representative. He could not even get the vouchers or other evidences of debt which were necessary for the establishment of the claim, by application to the proper custodian, but must go to the Governor of the State for his written order directing their delivery to him. There is nothing whatever in the transaction, from the beginning to the end, which shows an intention on the part of the Legislature to part with any interest in or control over the claims, except to the extent of the commissions of the agent after they had been earned. Walker was given no power to compromise any claim. All he could do was to establish the claim, and, when the State was ready to pay it, take his commissions. Clearly such an agency is not irrevocable in law because of its being coupled with an interest in the thing to be collected. If the vouchers and other evidences of debt had actually been delivered to him for collection, and he had expended time or money under his employment, in endeavoring to make the collection, a revocation of his authority might not require him to return the papers he held until he was compensated for what he had already done; but that is not the question here, because the purpose of this suit is to get possession of new vouchers, not to assert a lien upon such as he already had in hand.

There is nothing in the cases of *Hall* v. *Wisconsin*, 103 U. S. 5 [26: 302] or of *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 305 [28: 156] in conflict with this. In *Hall's Case* the question was whether his employment was an office, or under a contract for work and labor, and it was held to be under a contract, because, although he was appointed a commissioner to make a "geological, mineralogical, and agricultural survey of the State," the law providing for the survey and for his appointment required that the Governor "make a written contract" with him for the performance of his allotted work, and "the compensation therefor;" and it also declared that "such contract shall expressly provide that the compensation to such commissioner shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of two thousand dollars per annum, and that payment will be made only for such part of the year" as he may actually be engaged in the discharge of his duty as such commissioner. The contract actually entered into was by its terms "to continue till the third day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, * * * or unless a vacancy shall occur in his office by his own act or default." In deciding the case it was said: "In a sound view of the subject, it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations, limited, in point of time, with a State, for the erection, alteration, or repair of public buildings, or to supply the officers or employés who occupy them with fuel, light, stationery, and other things necessary for the public service." There was in that case a positive contract by the State for employment in a particular service, for a particular term, made under the authority of law; and because it was such a contract the State could not, any more than a private individual, rescind it at will. The employment in this case, however, has no such provision. There is no agreement as to time, and the matter stands precisely as that of Hall would, if a statute had been passed authorizing a geological, mineralogical, and agricultural survey of the State, and he had been employed to make it and receive for his services a compensation dependent on the amount of work actually done, or the time actually employed. It would hardly have been contended that under such a contract the State could not stop the survey and require Hall to quit work at any time it pleased. The difference between the two cases is the difference in the two contracts.

In *Jeffries' Case* the contract was by an administrator of a deceased person's estate with a firm of attorneys, to prosecute a doubtful claim, "for a portion of the proceeds, with full power to compromise it as they should please;" and we held that such an agency was not revoked by the death of the administrator who made the contract and the appointment of another in his place. The question was as to the validity of a compromise made by the attorneys, on that authority, after the death of the first administrator. In the present case there was no authority to compromise. Walker could do nothing to establish the claim. He could not even receive the money belonging to the State after he had got the allowance of the claim by the United States.

We find no error in the record and the judgment is affirmed.

MARY WALL ET AL., *Appts.*,

v.

GEORGE P. BISSELL ET AL.

(See S. C. Reporter's ed. 382–396.)

Executor's title—Indiana Statute as to power of

executors—executor who has not qualified, release by—release by trustee—surviving creditor —release by.

1. The title of an executor to the personal property of his testator, being derived from the will, generally vests in him from the testator's death.
2. In Indiana, by statute, although the personal property vests, from the testator's death, in the executor named in his will, an executor cannot interfere with the estate further than to preserve the same until the issuing of letters testamentary.
3. In the absence of any state decision upon the point, this court declines to hold that a release of a mortgage made by an executor in Indiana who has never qualified, and to whom no letters have been issued, has any validity.
4. Such release, executed as trustee under the will, by one named as executor therein, but to whom letters have not been issued, is not valid. The testator cannot evade the statute by bequeathing personal property to a trustee and authorizing him to act as such without taking out letters testamentary.
5. Where the legal title to a bond and mortgage is in one as executor, but the title in the debt for which the bond and mortgage is security is in him as surviving creditor, he has the right as surviving creditor to release such mortgage, without taking out letters, although half of the consideration of the release would inure to the benefit of the estate of his testator and the other half to himself.
6. Such release, although executed by him as executor, is, by reason of his being surviving creditor, binding upon the interests of the representatives of the testator as well as upon his own.

[No. 22.]

Argued April 12, 13, 1887. Decided March 19, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana, for the plaintiff, in a suit to foreclose mortgages. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

This was a bill in equity by George P. Bissell against Abraham G. Barnett, his wife, Byron H. Barnett and James W. Barnett his minor sons, his sisters Susan B. Shoaff and Mary Ann Wall and their husbands, Henry J. Rudisill, Oscar A. Simons and John H. Bass, Henry Burgess, Charles A. Zollinger, and the representatives of John J. Kamm, to foreclose mortgages of real estate in Indiana. Answers and cross bills were filed by the various parties, setting up their different interests; and a final decree was rendered for the plaintiff, from which Mr. and Mrs. Wall, Mr. and Mrs. Shoaff, and the two minor sons of Abraham G. Barnett appealed to this court. The case appeared by the pleadings and proofs to be as follows:

In 1869 Abraham G. Barnett, his brother, John H. Barnett, and Newton B. Freeman, were partners in a paper mill, and desired to raise money for the use of the partnership and to pay up Freeman's share of the capital. At the request of the two Barnetts, and of Rudisill (who appears to have been promised an interest in the partnership), Bissell lent to the two Barnetts the sum of $8,000, the whole of which was put into the firm and $5,000 of which was credited to Freeman. Pursuant to an agreement then made by the three partners and Rudisill and Bissell, the following instruments were executed:

On July 15, 1869, the two Barnetts executed to Bissell eight bonds for $1,000 each, payable in ten years, with interest semi-annually, secured by mortgage from John H. Barnett to Bissell, of land in the City of Fort Wayne.

On the same day, Rudisill executed to John H. Barnett a bond, reciting that "said Henry J. Rudisill has received from said Barnett the sum of $5,000, part of a loan made, by J. H. Barnett and Abraham G. Barnett for the sum of $8,000 of George P. Bissell, secured by" the bonds and mortgage aforesaid, and conditioned to "pay said sum of $5,000 of said bonds, with interest thereon, as it becomes due."

On December 23, 1871, as security for the payment of this bond, Rudisill executed to John H. Barnett a mortgage of land, upon all of which, except a small piece, there existed a prior mortgage made by Rudisill to his mother to secure the payment of an annuity to her, and now held by Simons and Bass.

On January 28, 1872, John H. Barnett died, leaving a will containing the following provisions:

First. A devise of part of the land, mortgaged by him to Bissell as aforesaid, to Mrs. Wall, with successive remainders to Byron H. Barnett, to his children, and to Abraham G. Barnett.

Second. A devise of the rest of that land to Mrs. Shoaff, with successive remainders to James W. Barnett, to his children, and to Abraham G. Barnett.

Third and Fourth. Devises of other lands to Mrs. Shoaff and to Abraham G. Barnett and his children.

"Fifth. Now, as to my interest in the paper mill and business carried on at the City of Fort Wayne under the name of Freeman & Barnett, which is regarded as one third in extent of said business effects, real and personal, etc., etc., stock, assets, machinery, dividends, dues, etc. I devise and bequeath, subject to the conditions and agreements, performed or unperformed, which were named at the time I became a party in interest in said paper business so carried on by and in Freeman & Barnett's name, and which conditions and agreements are known to my brother, A. G. Barnett, I give and bequeath unto my said brother, A. G. Barnett, and to my nephews, James Barnett Wall and Charles W. Wall, sons of my sister, Mary A. Wall, all my interest in the paper mill and business aforesaid, real and personal, or otherwise, so carried on and owned by said Freeman & Barnett: To have and to hold to each of said devisees or legatees, three in number, so named, one full third of my said interest in said paper business, mill, etc. The sole control of the respective interests of said James B. and Charles W. Wall shall be under the control of my brother, A. G. Barnett, until said James B. shall reach the age of twenty-five years. The profits arising out of said interest so bequeathed to said Charles and James B. respectively shall be at reasonable periods each year paid said legatees respectively by said Barnett, or by any other person who may be authorized to control said interest in the progress of said business, by law or otherwise. And I hereby give the said A. G. Barnett the right to sell said interests of said Charles and James B., if he shall deem such sale expedient and for the best interests of said Charles and James, he, the said A. G. Barnett, first giving said Charles and James security for faithfully accounting to them for the proceeds of said sale; or if he shall desire to buy said

interests, or either of them, before either shall be of age, then some third party shall qualify as guardian, and proceed to sell the same to said A. G. Barnett under order and authority of law.

"Sixth. I name my brother, A. G. Barnett, my executor, to act himself, or jointly with one he may choose; if acting alone, then he shall and may do so without bond as such executor, but if acting with another both shall give bond and take out letters testamentary and proceed according to law; but if he shall act alone, then, as executor, he shall have authority under this will to proceed as if he had letters testamentary to execute the trusts devolved on him as executor, as also those which may incidentally arise in the execution of this trust as executor, but not any others arising out of a different relation, such as trustee or guardian of some of the parties named herein or of some of the trust funds named hereinbefore. He shall have power to proceed to collect all debts, judgments, or choses in action, due me at my death, all rents due me at my death, of any and all my real estate, except the homestead, and to have control of and dispose of all my personal property, moneys and effects, reducing them to availability, and to collect all rents on the lots devised respectively, located in the City of Fort Wayne, until such rents and the reasonable use of the whole homestead place, including that devise to Mrs. Susan Shoaff and to himself, until such funds so arising from rents, use of homestead, moneys, personal property, etc., shall be enough to pay my debts, funeral expenses, debts of last illness, and to purchase a lot in Lindenwood cemetery, properly and fairly improve it, pay for exhuming the remains of my father and mother, their interment, and the erection of a monument suitable to their condition in life in said lot, and this shall be done speedily as the nature of the business shall allow, after which the devisees respectively herein lastly named, and incidentally referred to, shall control said property as the same is intended in the respective clauses wherein said property is devised."

On February 7, 1872, the will was duly admitted to probate, on the testimony of the subscribing witnesses, in a court of the State of Indiana.

Abraham G. Barnett never qualified or gave bond as executor, as required by the statutes of Indiana, and the court of probate never made any order appointing him executor, or directing letters testamentary to issue, and no such letters were ever issued. But he assumed to act as executor; and as such took control of the real and personal property, collected the rents of the real estate for some months (after which he turned it over to the devisees), paid the testator's debts and funeral expenses, purchased a burial lot, removed the remains of the testator's father and mother to it, and erected a monument upon it. The other devisees knew of all these acts, and made no objection, supposing him to be authorized by the will to do them.

On January 23, 1875, Rudisill sold and conveyed by warranty deed to Burgess, Zollinger and Kamm part of the land included in the mortgage from him to John H. Barnett, and in the annuity mortgage to his mother; she released from her mortgage this part of the land; and Abraham G. Barnett executed, on the margin of the record of the mortgage from Rudisill to John H. Barnett, a release of the same part, in the following words:

"I hereby release from any and all lien by reason of this mortgage the following of the premises herein described: All that part of S. E. ¼ of sec. 35, t'p 31, R. 12 East, this day conveyed by Henry J. Rudisill to H. Burgess, Chas. A. Zollinger, and J. J. Kamm. Witness my hand and seal as such executor, January 23, 1875.

"ABRAHAM G. BARNETT, [SEAL.]

"Executor of the Estate of John H. Barnett, deceased."

On the same day, and as part of the same transaction, Rudisill executed to "Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased," a mortgage of other lands, partly included also in the annuity mortgage. All the parties to this transaction acted in good faith. But the transaction was not shown to have been known to the devisees until about the time of the beginning of this suit, or to have ever been assented to by them.

The bill prayed for a foreclosure of the mortgages from John H. Barnett to the plaintiff and from Rudisill to John H. Barnett, or, if the court should hold the release of the latter good, then for a foreclosure of the mortgage from Rudisill to Abraham G. Barnett.

The circuit court decreed that the release was valid, and that the title in the land so released be quieted in the present holders as against all other parties to this suit, and that the various parcels of land be sold and applied to the payment of the debts secured by the several mortgages in an order not objected to by the appellants, supposing the release to be valid, which they denied.

Mr. **L. M. Ninde,** for appellants:

No person is authorized to act as executor or administrator until he is appointed and receives his letters from the proper court.

Landers v. *Stone*, 45 Ind. 408.

In *Croxton* v. *Renner*, 1 West. Rep. 206, 108 Ind. 226, and in *Jeffersonville R. R. Co.* v. *Swayne*, 26 Ind. 477, it is held that the jurisdiction of the court to grant letters of administration is derived from the statute and can only be exercised in the cases provided for thereby.

A release of a debt can only be made by the party legally or equitably entitled to it.

2 Pars. Com. Law, 221, 222; *Eastman* v. *Wright*, 6 Pick. 322; *Loring* v. *Brackett*, 3 Pick. 408.

Qualification by a bond is a prerequisite to receiving letters testamentary.

Bankhead v. *Hubbard*, 14 Ark. 298; *Hunter* v. *Bryson*, 5 Gill & J. 483; *Gardner* v. *Gantt*, 19 Ala. 666; *Holbrook* v. *Bentley*, 32 Conn. 502; *Bodley* v. *McKinney*, 9 Smedes & M. 339; *Echols* v. *Barrett*, 6 Ga. 443; *Webb* v. *Dietrich*, 7 Watts & S. 401; *Hall* v. *Cushing*, 9 Pick. 395; *Pettingill* v. *Pettingill*, 60 Me. 411; *Fairfax* v. *Fairfax*, 7 Gratt. 36; *Moore* v. *Ridgeway*, 1 B. Mon. 234; *Phillips* v. *Stewart*, 59 Mo. 491.

If a trustee releases or compromises a debt without sufficient reason, he will be answerable for it in his accounts.

2 Perry, Tr. § 482; 1 Perry, Tr. § 217.

Messrs. **R. S. Taylor** and **S. R. Alden**, for appellees:

Although the law directs that an administrator or guardian shall give bond, yet it is held in many cases that acts done in good faith without such bond are not void.

Dequindre v. *Williams*, 31 Ind. 444; *Foster* v. *Birch*, 14 Ind. 445; *Ex parte Maxwell*, 37 Ala. 362; *Jones* v. *Gordon*, 2 Jones, Eq. 353; *Giddings* v. *Butler*, 47 Tex. 585.

If a person duly elected to the office of sheriff should assume and exercise its duties, without receiving a commission, taking oath, or giving bond, but with the acquiescence of the courts and the public, his acts would not be void.

People v. *Hopson*, 1 Denio, 574; *People* v. *Stevens*, 5 Hill, 630; *Bucknam* v. *Ruggles*, 15 Mass. 180; *McIntyre* v. *Tanner*, 9 Johns. 135; *Doty* v. *Gorham*, 5 Pick. 487.

The functions of executors as such and trustees are distinct and separable.

Conklin v. *Egerton*, 21 Wend. 430; *Rex* v. *Jenkins*, 3 Dowl. & R. 41; *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497; *Bolton* v. *Jacks*, 6 Robt. 166; *Tainter* v. *Clark*, 13 Met. 220; *Beekman* v. *Bonsor*, 23 N. Y. 298; *Cole* v. *Wade*, 16 Ves. Jr. 27; *Sheets' Estate*, 52 Pa. 257; 1 Ves. & B. 213; 3 Ves. Jr. 210; *Cockrill* v. *Armstrong*, 31 Ark. 580.

Where two have a joint personal interest, the release of one bars the other.

Ruddock's Case, 6 Coke, 25; *Pierson* v. *Hooker*, 3 Johns. 68; *Austin* v. *Hall*, 13 Johns. 286; *Fitch* v. *Forman*, 14 Johns. 172; *Decker* v. *Livingston*, 15 Johns. 479; *Wheeler* v. *Curtis*, 11 Wend. 663; *Bradley* v. *Boynton*, 22 Me. 290; *Hall* v. *Gray*, 54 Me. 231; *Wisheart* v. *Legro*, 33 N. H. 182; *True* v. *Huntoon*, 54 N. H. 121; *Grossman* v. *Lauber*, 29 Ind. 618; *Smith* v. *Wiley*, 22 Ala. 403; *Stapleton* v. *King*, 33 Iowa, 35; *Myrick* v. *Dame*, 9 Cush. 248; *Blake* v. *Sanborn*, 8 Gray, 154; *Martin* v. *McReynolds*, 6 Mich. 70; *Emerson* v. *Knower*, 8 Pick. 63.

Resident executors were not required to give bond except on application of one interested in the estate when danger of loss was apparent.

Mandeville v. *Mandeville*, 8 Paige, 475; *Holmes* v. *Cock*, 2 Barb. Ch. 426; *Wood* v. *Wood*, 4 Paige, 299; *Clark* v. *Niles*, 42 Miss. 460; *Atwell* v. *Helm*, 7 Bush, 504; *Fairfax* v. *Fairfax*, 7 Gratt. 36; *Langley* v. *Harris*, 28 Tex. 564.

Testamentary direction controls or is held to be without general sweeping statutory provisions as to sale of a testator's real estate.

McDermut v. *Lorillard*, 1 Edw. Ch. 272; *Minuse* v. *Cox*, 5 Johns. Ch. 441; *Champlin* v. *Champlin*, 3 Edw. Ch. 602; *Goods of Smith*, L. R. 1 P. & D. 717.

In construing powers the intention of the parties, gathered from the whole instrument, considering the circumstances of the case, governs.

Wilson v. *Troup*, 7 Johns. Ch. 25; *Goodtitle* v. *Funucan*, Doug. 565; *Pomery* v. *Partington*, 3 T. R. 362; 7 Com. Dig. title *Poiar*, 8; *Smyth* v. *Taylor*, 21 Ill. 296.

The rule of sale in the inverse order of alienation has never obtained in the courts of Kentucky, Tennessee, Iowa, and other most respectable courts.

Parkham v. *Welch*, 19 Pick. 231; *Dickey* v. *Thompson*, 8 B. Mon. 312; *Jobe* v. *O'Brien*, 2 Humph. 84; *Bates* v. *Ruddick*, 2 Iowa, 423; *Barney* v. *Myers*, 28 Iowa, 478; *Barnes* v. *Racster*, 1 Younge & C. Ch. 401; *Stanly* v. *Stocks*, 1 Dev. Eq. 314–317.

In this State the rule cannot yet be regarded as a rule of property.

Mr. Justice **Gray** delivered the opinion of the court:

The principal question in this case is the validity of the release, executed by Abraham G. Barnett, of the mortgage from Henry J. Rudisill to John H. Barnett. By the law of Indiana, a mortgage creates only a lien to secure the mortgage debt, leaving the legal title of the land in the mortgagor. *Fletcher* v. *Holmes*, 32 Ind. 497.

It was argued for the appellees that this release was valid, considering Abraham G. Barnett in any one of three capacities: 1. As executor of the will of John H. Barnett. 2. As trustee under that will. 3. As surviving joint owner, in equity, of the bond and mortgage executed by Rudisill to John H. Barnett to secure the payment of a debt due to John H. Barnett and Abraham G. Barnett jointly.

1. The title of an executor in the personal property of his testator, being derived from the will, doubtless vests in him from the moment of the testator's death. *Dixon* v. *Ramsay*, 7 U. S. 3 Cranch, 319, 323 [2: 453, 454]; *Hill* v. *Tucker*, 54 U. S. 13 How. 458, 466 [14: 223, 226]. At common law, he might, before proving the will in the probate court, not only take possession of the property, but sell or dispose of it, pay debts of the estate, receive or release debts owing to it, bring actions for property which was in the testator's actual possession, and do almost any other acts incident to his office, except that he could not maintain any other actions without producing a copy of the probate and letters testamentary at the trial. 1 Williams, Executors, 7th ed. 293, 302, 303, 629.

But the Statutes of Indiana provide that whenever any will shall have been admitted to probate, letters testamentary shall be issued to the persons named therein as executors (being competent by law to serve as such) who shall qualify; and further provide as follows:

"Sec. 3. Every person named in the will as executor, who shall qualify and give bond, shall be named in such letters, and every person not thus named shall be deemed superseded.

"Sec. 4. Any person who is appointed executor, who shall renounce his trust in writing filed with the clerk, or who shall fail to qualify and give bond within twenty days after probate of such will, shall be deemed to have renounced such appointment, and such letters shall issue to any other person named in the will, capable and willing to accept such trust.

"Sec. 5. No executor named in the will shall interfere with the estate intrusted to him, further than to preserve the same until the issuing of letters; but for that purpose he may prosecute any suit to prevent the loss of any part thereof."

"Sec. 19. Every person appointed executor, administrator with the will annexed, or administrator, before receiving letters, shall execute

a separate bond," with sureties, "in a penalty payable to the State of Indiana, of not less than double the value of the personal estate to be administered, conditioned that he will faithfully discharge his duties as such executor or administrator, and shall take and subscribe an oath or affirmation that he will faithfully discharge the duties of his trust according to law;" and the bond, as well as the oath or affirmation, is required to be recorded. 2 Gavin & H. Stat. 484, 489, 490, 491; Indiana Rev. Stat. 1881, §§ 2222-2225, 2242, 2243.

These statutes clearly manifest the intent of the Legislature that, although the personal property shall vest from the death of the testator in the executor named in his will, yet, in order to secure the interests of creditors and of legatees, every executor shall give bond and take out letters testamentary before he can do any act as executor, except such as may be necessary to preserve the property and to prevent the loss of any part of it. The prohibition is absolute that, except for that purpose, "no executor shall interfere with the estate" until the issuing of letters testamentary.

The direction in the will of John H. Barnett that Abraham G. Barnett may act as executor, without giving bond or taking out letters testamentary, as the statutes require, is of no legal effect.

The current of decision in other States, so far as we are informed, is to the effect that under similar statutes (some of them less peremptory in their terms) any acts done by an executor by way of disposing of the property are invalid, unless he takes out letters testamentary, or is appointed executor by an order of the court of probate, equivalent to the issue of such letters. *Monroe* v. *James*, 4 Munf. 194; *Martin* v. *Peck*, 2 Yerg. 298; *Cleveland* v. *Chandler*, 3 Stew. (Ala.) 489; *Carpenter* v. *Going*, 20 Ala. 587; *Ex parte Maxwell*, 37 Ala. 362, 364; *Kittredge* v. *Folsom*, 8 N. H. 98, 111; *Rand* v. *Hubbard*, 4 Met. 252, 257; *Gay* v. *Minot*, 3 Cush. 352; *Carter* v. *Carter*, 10 B. Mon. 327; *Stagg* v. *Green*, 47 Mo. 500; *Hartnett* v. *Wandell*, 60 N. Y. 346, 350; *McDearmon* v. *Maxfield*, 38 Ark. 681.

We have been referred to no decision of the Supreme Court of Indiana that directly bears upon this case. The only one that approaches it is *Hays* v. *Vickery*, 41 Ind. 583. In that case, an heir, named in the will as executor, had, without qualifying as such, or taking out letters testamentary, but with the consent of all the other heirs, devisees and legatees, acted as executor, and made distribution of the property. A subsequent order of the probate court, made without notice to him, upon the application of one of those heirs, appointing another person administrator with the will annexed, was reversed on appeal, and letters testamentary directed to be issued to the executor upon his qualifying and giving bond according to law. The opinion proceeded upon the ground that the delay in taking out letters testamentary had been waived by the mutual arrangement of all parties interested; and it contained no intimation that the acts of an executor, who never took out letters testamentary, could affect the rights of any person interested in the estate who had not assented to them.

In the present case, whatever effect the facts that the other devisees knew that the executor was acting as such and made no objection might have against those of full age, the minor devisees could not be thereby estopped to assert their rights.

Letters testamentary issued to an executor, upon his qualifying according to law, may relate back and legalize his previous tortious acts. 1 Williams, Executors, 269; *Priest* v. *Watkins*, 2 Hill, 225. Or, an order of the court of probate, appointing an executor, may not be subject to be impeached collaterally by showing that he did not in fact qualify; and may of itself be sufficient evidence of his authority, without the production of letters testamentary. *Vogel's Succession*, 20 La. Ann. 81; *Piatt* v. *McCullough*, 1 McLean, 69, 74.

But where, as in this case, the executor has never qualified, nor been appointed by the court, and no letters testamentary have been issued, we have found no decision, under statutes like those of Indiana, that any disposition of the property by the executor is valid as against persons interested who are not estopped by having consented to it.

In the absence of any decision upon the point by the Supreme Court of Indiana, we are therefore not prepared to hold that the release in question has any validity as an act done by Abraham G. Barnett as executor.

2. The difficulties are quite as great in the way of holding the release valid, considered as executed by Abraham G. Barnett in the capacity of trustee under the will, distinct from his office as executor.

In the first place, the will, after naming Abraham G. Barnett executor, and directing that he may act as such without giving bond or taking out letters testamentary, provides that "As executor he shall have authority under this will to proceed, as if he had letters testamentary, to execute the trust devolved on him as executor, as also those which may incidentally arise in the execution of this trust as executor." By this iteration of the words "as executor," the testator clearly shows that he did not intend that in performing the usual duties of an executor he should act in any other capacity.

In the next place, it was not within the power of the testator to defeat the provisions and the policy of the testamentary law of the State, by bequeathing personal property to a trustee, without the intervention of an executor. As was said by *Chief Justice* Shaw, delivering the opinion of the Supreme Judicial Court of Massachusetts, "It is an established rule of law, that all the personal property of the testator vests in the executors for some purposes, before probate of the will; but to all intents and purposes, upon its probate. This they take, not merely as donees, by force of the gift, as *inter vivos*, but by operation of the rules of law controlling, regulating and giving effect to wills. A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees or of one or more trustees for particular purposes, such direction would be nugatory and void." *Newcomb* v. *Williams*, 9 Met. 525, 533. So in the earlier case of *Hunter* v. *Bryson*, the Court of Appeals of Maryland said: "But suppose Bryson not to be created executor by

the clause in the will which has been referred to, and that the testator's design was that the persons appointed should act literally as trustees without taking out any letters testamentary or of administration. The appointment is a nullity as far as the personal estate is concerned, being an attempt to evade the provisions of our testamentary system in a way which the law does not tolerate." 5 Gill & J. 483, 488.

3. We are then brought to a consideration of the question whether the release can be upheld, because of the authority vested in Abraham G. Barnett as surviving creditor, under the settled rule that one of two joint creditors or mortgagees, or the survivor of them, may release the joint debt. *Penn* v. *Butler*, 4 U. S. 4 Dall. 354 [1:364]; *People* v. *Keyser*, 28 N. Y. 226. The case, so far as affects this question, stands thus:

John H. Barnett and Abraham G. Barnett borrowed $8,000 of Bissell, and lent $5,000 of it to Freeman, and thereby became, at law as well as in equity, joint debtors to Bissell in the sum of $8,000, and joint creditors of Freeman in the sum of $5,000. Rudisill executed to John H. Barnett a bond, secured by mortgage, conditioned to pay to him the sum of $5,000, describing it in the bond as part of the sum of $8,000 borrowed by the two Barnetts of Bissell, thus clearly identifying the debt, which Rudisill's bond and mortgage were intended to secure, as the $5,000 which the two Barnetts had lent to Freeman, and which Freeman owed to them jointly. Rudisill's bond and mortgage, therefore, although they ran to John H. Barnett alone, and could have been enforced at law in his name only, yet in equity, having been made with the sole object of securing the payment of the debt which Freeman owed to both Barnetts jointly, belonged to them as joint creditors. *Batesville Institute* v. *Kauffman*, 85 U. S. 18 Wall. 151 [21:775].

Upon the death of John H. Barnett, the debt of Freeman was due to Abraham G. Barnett personally as surviving creditor, with authority as such to sue for and recover it, although he would of course be bound to account to John H. Barnett's representatives for half of anything that he might recover; and Rudisill's bond and mortgage continued to stand as security for that debt; and although the legal title in this bond and mortgage vested in Abraham G. Barnett as executor, yet the equitable interest in them belonged half to him as executor and half to him personally. If he had received from the mortgagor payment of the sum secured by the mortgage, whether as executor or as surviving creditor, in either case he would hold half of that sum to his own use and half as executor. So a valid release of the whole or part of the land mortgaged, made by him, whether as executor or as an individual, would bar him both in his official and in his private capacity; and any substituted security, received by him as a consideration for the release, would ultimately enure to the benefit of the same persons, that is to say, one half to his own benefit, and the other half to the benefit of those entitled under the will. In short, neither the parties to whom nor the amount in which he would be liable to account for anything received upon a payment or release would be affected by the capacity in which he assumed to act. If he had never been named as executor, a release of the debt by him, being surviving creditor, would have been valid at law, and his release of the mortgage, which was security for that debt, would have been good in equity. There is no reason, therefore, which can influence a court of equity, why he might not as surviving creditor release part of the mortgaged land from the mortgage.

The two characters of executor and of surviving creditor being united in the person of Abraham G. Barnett, the court, if he had executed the release in his own name merely, without describing himself as acting in either capacity, would presume that he acted in the character which would make the release valid and effectual. *Yeaton* v. *Lynn*, 30 U. S. 5 Pet. 224, 229 [8:105, 106].

The form in which the release was drawn up and executed does not affect the equities of the case.

It begins with the absolute and comprehensive words, "I hereby release from any and all lien by reason of this mortgage." Then follow a description of the land released, by range, township, section and quarter section, and as that day conveyed by Rudisill to Burgess, Zollinger and Kamm, and the final clause, "Witness my hand and seal as such executor, January 23, 1875." No executor had been previously named in the release, or in the mortgage, on the margin of the record of which the release was made. The release is signed "Abraham G. Barnett, executor of the estate of John H. Barnett, deceased."

When a person having title in property in different capacities executes a deed in one capacity only, and holds the consideration received for the benefit of those entitled to it, a court of equity, at least, will be slow to hold the deed invalid for want of a more complete and formal execution.

In *Corser* v. *Cartwright*, L. R. 7 H. L. 731, a man who was one of two executors of his father, and also the residuary devisee of his lands, charged with the payment of his debts, made a mortgage of the lands, reciting that he was entitled to them in fee, and not describing himself as executor. *Lord* Romilly, M. R., held that this mortgage was not an exercise of the power vested in the executors for paying the testator's debts, but was only a mortgage of the beneficial interest of the devisee, and therefore ineffectual against the testator's general creditors. But his decree was reversed by the Lords Justices in Chancery, and their decree was affirmed by the House of Lords upon the motion of *Lord Chancellor* Cairns, who said: "What I find is this, that the estates with which Your Lordships have to deal are clearly devised to, and the legal estate vested in, the residuary devisee, who was also one of the executors. I find him selling or mortgaging, and I find him, beyond all doubt, able to sell and able to give to a mortgagee a good title to the legal estate. I find that that legal estate is in his hands; and therefore any money that is produced by the sale or mortgage of that legal estate is subject to and chargeable with the payment of debts and legacies; and that therefore the money coming into his hands must be money which ought to be applied to the payment of debts and legacies. But then I find that he himself is an executor of the testator; that he himself is the person who ought to hold assets impressed

with the liability to satisfy debts and legacies. I find, therefore, that assets which ought to be applied to the payment of debts have come into the hands of an executor, and that he has given a receipt for them. Therefore, on the one hand the mortgagees have got the legal estate; and on the other hand they have got a receipt from the proper person for money which ought to be applied to the payment of debts and legacies. That being so, it appears to me that their title is entire and complete." L. R. 7 H. L. 740.

In *West of England & S. W. Dist. Bank* v. *Murch*, L. R. 28 Ch. Div. 138, that decision was followed, and applied to this state of facts: One of two brothers, partners in business, died, leaving a will, by which he directed his debts to be paid, and devised his real estate in trust with power of sale, and appointed his widow executrix and trustee. The widow and the surviving brother sold and conveyed real estate of which the two brothers had been tenants in common, and which was in fact partnership property, by deeds reciting that the brother in his own right, and the widow as trustee under the will, were seised of it in fee as tenants in common, but not stating that she was executrix, or that the property was partnership property. This conveyance was held to be valid, *Lord Justice* Fry saying: "It is plain that as executrix she could sell the whole of the partnership property." "Then it is said that if she had power so to do, yet, by omitting to state in the deeds by which she conveyed the freehold property that she was acting as executrix, she precluded herself from asserting that she was acting in that character. In my judgment, she did not. It must be borne in mind that, as executrix, hers clearly was the hand to receive the purchase moneys; and therefore those moneys came to the right hand, the hand of the person whose duty it was duly to apply the assets in satisfaction of the creditors of the deceased as well as of the beneficiaries under his will. Moreover, whether she was acting as trustee or as executrix, she was under an obligation to do the best she could for the estate. Her fiduciary character was substantially the same, whether she was acting as executrix or as trustee. I think, therefore, that I should be straining at a gnat, if I were to hold that the mere fact, that she spoke of herself in the instruments as trustee and not as executrix, was enough to prevent the validity of a transaction which, in her character of executrix, I hold that she had the power of carrying into effect." "The legal estate passed from her, because she held it as trustee, and the money reached the hands of the person who was bound to distribute it among the persons entitled to it. I therefore overrule this objection." 28 Ch. Div. 151–153.

In the present case, the legal title, indeed, in the bond and mortgage of Rudisill was in Abraham G. Barnett as executor, and could not, at law, be released by him in any other capacity. But the legal title in the debt, for which the bond and mortgage stood as security, and to which in equity they were incident, was in him as surviving creditor. In equity, therefore, he had the right, as surviving creditor, to release the mortgage, in whole or in part; and any consideration for such a release, whether received by him as executor or as surviving creditor, would inure to the benefit of himself, and of the estate of his testator in equal moieties.

If he had received payment of the debt, and given a receipt for it as executor, he would have held the money, half as executor, and half to his own use, just as he would have held it if he had receipted for it in his own name only; and it cannot be doubted that the addition "as executor" in the receipt would not have prevented the payment from extinguishing the debt, and consequently the mortgage by which it was secured.

The release which Abraham G. Barnett did execute was of part of the land mortgaged, and in consideration of receiving a mortgage of other land, the parties to the release and to the new mortgage acting in good faith, and with no intent to defraud devisees or other persons interested. The body of the release contains apt words of release by him (without stating in what capacity) of the land described "from any and all lien by reason of this mortgage;" and he is described as executor in the *testimonium* clause and the signature only. Although he is described as executor in the new mortgage also, a court of equity certainly could not hold that mortgage to convey any interest to him as executor or otherwise, if the release for which it was the consideration was void.

Abraham G. Barnett was the person authorized to make the release, and the consideration for the release came into his hands, for the benefit of the persons entitled to it. The interests of no one were affected by the question in which of his two characters he executed the release, and received the new mortgage. Whether he acted as executor or as surviving creditor, the fruits of the transaction belonged in equity, one half to himself and one half to the estate of John H. Barnett.

If the whole debt had belonged to him alone, the description of himself as executor in the release could not have prevented its operating upon his interest in the debt, and in the mortgage by which that debt was secured. As the survivor of two joint creditors, he had the same power (independently of any authority as executor) to release the debt and the mortgage, as if he had been the sole creditor. The release, therefore, notwithstanding the superfluous description of the releasor as executor, was, by reason of his being surviving creditor, binding upon the interests of the representatives of the deceased creditor, as well as upon his own; and upon this ground the *decree is affirmed.*

D. H. WILLIAMS, *Plff. in Err.*,
v.
EDWARD D. CONGER ET AL.

(See S. C. Reporter's ed. 397–426.)

Texas land title—protocol, when evidence—comparison of handwriting—ancient instrument—instruction to jury—authentication of instrument—copy, when evidence—recital—right of citizens of Mexico.

1. In an action to try the title to land granted by the Government of Coahuila and Texas in 1828 to one Miguel Rabago, the protocol, or first original, of the application of Rabago for the grant, and of

the concession, made thereon, produced from the archives in the office of the Secretary of State of Coahuila, at Saltillo, is admissible in evidence as a link in the chain of title.

2. Where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison; but other instruments or signatures cannot be introduced for the mere purpose of comparison.

3. An ancient instrument, being an alleged original power of attorney from Rabago, found in an old trunk, held to be admissible in evidence, under the facts of the case, as an ancient writing.

4. The court may give to the jury its opinion on the weight of evidence.

5. That an instrument was not acknowledged, nor witnessed, nor proved before a notary, does not affect its validity; such informalities only affect the mode of proving it. If not duly authenticated, it must be proved to have been executed by the party to be charged with it.

6. A copy of an instrument may be admitted in evidence, to show that the original was in existence when the copy was made, and as evidence that the latter was an ancient instrument.

7. A recital in an ancient document that the person executing it was a citizen of Mexico, with evidence that he was established as a merchant in the City of Mexico, held sufficient evidence that he was such citizen.

8. Citizens of Mexico never lost the right of disposing of their Texas lands by the division of the Empire.

[No. 105.]

Argued Dec. 16, 19, 20, 1887. Decided April 2, 1888.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment for defendants in an action to try the title to land. *Affirmed.*

The facts are fully stated by the court.

Mr. **Eugene Williams,** for plaintiff in error:

The pretended application of Miguel Rabago to Viesca and the pretended concession of Viesca were inadmissible for the purpose of comparing the handwriting thereof with the pretended signature of Miguel Rabago to the pretended power of attorney.

Hazleton v. *Union Bank*, 32 Wis. 48; 1 Whart. Ev. 2d ed. § 717.

The paper, if genuine and an archive, can be brought into court only by its lawful custodian, or by a lawfully certified or examined copy.

1 Whart. Ev. 2d ed. p. 111, §§ 107, 828; *Smith* v. *Townsend*, Dall. (Tex.) 571; *Houston* v. *Perry*, 5 Tex. 464; *Wallis* v. *Beauchamp*, 15 Tex. 306; *Leathers* v. *Salvor W. & T. Co.* 2 Woods, 680; *Phelps* v. *Hunt*, 43 Conn. 194; *Luco* v. *U. S.* 64 U. S. 23 How. 515 (16: 545); *Eborn* v. *Zimpelman*, 47 Tex. 520; *Edwards* v. *James*, 7 Tex. 378; 1 Greenl. Ev. § 502.

Foreign laws should be proved.

Strother v. *Lucas*, 31 U. S. 6 Pet. 768 (8:575); *Martin* v. *Payne*, 11 Tex. 295; *Ennis* v. *Smith*, 55 U. S. 14 How. 426 (14:484); *Church* v. *Hubbart*, 6 U. S. 2 Cranch, 236 (2:265); *Vandervoort* v. *Smith*, 2 Cal. 155.

The purported application of Miguel Rabago was not shown to have been his act, and was not a paper which by law required his signature.

White v. *Holliday*, 11 Tex. 607.

Rule on comparison of handwriting.

Hanley v. *Gandy*, 28 Tex. 211; *Kennedy* v. *Upshaw*, 64 Tex. 420; *Matlock* v. *Glover*, 63 Tex. 236.

It is a general rule that evidence by comparison of hands is not admissible.

Moore v. *U. S.* 91 U. S. 270 (23:346); *Macferson* v. *Thoytes*, Peake, N. P. 29.

Comparison of hands is no evidence.

Jumpertz v. *People*, 21 Ill. 414; *Doe* v. *Suckermore*, 5 Ad. & El. 703; *Jackson* v. *Phillips*, 9 Cow. 94.

The English rule has been changed in Texas in criminal cases.

Code Crim. Proc. 667.

But not in civil cases.

Eborn v. *Zimpelman*, 47 Tex. 518; 2 Phill. Ev. 257.

Comparison of handwriting has been admitted only in extraordinary instances arising from the necessity of the case.

Roe v. *Rawlings*, 7 East, 282; *Woodard* v. *Spiller*, 1 Dana (Ky.) 180; *S. C.* 25 Am. Dec. 139; *Jackson* v. *Murray*, Anth. N. P. 105; *Row* v. *Kile*, 1 Leigh, 222; *Jackson* v. *Brooks*, 8 Wend. 426; *State* v. *Givens*, 5 Ala. 747.

Comparison of hands may be made where other writings, admitted or clearly proved to be genuine, are already in evidence for some other purpose.

U. S. v. *Darnaud*, 3 Wall. Jr. 181; *Bragg* v. *Colwell*, 19 Ohio St. 412; *Shannon* v. *Fox*, 1 Cranch, C. C. 188; *Martin* v. *Maguire*, 7 Gray, 177; *Depue* v. *Place*, 7 Pa. 428; *Reed* v. *Spaulding*, 42 N. H. 122; *Eborn* v. *Zimpelman*, *supra*; *Tyler* v. *Todd*, 36 Conn. 218; *Jones* v. *State*, 60 Ind. 241; *Bowman* v. *Sanborn*, 25 N. H. 98; *Miles* v. *Loomis*, 75 N. Y. 288; *Hynes* v. *McDermott*, 82 N. Y. 41; *S. C.* 22 Alb. L. J. 367; *Outlaw* v. *Hurdle*, 1 Jones, L. 150; *Williams* v. *Drexel*, 14 Md. 573; *Allport* v. *Meek*, 4 Car. & P. 267; *Goodyear* v. *Vosburgh*, 63 Barb. 154; *Hazleton* v. *Union Bank*, 32 Wis. 48; *State* v. *Miller*, 47 Wis. 633; *Commonwealth* v. *Eastman*, 1 Cush. 189; *State* v. *Givens*, 5 Ala. 757; *Kirksey* v. *Kirksey*, 41 Ala. 639.

Experts may make comparison of a genuine signature with ancient writing in dispute when living witnesses cannot be had and such writing is not old enough to prove itself.

Williams v. *Drexel*, 14 Md. 573; *State* v. *Scott*, 45 Mo. 302; *State* v. *Hastings*, 53 N. H. 460; *Hicks* v. *Person*, 19 Ohio, 429; *Yates* v. *Yates*, 76 N. C. 143; *Van Sickle* v. *People*, 29 Mich. 61; *McAllister* v. *McAllister*, 7 B. Mon. 270.

The standard must be proven clearly, beyond a reasonable doubt, in addition to what is necessary to admit the standard in evidence.

Bragg v. *Colwell*, 19 Ohio St. 412; *Outlaw* v *Hurdle*, 1 Jones, L. 150.

If there is any controversy as to the genuineness of the specimens, they are excluded.

Bowman v. *Sanborn*, 25 N. H. 98; *Reed* v. *Spaulding*, 42 N. H. 122; *Commonwealth* v. *Coe*, 115 Mass. 481; *Tyler* v. *Todd*, 36 Conn. 218; *State* v. *Ward*, 39 Vt. 225.

An ancient deed may be admitted in evidence without direct proof of its execution if it appears, first, to be of the age of at least thirty years; second, when it is found in proper custody; third, when either possession under it is shown or some other evidence of its authenticity freeing it from all just grounds of suspicion.

Applegate v. *Lexington & C. C. Min. Co.*, 117 U. S. 255 (29:892); *Middleton* v. *Mass.*, 2 Nott & McC. 55; *Jackson* v. *Brooks*, 8 Wend. 431; *Crowder* v. *Hopkins*, 10 Paige, 183; *Willson* v.

Betts, 4 Denio, 215; *Jackson* v. *Blanshan*, 8 Johns. 292; *Meegan* v. *Boyle*, 60 U. S. 19 How. 130 (15:577); *Jackson* v. *Davis*, 5 Cow. 123; *Hanrick* v. *Barton*, 88 U. S. 16 Wall. 166 (21:354).

A power not under seal will not authorize a deed under seal.

Watson v. *Sherman*, 84 Ill. 268; *Peabody* v. *Hoard*, 46 Ill. 242; *Clark* v. *Graham*, 19 U. S. 6 Wheat. 577 (5:334).

If the agent, in the performance of his agency, completes his trust, the agency is *functus officio*.

Moore v. *Stone*, 40 Iowa, 259; *U. S.* v. *Grossmayer*, 76 U. S. 9 Wall. 72 (19:627); 2 Perry, Tr. 3d ed. p. 46, § 511c.

It is error in the court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered.

Lucas v. *Brooks*, 85 U. S. 18 Wall. 454 (21: 788); Bump. Fed. Proc. 302; *U. S.* v. *Breitling*, 61 U. S. 20 How. 252 (15:900).

By the Texas Constitution, March 17, 1836, section 10: "No alien shall hold land in Texas except by title emanating directly from the Government of this Republic". This was the law of Texas before the Republic.

Clay v. *Clay*, 26 Tex. 24; *Lacoste* v. *Odam*, Id. 458; *Barrett* v. *Kelly*, 31 Tex. 481; *Phillips* v. *Moore*, 100 U. S. 208 (25: 603); *Osterman* v. *Baldwin*, 78 U. S. 6 Wall. 116 (18: 780); *Jones* v. *McMasters*, 61 U. S. 20 How. 8 (15: 805); *Merle* v. *Mathews*, 26 Cal. 475; *Andrews* v. *Spear*, 48 Tex. 568; 1 Pasch. Dig. note to Const. 845, 310; *Bowmer* v. *Hicks*, 22 Tex. 155.

Mr. **E. H. Graham**, for defendants in error:

In Mexican titles much more stress is placed on the original grant or concession than is now in Texas on the land certificate, or in the United States on the land warrant.

Hanrick v. *Barton*, 88 U. S. 16 Wall. 170 (21: 852).

In Mexican titles the original grant or concession must be shown in making out a title.

Hanrick v. *Barton*, *supra*; *Hollingsworth* v. *Flint*, 101 U. S. 591 (25: 1028); *Spencer* v. *Lapsley*, 61 U. S. 20 How. 264 (15: 902); *McPhaul* v. *Lapsley*, 87 U. S. 20 Wall. 264 (22: 344).

It cannot be said to be irrelevant, because it is part of the title and conduces to prove an issue in the case.

1 Whart. Ev. § 20; *Schuchardt* v. *Allen*, 68 U. S. 1 Wall. 368 (17: 645).

It has been repeatedly held in Texas that archives are primary evidence and, as such, admissible.

Wheeler v. *Moody*, 9 Tex. 375; *Herndon* v. *Casiano*, 7 Tex. 322; *Blythe* v. *Houston*, 46 Tex. 67; *Andrews* v. *Marshall*, 26 Tex. 212.

The exception should be specific, and point out the particular objection.

Noonan v. *Caledonia Min. Co.* 121 U. S. 400 (30: 1068).

This court takes judicial notice of the law at that time.

State v. *Sais*, 47 Tex. 309; *Brownsville* v. *Cavazos*, 2 Woods, 298.

The rule forbidding proof of handwriting by comparison is gradually being abandoned by the States of this Union that once recognized it, until it is now recognized in only sixteen States, and in some of these it is very much qualified by exceptions.

Lawson Expert & Opinion Ev. 326, 376–407; 1 Whart. Ev. 717 and note; 1 Best, Ev. 459; 2 Starkie, Ev. 7th Am. ed. 516.

This court can scarcely be said to be committed to the rule.

Moore v. *U. S.* 91 U. S. 273 (23: 347); *Strother* v. *Lucas*, 31 U. S. 6 Pet. 767 (8: 575); *Shinn* v. *Hicks*, 4 S. W. Rep. 486.

The practice on this point is different in the different States.

Homer v. *Wallis*, 11 Mass. 309.

The better reason is in favor of allowing the jury to compare.

Travis v. *Brown*, 43 Pa. 9; *S. C.* 82 Am. Dec. 540.

The plaintiff is estopped to deny the signature of Rabago to this original petition, and hence comparison with it is admissible.

State v. *Clinton*, 67 Mo. 380; *State* v. *Thompkins*, 71 Mo. 615; *Kennedy* v. *Upshaw*, 64 Tex. 420; *Canley* v. *Platt*, 2 McCord, 261.

The rule against comparison does not apply, and perhaps never did, when a *prima facie* case has been made without it, or when the evidence is conflicting. It is only when comparison is relied on alone and by itself. But when comparison is resorted to in aid and corroboration of other competent evidence or of doubtful proof, or when the evidence is conflicting, the rule is not violated.

Benedict v. *Flanigan*, 18 S. C. 506; *S. C.* 44 Am. Rep. 588; *Boman* v. *Plunkett*, 2 McCord, 518; *Travis* v. *Brown*, *supra*; *Baker* v. *Haines*, 6 Whart. 284; *S. C.* 36 Am. Dec. 225; *Myers* v. *Toscan*, 3 N. H. 48; *Gore* v. *Stevens*, 1 Dana, 201; *S. C.* 25 Am. Dec. 141; *Woodard* v. *Spiller*, 1 Dana, 180; *Smith* v. *Fenner*, 1 Gall. 175; *Moody* v. *Rowell*, 17 Pick. 490.

The authorities seem to be in conflict as to whether the judge or jury should pass upon the genuineness of the standard.

State v. *Hastings*, 58 N. H. 454; *State* v. *Ward*, 39 Vt. 225.

The letter power of attorney from Miguel Rabago to Victor Blanco, dated June 8, 1882, was properly admitted in evidence as an ancient instrument and as a valid title paper in the chain of title.

Williams v. *Conger*, 49 Tex. 582; *Frankland* v. *Cassaday*, 62 Tex. 418; *Meyers* v. *Dittmar*, 47 Tex. 375; *Clark* v. *Keith*, 106 U. S. 464 (27: 302); *Duncan* v. *Gegan*, 101 U. S. 812 (25: 876); *Andrews* v. *Marshall*, 26 Tex. 212; *Watrous* v. *McGrew*, 16 Tex. 509.

The court did not err in charging the jury that Blanco could have procured and retained a legal copy of the power from Rabago to him, which would have all the force and effect of an original, nor in refusing the charges asked by plaintiff on this subject, as shown under the fifth assignment.

Williams v. *Conger*, 49 Tex. 595, 597; *Titus* v. *Kimbro*, 8 Tex. 212; *Blythe* v. *Houston*, 46 Tex. 67; *McPhaul* v. *Lapsley*, 87 U. S. 20 Wall. 284 (22: 346).

The court did not err in its general charge relating to proof of the power.

The court did not err in admitting in evidence the copy of Blanco's deed to Laguerinne, nor the copy of Laguerinne's power to Priolland.

DeLeon v. *White*, 9 Tex. 600; *Spencer* v. *Lap-*

ley, 61 U. S. 20 How. 274 (15: 906); *Holmes* v. *Coryell*, 58 Tex. 681; *State* v. *Cardinas*, 47 Tex. 250; *Las Caygas* v. *Larionda*, 4 Mart. O. S. La. 288; *Watrous* v. *McGrew*, 16 Tex. 506; *Hanrick* v. *Barton*, 88 U. S. 16 Wall. 173 (21: 353).

The evidence in the record points to the irresistible conclusion that there was an original power from Rabago to Blanco, though ours may not be the one, and such original will, from these facts, now be conclusively presumed.

Watrous v. *McGrew*, 16 Tex. 512; *Johnson* v. *Timmons*, 50 Tex. 534.

From Supplemental Brief.

The question raised by plaintiff is fully settled against him, both by the Supreme Court of Texas and by this court.

Barrett v. *Kelly*, 31 Tex. 481; *Andrews* v. *Spear*, 48 Tex. 568; *Phillips* v. *Moore*, 100 U. S. 208 (25: 603); *Osterman* v. *Baldwin*, 73 U. S. 6 Wall. 116 (18: 730).

Mr. **Eugene Williams**, for plaintiff in error, in reply:

The doctrine of estoppel, as such, does not apply here.

Bragg v. *Colwell*, 19 Ohio St. 412; *Shannon* v. *Fox*, 1 Cranch, C. C. 133; *Martin* v. *Maguire*, 7 Gray, 177; *Jones* v. *State*, 60 Ind. 241; Lawson, Ex. Ev. 382; *Allport* v. *Meek*, 4 Car. & P. 267; *Goodyear* v. *Vosburgh*, 63 Barb. 154.

It is a misnomer to call the opinion and a simple judgment of remand for a new trial *res judicata*.

White v. *Downs*, 40 Tex. 225; *Clark* v. *Keith*, 106 U. S. 464 (27: 302).

Mr. Justice **Bradley** delivered the opinion of the court:

This is an action of trespass to try title, brought by the appellant to recover from the appellees the possession of eleven leagues of land situated in McLennan and Bosque Counties, in Texas, on the west bank of the River Brazos, and granted by the Government of Coahuila and Texas in December, 1828, to one Miguel Rabago. The defendants pleaded not guilty, the Statute of Limitations, and laches. The action was commenced on the 11th of September, 1873, in the District Court of McLennan County, Texas, and was tried in that court in the year 1876, and a verdict was rendered and judgment given for the defendants. The case was then appealed to the Supreme Court of Texas, and at the Austin Term of 1878 the judgment was reversed for an error in the charge on the question of laches, and the cause was remanded for a new trial. 49 Tex. 582. It was then removed to the Circuit Court of the United States for the Northern District of Texas, and was tried in that court in April Term, 1884. Both parties claim title under Rabago; the plaintiff, by derivation from his heirs at law (he having died in 1848), and the defendants through an alleged conveyance made by Rabago, in his lifetime, by an attorney in fact, one Victor Blanco. No question is made, therefore, as to the validity of Rabago's title. The principal controversy at the trial arose in relation to the admission in evidence of two papers offered by the defendants, namely, first, the protocol, or first original, of the application of Rabago for the grant, and of the concession made thereon, produced from the archives in the office of the Secretary of State of Coahuila at Saltillo; secondly, the alleged original power of attorney from Rabago to Blanco, by virtue of which the latter executed a conveyance of the land in the name of Rabago, under which the defendants claim title. The latter was admitted as an ancient document in case of insufficient proof of Rabago's signature; but the jury were permitted to compare the signature with that purporting to be Rabago's affixed to the protocol of the application for the grant. Several bills of exception were taken by the plaintiff to the rulings and charge of the court, a verdict was rendered for the defendants and judgment was entered thereon, to reverse which the present writ of error was brought.

The following are copies of the documents referred to. The translation of the alleged protocol of Rabago's application, and of the concession made thereon, is in the words following, to wit:

"[Seal of Coahuila and Texas.]

"Petition of Don Miguel Rabago for the purchase of eleven leagues of land in the Department of Bexar. December 1, 1828.

"3rd seal. Two reals. Issued by the State of Coahuila and Texas for the years 1828 and 1829.

"Most Excellent Sir: The citizen Miguel Rabago, resident of the valley of Santa Rosa, with due respect represents to you that needing land for agricultural and raising of stock, he begs you that, by virtue of your authority, you will be pleased to sell him eleven leagues of land on the margins of the Trinity River, in the Department of Bexar, or in the section which shall appear to me to be most convenient and best adapted to my interests, being all together or in different localities, offering to settle and cultivate said lands within the time prescribed by the Colonization Laws of the State of the 24th of March, 1825. Also, that you will be pleased to grant me the time designated by the said law to pay the dues on the said land. I ask Your Excellency that you will be pleased to refer my petition, for which I will be thankful.

"Leona Vicario, 28th of November, 1828.

"(Signed) MIGUEL RABAGO."

"Leona Vicario, 2d of Dec'r., 1828.

"Conformable to article 24 of the Colonization Laws of the 24th of March, 1825, I sell to the petitioner the eleven leagues of land he asks for of the vacant lands in the Department of Texas, in the part he may point out, or in the locality most suitable to him. The commissioner whom the government will appoint will place him in possession of said leagues, and will extend the necessary titles, previously classifying the class and quality of said lands as a guide of the amount to be paid to satisfy the government dues, for which payment I grant him the time designated by the 22d article of said Colonization Law. A copy of the petition and decree will be given to the party intended for his observance and the subsequent effects. "(Signed) VIESCA.

SANTIAGO DEL VALLE."

This protocol or second original was authenticated by a certificate annexed thereto, by

the Secretary of State of Coahuila, the translation of which is in the words following, to wit:

"The citizen, Licentiate José Ma. Musquiz, Secretary of the Government of Coahuila de Zaragoza, certifies that the annexed document is the original which exists in the archives of the Government of Coahuila relative to the concession of eleven [leagues] of land made to Don Miguel Rabago, in the Department of Bexar, on the 2d of December, 1828. And at the request of the applicant this document is given, with the obligation of returning it when the suit in which it is to be used shall be terminated.

"Saltillo, April 6, 1881.

"[SEAL] (Signed)
JOSÉ MA. MUSQUIZ, *Sect'y.*"

The translation of the alleged original power of attorney from Rabago to Blanco is in the words following, to wit:

"MONCLOVA, *8th June*, 1833.

"Señor Don Victor Blanco:

"My esteemed Uncle and Sir: With this I hand you the testimonio of eleven leagues of land which His Excellency the Governor of the State granted to me a sale of, in the Department of Texas, in order that you may have the goodness to do whatever should be in your power, so that possession may be taken of them by yourself or by a person of your confidence, giving to you the most ample power so that you may cultivate them, may sell them, may exchange or alienate to your entire satisfaction, because for everything I authorize you, and I will stand and I will pass in all time for that which you should do; and should this my letter power not be sufficient, I will grant judicially as soon as you please, and notify me that you require it and you excusing this trouble. I place myself at your disposal as your most affectionate nephew and servant, who attentively kisses your hands.

"(Signed) MIGUEL RABAGO (rubric)."

(Indorsement.)

"I transfer all my powers in favor of Señor Don Samuel Williams, postmaster of the Town of San Felipe de Austin, in order that in my name and as my attorney he may take possession of the eleven leagues expressed in this.

"(Signed) VICTOR BLANCO (rubric).

"Monclova, 3d April, 1833."

It appeared on the trial that the extension of final title to Rabago was made on the 18th of January, 1834, on the application of Samuel M. Williams, as attorney for Rabago; but no power of attorney authorizing him to make the application was produced or proved by the plaintiff whose title depended on the extension thus obtained. The paper above copied, however, purporting to be a power of attorney from Rabago to Blanco, and propounded by the defendants, if their witnesses were to be believed, was found among the old papers of Williams in the custody of his son, and had on it an indorsement by Blanco transferring to Williams all the powers conferred upon him so far as to enable him (Williams) to take possession of the eleven leagues of land.

The defendants claimed that after the title was thus extended, to wit, on the 25th of May, 1836, Victor Blanco, under and by virtue of the power of attorney referred to, sold the land in question, in the City of Mexico, to one Guillermo Laguerenne by an act of sale passed before one Bonilla, a notary public, and that Laguerenne, on the 10th of January, 1837, in the City of Mexico, executed before one Madriago, a notary public, a power of attorney to Francisco Priolland, of New Orleans, authorizing him to sell all and any real estate belonging to Laguerenne, and that the latter, in pursuance of said power, did sell the said eleven leagues on the 15th of February, 1837, to one George L. Hammekin, by act of sale passed before one Caire, a notary public of New Orleans. It was admitted that the defendants had a regular chain of title from Hammekin.

The course of the trial was as follows: The plaintiff first gave in evidence a duly certified translation of the title of Rabago, from the records of the general land office of Texas, consisting of—

1. A testimonio of Rabago's application for the grant, dated November 28, 1828; and of the concession made thereon, dated December 2, 1828.

[The above testimonio was dated December 2, 1828, and signed by the Government Secretary.]

2. The extension of title, comprising the application for extension by S. M. Williams, as attorney of Rabago, dated December 8, 1833; the approval of the empressarios (of whom Williams was one); the order of survey; the field notes of the survey, etc.; concluding with a formal patent. This expediente was indorsed as filed in the land office June 7, 1875.

The plaintiff then proved the death of Rabago, and deduction of title from Rabago's heirs to himself, and rested.

The defendants, preparatory to offering their documentary evidence of title, — including, amongst other things, (1) the said protocol, or first original of Rabago's application for the grant, with his signature thereto, and the original concession made to him thereon; (2) the original power of attorney, above mentioned, from Rabago to Blanco; (3) the act of sale from Rabago, by his attorney Blanco, to Laguerenne; (4) Laguerenne's power to Priolland; (5) Priolland's act of sale to Hammekin—submitted the following evidence, to wit: The depositions taken at Saltillo, Mexico, in August, 1881, of José M. Musquiz, Secretary of State of Coahuila, and *ex officio* custodian of the archives relating to land grants in Texas; and of Estaban Portilla, keeper in charge of said archives, who identified the paper produced by the defendants purporting to be such protocol, or first original, of Rabago's application, found (as they testify) among the said archives in the proper office in Saltillo, and which by the law of the State might be allowed to go out of the office by the permission of the Governor. Also, the depositions of Ex-Governor E. M. Pease, of Austin, Texas, and of Andrew Neill, a notary public of the same place, who testified that they were familar with the signatures of Viesca and Del Valle by having often seen them as affixed to the public archives, laws and records of Coahuila and Texas, deposited in the public offices of the State of Texas, and believed their signatures to the purported original concession, attached to said application, to be their genuine handwriting. The defendants

also gave in evidence the testimony of John Willett, to the effect that he procured the said protocol in Saltillo, for the use of the counsel of the defendants, by the courtesy of the Governor of Coahuila, and of the Secretary, Musquiz, upon giving his bond for its return. It was also in evidence that Rabago was in Saltillo (which is the same as Leona Vicario) in person when the original concession was granted, and brought the testimonio home with him, and the interpreter testified that the application and concession in the certified copy put in evidence by the plaintiff is a good translation of the document produced by the defendants.

The defendants then gave in evidence the testimony of William H. Williams, son of Samuel M. Williams, born in 1833, and of M. E. Klieberg, of Galveston, tending to prove that the said paper, purporting to be the original power of attorney from Rabago to Blanco, of which a copy has been given, was found in 1876 by said Klieberg after a search therefor at the request of said William H. Williams in behalf of General Thomas Harrison, one of the defendants, in an old leather trunk that had belonged to said Samuel M. Williams, of whose papers said William H. Williams was custodian, and which trunk contained old miscellaneous papers of said Samuel relating to occurrences before the year 1836, and had always been in said Williams' possession since his father's death in 1858; that the paper in question was an old looking paper; that the trunk contained several letters and documents signed by Victor Blanco; and that said paper, with said letters and documents, were delivered to General Harrison.

The defendants also gave in evidence the testimony of George L. Hammekin, taken before a notary in November, 1876, who stated that he purchased the land in controversy about forty years before, in the City of New Orleans, from Francisco Priolland, acting as attorney for Guillermo Laguerenne; and had in his possession for a long time a paper purporting to be a copy of a power of attorney from Miguel Rabago to Victor Blanco, and had it then (whilst testifying). That it was dated Monclova, 8th June, 1832; first saw it in 1837 or 1838; that Laguerenne was a Frenchman or an American; that the land was sold to him May 25, 1836, and by him to witness in February, 1837. [The copy referred to by the witness was annexed to his deposition, and exactly corresponded with the paper propounded by the defendants as the original. It had annexed to it a certificate, of which the following is a translation, to wit:]

"I, the undersigned notary, do certify that the foregoing copy is, to the letter, the same as the original power that Don Victor Blanco has presented to me, and the same that I had before me when making out the bill of sale; that on the 25th day of May, 1836, made by virtue of it to Don Guillermo Laguerenne of eleven sitios of land situated in the Department of Texas, on the west side of the Brazos River, above the road that leads from the Town of Nacogdoches to Bejar, as it appears in the public records in my charge. And so that this be of value wherever required, and at the request of the party interested, I issue duplicates of the present in Mexico, the 17th day of March, 1837, being witnesses Dn. Rafael de Revilla, Dn. Teofilo Carreno, and Dn. Felipe de Revilla Olivares, of this community.

"(Signed) MIGUEL DIEZ DE BONILLA,
"Notary Public."

The defendants also gave in evidence the further testimony of said Hammekin, taken by deposition on the 26th of March, 1880, wherein he says: "I have had the following title papers of the Rabago grant in my possession: 1. Testimonio, or second original issued in the name of Miguel Rabago. 2. A letter of attorney from Miguel Rabago to Victor Blanco. 3. Sale by Victor Blanco as attorney for said Rabago to said Laguerenne. 4. Power of attorney from said Laguerenne to Francis Priolland. 5. Sale by said Priolland to myself.

"I received the above entitled papers from Francis Priolland in New Orleans at the time I made the purchase. I delivered them to my agent, Robert Rose, and have not seen them since. I saw today the original power of attorney from Rabago to Blanco. I have seen Blanco's signature frequently before and after I left Mexico. I know Victor Blanco's signature because I have seen it on many papers having no reference to the Rabago grant. It appears on the said original power of attorney, subscribed to the transfer made to Samuel May Williams. I believe the transfer is in Blanco's handwriting, and I know the signature is his. I had a copy of said power certified before and by Mig'l Diez de Bonilla in the City of Mexico. I also had a copy of this copy." The witness stated that this last copy was delivered by him to General Harrison; and that the original testimonio of title was deposited by him in the general land office at Houston in 1873. [These papers were offered in evidence by the defendants, the said copy of the power being shown to be an exact copy or counterfeit of the purported original power.] The witness further stated that he and his vendees had exercised acts of ownership on this eleven league grant and claimed it certainly since May, 1838; and stated the manner in which such acts of ownership had been exercised.

Hammekin further testified, in another deposition, that the original act of sale from Rabago by Victor Blanco to Laguerenne, dated May 25, 1836, which was given to the witness by Priolland when he purchased the land in 1837, was executed before Miguel Diez de Bonilla, a notary public in the City of Mexico; that he knew the signature of said officer, and recognized his signature to said act of sale as his genuine signature, because he had often employed Bonilla during his (witness') residence in Mexico from 1831 to 1836; that he delivered it to Robert Rose, his attorney and agent, in 1850, and had not seen it since. He also stated that he had, then, in his possession, (1) a legal copy of the original testimonio of title to Rabago, followed by a petition to Judge Alltors by Guillermo Laguerenne for the same, and a certificate signed by Miguel Diez de Bonilla, and the certificate of the American consul; (2) a simple copy of the sale from Rabago by Blanco to Laguerenne, followed by a copy of the [receipt of the treasurer of the custom house of Mexico, for the *alcabala* from said Laguerenne. These papers were attached to the deposition. The certificates are dated

in the year 1836. To show the loss of the paper given by Hammekin to his agent, Robert Rose, the defendants produced as a witness John N. Rose, who testified that Robert Rose was his brother, was a lawyer, and died in Washington City in May, 1871, and that he (John) was Robert's administrator, and had charge of all his papers, and had several times searched for, and failed to find, the following papers, viz.: (1) the deed from Rabago, by his attorney Blanco, to Laguerenne; (2) the power of attorney from Rabago to Blanco, dated the 8th of June, 1832; (3) the power of attorney from Laguerenne to Priolland, executed in Mexico, January 10, 1837.

The defendants also gave in evidence the testimony of several witnesses, tending to prove that they and those from whom they derived title had constantly exercised acts of ownership over the land in question from the time of the origin of their title, by paying the taxes, filing the muniments of title, surveying the tract into parcels, selling to settlers, leasing to tenants, compromising with persons who got unauthorized possession of portions of the land, etc., and that, by these means, the tract had become largely settled, and many valuable improvements had been erected thereon.

E. D. Conger testified on the stand: That he is one of the defendants in this case, and was one of the purchasers from Gen. Harrison; that before they purchased they had the title examined by competent attorneys, and bought on the faith of their opinion as to the title; that they never heard of any adverse claim until the institution of this suit; that the land bought by the Congers was the remnant of the grant after the best parts of it had been sold off; that they have paid taxes on the land regularly since they have purchased it; that there were about one hundred settlements on the eleven leagues when they purchased, but none on the part they purchased.

The defendants also introduced in evidence:

1. A certificate from the comptroller of the State, showing that Robert Rose, as agent for G. L. Hammekin, rendered for taxes for the years 1854 to 1859, both inclusive, 48,700 acres of the M. Rabago grant in McLennan County, and that the records do not show that there were any other assessments made for those years.

2. An original lease from A. M. Hughes to William Graham to the Neville league on said grant, dated May 24, 1854. It recites that Hughes is acting for Robert Rose, the agent for Mr. Goodrich, who claims the Rabago eleven leagues of land. Also, a transfer from said Graham to David E. London of this lease, dated October 17, 1854.

3. A power of attorney from George L. Hammekin to Robert Rose, dated May 24, 1855, recorded in the records of McLennan County, April 28, 1857. It is a general power to prosecute, sue for, recover, and establish his claim to lands situated in different parts of Texas; to compromise with settlers, and sell.

4. Docket of the District Court of McLennan County, showing the suits about the land before the war, styled *Hammekin* v. *Graham* and *Hammekin* v. *Bell*.

The original act of sale from Rabago, by Blanco, to Laguerenne, purchased by the defendants as after mentioned, recites that the sale was made under a "letter power," which the officer saw, read, and returned to the party, Blanco. It was in evidence that Rabago was a citizen of the State of Coahuila, and that he and his family lived there all their lives. The original testimonio of the title, dated January 18,. 1834, which Hammekin testified was delivered to him by Priolland when he bought in 1837, was also put in evidence by the defendants.

Other evidence referred to in the charge of the court need not be adverted to here.

After the introduction of the foregoing evidence, the defendants offered in evidence, as a part of their title, the said protocol, or first original of Rabago's application for the said eleven league grant, and of the concession made thereon, dated, respectively, the 28th of November and the 2d of December, 1828. The plaintiff objected to its admission on the following grounds:

1. That it is irrelevant and forms no part of the defendants' title.

2. The paper, if genuine, is an archive of a foreign government, and from public policy cannot be introduced in our courts; but only a lawfully certified and examined copy can be introduced.

3. The custodian shows that he holds it by virtue of a foreign law which is not properly proven.

4. But if the paper be admitted, then it is objected to for purposes of comparison of handwriting, for which object alone it is introduced. Because—

First. It is not such a paper as was required to be signed by Rabago, and no presumption can arise that it was so signed by reason of its being an archive or ancient document.

Second. There is no evidence of the handwriting being that of Rabago.

Third. It is not admitted nor proven to be the genuine handwriting of Rabago.

Fourth. The instrument with which it is to be compared is not so old but that living witnesses to the questioned signature can be and are actually introduced.

The court overruled these objections and permitted the paper to go to the jury for all purposes, subject to be controlled by his charge as to its being a standard of comparison for the handwriting of Miguel Rabago. To this ruling the plaintiff excepted.

The plaintiff then offered evidence to rebut that adduced by the defendants, as to the genuineness of the alleged protocol, to wit: the testimony of Antonio Garcia Corillo and Ramon L. Flores, the purport of which was that Flores, then chief clerk of the Department of State, at the request of Corillo, had searched the archives in 1874 for everything relating to the Rabago grant, and had not found the document now produced by the defendants. The court still adhered to its ruling to admit the document in evidence.

This raises the first question in the cause, namely, whether the protocol, or first original of the application and concession, belonging to the public archives of the State of Coahuila, at Saltillo is admissible as evidence. The court below decided that it was, and we have difficulty in seeing any reason why it should not

be. It is true that the testimonio given out to the interested party is a second original, and is treated as an original, and may be admitted in evidence as such; but it does not take away from the validity and faith of the first original. The latter may always be resorted to for the purpose of correcting any errors in the testimonio. It is true, it may be deemed a matter of public policy in some States to prohibit public records from being removed from their places of deposit; but if their removal is allowed, or in any legitimate way effected, they certainly constitute the best evidence of their contents and authenticity. No public policy could have been contravened, in the present case, but that of the State of Coahuila, or the Republic of Mexico. If the authorities of Coahuila allowed the removal of the protocol in question, we do not see what objection could be made by the courts of Texas, or of the United States. On general grounds, there is no valid objection to its admissibility. Though by the practice of the courts a certified or sworn copy of a record of another court may suffice, it is not unusual for the record itself to be brought in. In Taylor on Evidence, § 1377, it is said: "The general records of the realm, which are placed under the custody of the Master of the Rolls, may be proved by copies purporting to be verified by the deputy keeper of the records, or one of the assistant record keepers, and to be sealed and stamped with the seal of the record office; and in cases of importance before the House of Lords or elsewhere, permission will be given to one of the assistant keepers to produce the original record." In § 1378, it is also said: "The records of the superior courts may either be proved by the mere production of the originals, or,—as this course would be highly inconvenient to the public if generally adopted, since it might lead to mutilation or loss of valuable documents,—they may be proved by means of *copies*. Of these, there are four kinds; viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court where the record remains; office copies; and examined copies." This shows that originals are admissible as evidence, if properly authenticated. We do not see how it could well be more satisfactorily authenticated than it was, namely, by the certificate annexed to it by the Secretary of the State of Coahuila, and by the actual identification of it, made by the said secretary and his keeper of records when examined as witnesses in the cause. The objection that it was irrelevant is certainly untenable. It was one of the links in the defendants' chain of title. They were not bound to rest on the *testimonio* of the same document introduced in evidence by the plaintiff, nor on that introduced by themselves. They were entitled, if they chose, to put in the very original itself, even if it were cumulative evidence. As to the uses to which it might be applied, being admissible as evidence, it might go before the jury, and be used, under the charge of the court, for all legitimate purposes in the cause. It was certainly available as a link in the defendants' chain of [title, if for nothing more.

The defendants contended that the signature purporting to be that of Rabago, appended to the application, might be examined by the jury as a standard of comparison of Rabago's handwriting, on the question whether the signature purporting to be his on the other paper, namely, the power of attorney from Rabago to Victor Blanco, was genuine or not. This was resisted by the plaintiff on the grounds stated above; and, before the cause went to the jury, the plaintiff requested the court to charge that, at the date of the signature to the application, the law did not require it to be signed by Rabago; and that it should only be considered as one of the links in the chain of defendants' title, and not for the purpose of comparison of handwriting; and that the jury should not consider such signature as the signature of Rabago for that purpose. The court refused to give this instruction, and the plaintiff excepted; and the court then charged the jury on this point as follows, to wit:

"The defendants have also offered a paper which purports to be the original application of Miguel Rabago for this concession, which purports to be signed by said Rabago in person —that is, by himself, and have offered proof to the effect that this paper came from the office of the archives at Saltillo, which is the proper custody for said original application and decree, and to the effect that the signatures of Governor Viesca and of the secretary are genuine, with proof as to the circumstances of the finding said paper, and manner [of] keeping said archives; and if you believe from the proof that said paper so offered by the defendants is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature; and if the other proof in the case does not in your judgment overbear this weight you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blanco."

To which charge of the court the plaintiff's counsel objected and excepted for the following reasons:

1. The charge is upon the weight of evidence.

2. It submits to the jury a question which should be decided by the court.

3. It submits to the jury a paper for the comparison of handwriting which is neither proven nor admitted to be genuine, nor to be signed by the genuine signature of Miguel Rabago.

The first and second reasons are certainly not well assigned. The charge does not take from the jury the determination of the weight of the evidence; nor does it submit to the jury a question of law determinable only by the court. Whether the signature appended to the application, purporting to be Rabago's, if the jury believed it to be his, might legally be used by them as a standard of comparison to aid them in determining the genuineness of the signature to the writing purporting to be a letter power from Rabago to Blanco, is the important question arising upon the charge.

It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or ad-

mitted to be his, will not be allowed, from such knowledge, to testify to that person's handwriting, unless the witness be an expert, and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had. Greenl. Ev. § 578. It is also the result of the weight of authority that papers cannot be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose. Greenl. Ev. §§ 579, 581. But where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison. *Griffith* v. *Williams*, 1 Cromp. & J. 47; *Doe* v. *Newton*, 5 Ad. & El. 514; *Van Wyck* v. *McIntosh*, 14 N.Y. 439; *Miles* v. *Loomis*, 75 N. Y. 288; *Medway* v. *U. S.* 6 Ct. Cl. 421; *McAllister* v. *McAllister*, 7 B. Mon. 269; 1 Phil. Ev. 4th Am. ed. 615; Greenl. Ev. § 578. The history of this last rule is well stated in *Medway* v. *U. S.*, *qua supra*. In *Griffith* v. *Williams*, it was stated by the court that "Where two documents are in evidence, it is competent for the court or jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence." In *Doe* v. *Newton*, *Lord* Denman said: "There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied, to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped." The other judges expressed substantially the same view. "The true rule on this subject," said *Justice* Johnson, in *Van Wyck* v. *McIntosh*, 14 N.Y. 439, 442, "is that laid down in *Doe* v. *Newton*, that where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other instruments or signatures cannot be introduced for that purpose." See Amer. note to *Griffith* v. *Williams*, 1 Cromp. & J. 47, Phil. ed.

This rule is not contravened by the decisions of the Supreme Court of Texas or of this court. The leading case in Texas on comparison of handwriting is *Hanley* v. *Gandy*, 28 Tex. 211, which only decides that other papers, not connected with the cause, cannot be introduced for the mere purpose of instituting a comparison of handwriting. No case decides that a signature to be proven cannot be compared by the jury with other papers or signatures of the party, properly in evidence in the cause. *Strother* v. *Lucas*, 31 U. S. 6 Pet. 763 [8:573], the leading case in this court, relates to the competency of a witness to testify as to the genuineness of a signature without having any knowledge of the party's handwriting; and the court held that such evidence was not admissible. The case of *Moore* v. *U. S.* 91 U. S. 270 [23:346] affirms the rule in question in cases where the paper used as a standard of comparison is admitted to be in the handwriting of the party, or where he is estopped from denying it to be so; it does not disaffirm the rule as applied to cases where the standard is clearly proved to be in such handwriting. In that case the paper referred to as the standard of comparison was the claimant's power of attorney given to his attorney in fact, by virtue of which the latter presented his case to the court of claims. It was held that he was estopped from denying that the signature to the power was in his handwriting. The present case is quite similar to that. The plaintiff himself claims title under the very application of Rabago, the signature to which is claimed to be a proper standard of comparison of Rabago's handwriting. Is he not estopped from denying it to be Rabago's hand? His counsel say that at that period of time the application did not require the party's signature. Even if this be so, still, it is proved that Rabago was at Saltillo at the time the application was made, and it purports to be signed by him, and not by any person for him; and, if the document is the real protocol of the application as presented, it is to be presumed, at least until the contrary is shown, that the signature which it bears is the real signature of Rabago. Whether the document is or is not the real protocol of the application, as presented, was fairly left to the jury under the circumstances and evidence of the case—which, we may add, were so strong and convincing that the jury would not have been justified in finding in the negative. The evidence, indeed, was such as abundantly to satisfy the condition, that the paper referred to as a standard of comparison must be clearly proved to be genuine. We think that the charge of the court was right.

The defendants next offered in evidence, as an ancient instrument, the alleged original power of attorney from Rabago to Victor Blanco, found by the witness Klieberg in the old trunk, at Galveston, a copy of which, with the indorsements thereon, has been already given. The plaintiff objected to its admission for the following reasons, to wit:

First. Having been in the trunk since March, 1836, it could not have been the instrument by virtue of which title passed from Rabago in the City of Mexico, by deed from Blanco to Laguerenne on the 25th of May, 1836.

Second. The recitals in the deed contradict the evidence of Williams and Klieberg, under whose testimony it is introduced.

Third. It cannot be introduced as an ancient instrument, because,—

1. No possession was ever held under it, it not coming to the possession of the defendants for forty years after its execution.

2. It is suspicious on its face by reason of not being acknowledged, certified to, witnessed, nor written on sealed paper.

3. It does not come from the proper custody.

Fourth. It is not such an instrument as would have passed title to land in 1832 or in 1836.

1. It is not acknowledged, witnessed, certified to, nor written on sealed paper.

2. No summons was served upon the grantor to appear before an official for the purpose of rendering it an authentic or judicial act.

Fifth. The power to Blanco, if any, could not pass an equitable title, if any, which could not be cognizable in a court of law.

Sixth. It is not made part of the Laguerenne deed.

Seventh. If it conveyed any power, it was divested out of and from Blanco by the indorsement and delivery to Samuel May Williams in 1838.

Eighth. It appears to have been executed, if at all, before six years from the issuance of the concession, and does not bind the attorney nor his vendees to cultivate the land.

Ninth. If genuine, it was revoked by the War of 1835, the Revolution between Texas and Mexico, and the Constitution of March 17, 1836.

Tenth. It cannot act as power to make a parol or verbal sale, because no possession was taken under it within a reasonable time.

These objections were overruled, the paper admitted in evidence, and the plaintiff excepted; this being the fourth exception taken at the trial.

The objections made against the admission of the paper seem to be either entirely unfounded, or trivial in their character. It is not testified by William H. Williams that it had been in the black trunk ever since March, 1836; he could not know such a fact, for he was only born in 1838. He only says that it was probably placed in the trunk by his mother at the time of the "runaway scrape" (which took place on the advance of Santa Anna in March, 1836); that from his mother's statements, she had his father's papers with her at that time, and that she kept them until her death, and the witness has kept them from that time until now; that the trunk was either in his father's or mother's possession, until it came into his; that his earliest recollection of it was in 1840, at their house in Galveston, where it remained until 1859; but that it was traditionally known to witness to have been with the family at San Philipe de Austin and at Quintana, and afterwards at Galveston; that from 1836 to 1838 his father and mother lived at Quintana, at the mouth of the Brazos River.

There is nothing in this testimony inconsistent with the fact that Blanco may have transmitted the paper to Samuel M. Williams after the execution of the deed to Laguerenne in Mexico in May, 1837. As it was Williams' authority for taking possession of the property, and not recited in the final title papers, he may have wished it returned to him.

There is nothing in the recitals of the deed to Laguerenne repugnant to the above hypothesis. That deed (which will be more particularly mentioned hereafter) begins as follows: "Before me, notary public and witnesses, Don Victor Blanco, in name of Don Miguel Rabago, in virtue of letter power which has conferred on him for various purposes, among which is comprised the faculty that he can sell and may sell the lands which he has in Texas, which he showed to me, which I have seen, read, and returned to the party, and to it in his possession I refer,—said: That the aforesaid Don Miguel Rabago possesses," etc. [then proceeding in the usual form of an act of sale.] There is no recital here at all inconsistent with the testimony of Williams or of Klieberg; and, as the notary certifies that the power was exhibited to him, Blanco had no occasion to retain it in his possession. Besides, he was a near relative and friend of Rabago, and did not require it.

The other reasons given for objecting to the admission of the power are equally untenable. It is said that no possession was ever held under it, it not coming into the defendants' possession for forty years after its execution. This is not true. The possession of the defendants and of those whose title they hold was always under and by virtue of the instrument. If property passes through a dozen hands in the course of forty years, each keeping in his own possession the deed given to him, the possession of all is equally under the first deed, which may be given in evidence as an ancient deed, although never seen by any but the first grantee to whom it was given. The paper is said to be suspicious on its face, for want of acknowledgment, etc., and that no summons was served on the grantor to appear before an official to render it an authentic or judicial act. It is enough to say that none of these things affect the validity of the instrument; and the circumstances of the case and of the time are sufficient (if any reason is necessary) to account for the absence of these formalities. Besides, they relate more especially to the effect of the instrument than to its admissibility as an ancient document; and in that regard will be examined under the seventh exception, hereafter considered. We see nothing in the other objections to call for remark, except the one that supposes the power was divested out of Blanco by the indorsement and delivery to Samuel M. Williams. This is not so. The indorsement merely gives Williams power to "take possession of the eleven leagues." The power to sell was not transferred. This very fact suggests the reason why the power was returned by Williams to Blanco after the possessory title had been completed. Blanco would want it for the purpose of enabling him to make a sale. The more we consider the circumstances, the more clear it appears that the evidence is entirely harmonious, and consistent with itself. We think that the paper was properly admissible as an ancient writing. It is unnecessary to dilate on the subject of ancient documents in general, and when they are admissible. We are of the opinion that all the conditions of admissibility were satisfied in this case.

But there is another reason why it is proper that we should so hold. The case was once before the Supreme Court of Texas on an appeal taken to set aside the verdict rendered on a former trial; and that court held, under the same evidence used at the trial in the circuit court, that the document was admissible in evidence as an ancient one. If the action had originally been brought in the circuit court upon proper jurisdictional grounds, and had been tried as it was in the state court, and if, on a writ of error from this court, we had decided as the Supreme Court of Texas did,—we should have felt bound by our first decision. We would not have allowed it to be questioned.

Clark v. *Keith*, 106 U. S. 464 [27:302]. The present case is in exactly the same category. The removal of the cause from the state court does not put us in the position of a court of review over the Supreme Court of Texas. When it acted, it was the highest court that could act in the cause, and stood in precisely the same position that we stand now. Its action must be accepted by us as that of a court having plenary and final jurisdiction.

By the fifth exception, objection is made to that portion of the judge's charge in which he says: "By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Williams (April 3, 1833), authorizing him to solicit title to and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne, Blanco could have procured, if he desired, and retained in his possession a legal copy of the power of attorney, which would have all the force and effect of the original; and although the original might at the time be in Samuel May Williams' trunk, in Texas, Blanco's conveyance to Laguerenne would not on that account be without authority if the said paper in Williams' trunk was a genuine paper giving him such power. Such power, if conferred, was conferred on the one named, and remained with him, whether evidenced by the original writing or such copy."

It is objected that there is no evidence that any attempt was ever made by Blanco to obtain such a copy; and that none could have been obtained, because the original had never been an archive of any office. This same objection was before the Supreme Court of Texas. That court seems to have adopted the hypothesis that Williams never returned the power to Blanco, and that the latter, therefore, did not return it to Williams after making use of it in the sale to Laguerenne. The court says: "Where should we have expected to find the instrument? Certainly we would infer that it should have been placed by the commissioner to whom it was presented either with the papers pertaining to the title which he issued for the land, or have been returned to the party by whom it was presented to him. But as the title shows that it was not incorporated into it, as is most usual when the power is an authentic act, we should expect to find it in the custody of Williams, in whom the title and possession of it purports on its face to be vested; or, if not, that he would have transmitted it to his principal, Blanco. But as the latter appears to have taken the precaution to have another power of like effect from Rabago, or to have secured an official copy of this one before remitting it to Williams, there was no necessity for its being returned to him." Certainly there is nothing unreasonable or improbable in the hypothesis that the paper should have been executed in duplicate, in view of the fact that the possessory title to the land had yet to be obtained, and some person in Texas would have to be authorized to attend to it. We think, therefore, that the judge was justified in making the charge he did, and that the jury could not have been misled by it. The fact that Blanco had the original, or a copy in Mexico on the 25th of May, 1836, does not detract from the force of the presumptions in favor of the power found in the trunk.

The sixth exception was taken to that portion of the charge which related to the evidence proper to be taken into consideration on the question of the genuineness of the power of attorney and its effect. The portion of the charge referred to is as follows, to wit:

"The defendants introduced testimony tending to show that as early as 1838 Hammekin had placed in his possession the deed from Blanco to Laguerenne, referring to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received said copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin, which copy has been given you, declared by the interpreter to be identical (with immaterial exceptions) in terms with the letter power offered by defendants; that Hammekin had placed the testimonio in the land office as required by law of persons having such evidence of title to land in Texas; that said Hammekin paid the government dues on said grant, had paid taxes, had sent agents on the land as early as the growing settlement of the country so far freed this section of the country from the hostile Indians, as permitted its occupancy, and the assertion of ownership by assuming actual control of it, and that Hammekin and those to whom he conveyed and the defendants claiming under them had continued to assert ownership to these lands under said power of attorney; and if, in your judgment, said proof establishes such facts, and the proof as to the age and custody of the said letter power satisfies you that said paper is as old as its date imports, and has been in the custody that said evidence indicates, you may consider this proof equal to the direct testimony of at least one witness to the signature of Miguel Rabago; and unless in your judgment the evidence of plaintiff's witnesses and all the circumstances of these parties and these transactions as shown by all the testimony proves that Miguel Rabago did not sign said letter power, you will find said letter power to be genuine, and return your verdict for the defendants."

To this extract from the charge the plaintiff's counsel objected—

1. Because it is a charge upon the weight of evidence.

2. It is in itself an incorrect statement of law.

The plaintiff's counsel seem to overlook the language of the charge. The court did not say that such and such facts were proved, but that the defendants introduced testimony tending to show such facts, and left the testimony with the jury. Besides, we have repeatedly held that the court may give to the jury its opinion on the weight of evidence. We see no error whatever in the charge.

The seventh exception was taken to a portion of the charge which instructed the jury that if the papers and documents relied on by the defendants, and constituting their chain of title, were genuine, they conclusively show that Rabago parted with his title in his lifetime, and no right to it could pass to his heirs by descent, and that the defendants by reason of their right

thus acquired would be entitled to a verdict. The ground assigned for this exception was that the letter power of attorney was not such an instrument as could convey land in Texas at that time, because it was not an authentic instrument, being neither acknowledged, witnessed, certified to, nor written on sealed paper, nor proved before a notary; and no summons was even served on Rabago to appear before an official for the purpose of rendering it an authentic or judicial act. We apprehend that the want of the formalities referred to merely affects the mode of authenticating the instrument. If it is passed before a notary public and witnesses, and is certified as a *testimonio*, it is called an authentic instrument and proves itself. If not thus authenticated, it must be proved to have been executed by the party to be charged with it. *Watrous* v. *McGrew*, 16 Tex. 509, 513; *Andrews* v. *Marshall*, 26 Tex. 212; *Jones* v. *Montes*, 15 Tex. 351, 352; *Chambers* v. *Fisk*, 22 Tex. 504; *Gonzales* v. *Ross*, 120 U. S. 605, 624 [30:801, 808]; *Hanrick* v. *Barton*, 83 U. S. 16 Wall. 166, 171, 172 [21:350, 352]. The appellant relies upon a passage in Escriche (*verbo* Poder) where he says that a power of attorney is to be made before a notary public, and to have certain formalities described. But he there refers to the technical power called, in the Spanish law, *poder*, or *procuracion*, having much the same meaning as our term "power of attorney," which indicates a power or authority under seal. But the technical *poder* is not the only form by which authority may be given to act for another. A technical power, executed with all the solemnities, is but one form of a mandate (*mandato*, *mandamiento*). Under the word *mandato*, the same Escriche says: "Mandate. A consensual contract, by which one of the parties confides the carrying on or execution of one or more matters of business to the other who takes it in his charge. * * * Mandate has also the name of procuration, and the mandatary that of procurator; but the word mandate is more general and comprehends every power given to another in whatsoever mode it be, whilst procuration supposes a power given by writing." Again: "The mandate may be contracted between persons present, or absent, by words, by messengers, by public writing or private writing, and even by letter, as likewise by acts; *e. g.*, if a person, being present, allows another to transact his business, etc." See farther to the same effect, Azo and Manuel's Inst. Book II, Tit. XII; Tapia's Febrero Novisimo, Book II, Tit. IV, c. 13, 14; Partida V, Tit. XII, L. 24.

In the present case the parties were not in the same place; Rabago resided in the State of Coahuila, and Blanco in the City of Mexico; so that the making of the power in the form of a letter was the very form allowed by the laws in such a case. As before said, the only difference it made was in the proof necessary to authenticate the instrument in legal proceedings.

As to the objection that this form was not sufficient to authorize an act of sale, but that it required a power executed under the same solemnities as the act of sale itself, we know of no such rule in the Spanish or Mexican law. The English rule as to the requisites of a power to execute sealed instruments has no application to the case.

The eighth exception related to the admission in evidence of Hammekin's copy of the power of attorney. He testified that when he purchased the land from Laguerenne, through Priolland, the latter had no copy of the power from Rabago to Blanco, and he (Hammekin) made it a condition that a copy should be furnished to him; and that soon after he received a certified copy, which he delivered to his agent, Rose, with the other papers, and with them has been lost. He testified, however, that he took an exact copy of this certified copy before giving the latter to Rose, and had it yet; and it was in evidence in the case and was found to be an exact copy of the power found in the old trunk, with the exception of a date being written in words at length in place of figures, and an abbreviation being written in full words. This copy made by Hammekin himself (called the "Hammekin copy") is the paper whose admission in evidence was objected to. The plain answer to the objection is that it was not offered nor admitted as a muniment of title, but merely to show the fact that there was such a paper in existence in 1837 as that found in the trunk, which fact had a legitimate bearing on the question whether the latter was an ancient instrument. For this purpose, it was certainly admissible.

The ninth exception related to the admission in evidence of a copy of the deed, or act of sale, executed by Victor Blanco, as attorney for Rabago, to Laguerenne, dated May 25, 1836; and of a copy of the power of attorney given by Laguerenne to Priolland to sell his real estate. The copies offered in evidence by the defendants were certified copies. That of the deed of May 25, 1836, was taken in the City of Mexico from the original protocol of the deed in the notarial archives, or records, of the deceased notary, Miguel Diez de Bonilla, before whom the deed purported to be executed. It appeared by the testimony of one Crescencio Landgrave, a notary public of the City of Mexico, that these archives, with those of other deceased notaries, had been collected and placed in the public archives of the City of Mexico, under the charge of different notaries. Landgrave testified that he had general charge of said archives, and the particular charge of those of Bonilla, whom he knew, and with whom he was intimate; and that he knew Bonilla's signature appended to the different documents in the archives, and, in fact, received them from his own hands in his (Bonilla's) lifetime. He further testified that the protocol of the deed from Rabago, through Blanco, to Laguerenne, was among the archives of Bonilla, and that he, as the custodian thereof, made an official and duly certified copy of said deed (which was the copy offered in evidence)—the certificate annexed to the copy being in the words following, to wit:

"I certify and give faith that the preceding copy is faithful and exact to the letter of the original document which exists on folio 37 to folio 40 of the protocol of my deceased companion, Don Miguel Diez de Bonilla, which I have under my custody in the archives of the city which is under my charge, from whence the present was taken in order to deliver it to the consul of the United States of the North, in Mexico, by virtue of judicial mandate, this 15th December, 1874, in presence of Don Miguel

Moral and Don Manuel Correo, of this vicinity. (Between Parenthesis:) All not valid.

"[L. S.]

(Signed) CRESCEN. LANDGRAVE."

The official authority of Landgrave is authenticated by the certificates of three other notaries, of the Governor of the Federal District, of the chief official of the Department of Foreign Affairs, and of the United States consul, each certifying to the authority of the preceding.

Landgrave further testified that his brother in office, notary public Antonio Ferreira, had charge of the records of the deceased notary Francisco Madriago, before whom the power of attorney from Laguerenne to Priolland, before referred to, purports to have been executed.

A certified copy of this power of attorney, certified by Ferreira, and authenticated in the same manner as the deed to Laguerenne, was the copy offered in evidence by the defendants, the power being dated January 10, 1837, and its protocol being among the archives of the deceased notary Francisco de Madriago. This power of attorney authorized said Priolland to sell and dispose of all and any real estate belonging to Laguerenne wherever situated.

It is unnecessary to examine in detail the reasons assigned by the plaintiff for objecting to the admission of these papers in evidence. We think that they were properly and sufficiently authenticated, and that the judge committed no error in admitting them.

The only other exception related to the citizenship of Laguerenne. The plaintiff alleged that it was not shown that he was entitled to convey land in Texas in May, 1837, but that he was disabled to do so by reason of his being a citizen of France, and an alien to the Government of Texas. The only direct statement as to his citizenship is that contained in the said power of attorney which he executed, and which begins as follows: "In the City of Mexico, on the 10th day of January, 1837, before me [Madriago], a notary public, and witnesses, personally appeared Don Guillermo Laguerenne, a citizen, and of the commerce of this place, in whom I have faith and know," etc. There is no testimony in the case sufficient to overthrow the presumption arising from this recital. Hammekin says that he does not recollect whether he was an American or a Frenchman; that in May, 1836, he was established as a merchant in the City of Mexico; that he had a brother in Philadelphia much older than himself, who was a merchant in that city for many years. This is all the evidence on the subject. It must be received, therefore, that he was a citizen of Mexico. As to citizens of Mexico, it is well settled that they never lost the right of disposing of their Texas lands by the division of the empire. *Airhart* v. *Massieu*, 98 U. S. 491, 493, 497 [25:213–215].

Having considered all the material questions raised by the plaintiff in error, and being of opinion that he has not succeeded in showing any error in the judgment of the court below, the same is *affirmed*

WESTERN UNION TELEGRAPH COMPANY, *Appt.*,

v.

ATTORNEY-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 530–555.)

Taxation of telegraph companies—liability to taxation—government agencies—tax, when legal—rule of taxation—injunction.

1. The Act of July 24, 1866, sections 5263–5269, Revised Statutes, giving to a telegraph company the right to run its lines over the public domain, post roads, etc., is merely a permissive statute, and does not carry with it any exemption from the ordinary burdens of taxation.

2. The company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property, as any person would be.

3. Agencies of the Federal Government are only exempt from state taxation so far as such taxation may interfere with or impair their efficiency in performing the functions by which they serve the government.

4. A tax, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon it on account of property owned and used by it in the State, where the proportion of the length of its lines in the State to their entire length is the basis for ascertaining the value of the property; and such tax is not forbidden by the acceptance, by the telegraph company, of the right conferred by section 5263, Revised Statutes, or by the commerce clause of the Constitution.

5. This court will not hold a tax void because, if called upon, it might have adopted a different system or rule for ascertaining the taxable value on which the percentage of taxation should be arrived at, provided the rule adopted is not unfair or unjust.

6. An injunction forbidding the telegraph company from operating its lines, the greater part of which are over post roads of the United States, until the tax is paid cannot be sustained; and a state statute prescribing such injunction, as a remedy to enforce the collection of its taxes, is void.

[No. 1325.]

Argued Feb. 15, 1888. Decided March 19, 1888.

APPEAL from a judgment of the Circuit Court of the United States for the District of Massachusetts, against a telegraph company, for a state tax. Judgment for the amount of the tax *affirmed;* that part of the judgment which awards an injunction *reversed.*

The facts are fully stated in the opinion.

Messrs. **George S. Hale,** *Chas. W. Wells* and *Willard Brown*, for appellant:

Telegraph companies which have accepted the Act of Congress of July 24, 1866, are, as to government business, government agencies; and so far as a state tax on a company is on, or affects, the means employed by the Government of the United States to exercise its constitutional powers it is void.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460 (26:1067); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 788 (6:204).

The States can not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government.

Union Pac. R. R. Co. v. *Peniston*, 85 U. S. 18 Wall. 5 (21:787).

The power of taxation by a State involves and includes the power of destroying the thing taxed, and does not exist as to anything which the taxing power cannot destroy.

McCulloch v. *Maryland*, 17 U. S. 4 Wheat. 316, 427, 431, 433, 436 (4: 579, 606–608); *New York* v. *Tax Comrs.* 67 U. S. 2 Black, 620 (17:451); *Weston* v. *Charleston*, 27 U. S. 2 Pet. 449, 466, 468 (7:481, 487, 488).

The grant of the right, privilege or franchise, to construct and maintain lines of telegraph on post roads of the United States by the Act of July, 1866, cannot be interfered with or limited by any State by prohibition.

One State cannot exclude a corporation organized under the laws of another State from prosecuting its through or local business over and by its use of lines on post roads, if that corporation has accepted the Act of Congress.

Pensacola Tel. Co. v. *Western Union Tel. Co.* 96 U. S. 1 (24:708); *Hewett* v. *Western Union Tel. Co.* 14 Wash. L. Rep. 194, 211; *Savannah* v. *Charlton*, 86 Ga. 460.

Any statute of a State, intended to regulate, tax or restrict the transmission of persons, property or messages from one State to another is void.

Wabash, St. L. & P. R. Co. v *Illinois*, 118 U. S. 557 (30:244); *Fargo* v. *Michigan*, 121 U. S. 230 (30:888).

Nor can a State by a privilege tax on cars, not owned by a railroad company, used upon its road, tax the privilege of carrying passengers in such cars through the State.

Pickard v. *Pullman Southern Car Co.* 117 U. S. 34 (29:785).

The tax in question in Massachusetts can be sustained only as an excise or franchise tax.

Manufacturers Ins. Co. v. *Loud*, 99 Mass. 146; *Hamilton Mfg. Co.* v. *Massachusetts*, 78 U. S. 6 Wall. 632 (18:904); *S. C.* below, 12 Allen, 298; *Providence Sav. Inst.* v. *Massachusetts*, 78 U. S. 6 Wall. 611 (18:907); *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *People's Sav. Bank*, 5 Allen, 428, 431.

An excise cannot be assessed at different rates or amounts on different descriptions of property, or alone on any one class of property, while others are differently assessed.

1 Desty, Tax. p. 8, 28; Cooley, Tax. 2d. ed. 4.

Franchises are special privileges.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519, 595 (10:274, 311).

The Company is a government agency and uses this franchise for such business.

Western Union Tel. Co. v. *Texas*, 105 U. S. 460, 464, (26:1067, 1068).

The fact that it also uses it for private or local business does not authorize the burden imposed by a state tax.

New York v. *Tax Comrs.* 67 U. S. 2 Black, 620 (17:451); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 738 (6:204); *Western Union Tel. Co.* v. *Texas*, *supra*.

It was considered in *New York* v. *Tax Comrs. supra*, that a tax bearing on United States stock was invalid. A tax on the franchises by length of lines is like a general tax on all messages.

Western Union Tel. Co. v. *Texas*, *supra*; *Commonwealth* v. *Hamilton Mfg. Co.* 12 Allen, 298; *Atty-Gen.* v. *Bay State Min. Co.* 99 Mass. 148, 152.

The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

Gleason v. *McKay*, 134 Mass. 419, 425.

But in this case the right of exclusion clearly does not exist, and the defendant does not purchase the privilege of the State, but of a paramount authority.

Fargo v. *Michigan*, 121 U. S. 230, 242, 243 (30:888,893), and *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 205, 206, 211 (29:158, 162–164); *Philadelphia & S. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 342–344 (30:1200, 1203, 1204).

It has been shown to be a tax on the franchises of the Company, and the right in question is one of them.

New York v. *Weaver*, 100 U. S. 539 (25:705).

Valuation is part of the assessment of taxes.

Achison v. *Huddleson*, 53 U. S. 12 How. 293 (13:993).

A State cannot impose taxes upon persons passing through the State.

Robbins v. *Shelby County Taxing Dist.* 120 U. S. 489, 493 (30:694, 696).

The power granted by the Constitution to Congress to establish postoffices and post roads extends to the adoption of the electric telegraph as one of the instrumentalities for that service.

Pensacola Tel. Co. v. *Western Union Tel. Co.* 96 U. S. 7 (24:708).

The tax is not laid upon the property represented by the capital stock; and if it were so, it would be void.

Hamilton Mfg. Co. v. *Massachusetts*, 78 U. S. 6 Wall. 632 (18:904); *Providence Sav. Inst.* v. *Massachusetts*, 73 U. S. 6 Wall. 611 (18:907).

The omission to deduct from the total valuation the real estate located and subject to local taxation in other States renders the tax excessive and invalid.

Minot v. *Philadelphia, W. & B. R. R. Co.* 85 U. S. 18 Wall. 206 (21:888); *Gloucester Ferry Co* v. *Pennsylvania*, 114 U. S. 197 (29:159); *New York* v. *Weaver*, *supra*.

The defendant is a person, and entitled to protection against unequal taxation.

Santa Clara County v. *Southern Pac. R. R. Co.* 118 U. S. 394 (30: 118); *San Mateo County* v. *Southern Pac. R. R. Co.* 13 Fed. Rep. 722, 747, 748, 762; *Libby* v. *Burnham*, 15 Mass. 144; *Stetson* v. *Kempton*, 13 Mass. 272.

Messrs. Andrew J. Waterman, Atty-Gen. of Massachusetts, and **Henry C. Bliss**, *Asst. Atty-Gen.*, for the Commonwealth:

This is not a tax on property but an excise, and, in order that it may be reasonable, the amount to be paid is measured by the aggregate market value of the shares of the capital stock. Such a mode of taxation is legal.

Portland Bank v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *People's Sav. Bank*, 5 Allen, 428; *Commonwealth* v. *Hamilton Mfg. Co.* 12 Allen, 305–309; *Reg.* v. *Arnaud*, 9 Q. B. 806–817; *Utica* v. *Churchill*, 33 N. Y. 161, 237; *Van Allen* v. *Albany Assessors*, 70 U. S. 3 Wall. 573 (18:229); *Atty-Gen.* v. *Bay State Min. Co.* 99 Mass. 148.

A sovereignty has a right to adopt any standard of measurement, and may follow its caprice even in this respect.

New York v. *Tax Comrs.* 67 U. S. 2 Black, 620, 630 (17:451, 454); *Minot* v. *Philadelphia, W. & B. R. R. Co.* 85 U. S. 18 Wall. 206–225 (21:888–894); *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284–293 (21:164–167).

Legislation may, in a great variety of ways, affect commerce and persons engaged in it, without constituting a regulation within the meaning of the Constitution.

Wabash, St. L. & P. R. Co. v. *Illinois*, 118 U. S. 557–594 (30:244–257); *Sherlock* v. *Alling*, 93 U. S. 99 (23:819); *Munn* v. *Illinois*, 94 U. S. 113 (24:77); *Chicago, B. & Q. R. R. Co.* v. *Iowa*, Id. 155 (24:94).

It is not necessary herein to distinguish between domestic and foreign corporations; the power of the State extends over each within its limits.

Paul v. *Virginia*, 75 U. S. 8 Wall. 168 (19:357); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 209 (29:164); *Union Pac. R. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5–34 (21:787–792); *Commonwealth* v. *Lancaster Sav. Bank*, 128 Mass. 495; *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123 (19: 382); *Manufacturers Ins. Co.* v. *Loud*, 99 Mass. 146.

In *Commonwealth* v. *People's Sav. Bank*, 5 Allen, 428–436, it is said that perfect equality in the assessment of taxes is unattainable. An excise tax is legal if it applies alike on all persons who exercise a particular employment or enjoy the same privilege.

Oliver v. *Washington Mills*, 11 Allen, 268, 279; *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 632–639 (18: 904–906); *Dickey* v. *Maysville, etc., Turnpike Road Co.* 7 Dana, 113.

This case is distinguishable from *Osborn* v. *U. S. Bank*, 22 U. S. 9 Wheat. 860 (6:233); and *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 360 (4: 590) in that the Western Union Telegraph Company was not created by the government as an instrument for carrying into effect the powers vested in the United States. The right to tax is an incident to sovereignty.

McCulloch v. *Maryland*, 17 U. S. 4 Wheat. 429 (4:607).

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its Attorney-General, at the relation of the treasurer thereof, Alanson W. Beard. It was afterwards removed, upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the Telegraph Company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant Company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the Corporation apportioned to that State, the rate of taxation having been determined for that year, 1885, at $14.14 for and upon each $1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the Telegraph Company that the valuation of its entire capital stock was $47,500,000, from which was deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said Corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures, the treasurer of the State assessed the value of that portion of the capital stock of this Company which, under this calculation, would fall within the Commonwealth of Massachusetts, at the sum of $750,952. The amount thus arrived at, at the rate of $14.14 upon each $1,000 of valuation, produced the sum of $10,618.46 as the amount of the tax claimed to be due and payable to the treasurer of said Commonwealth by that Corporation. This sum was demanded of the Telegraph Company, but it refused to pay the same.

The answer of the defendant Corporation set up that of its 2,833.05 miles of line within the State of Massachusetts more than 2,334.55 miles were over, under, or across post roads, made such by the United States, leaving only 498.50 miles not over or along such post roads, on which the Company offered to pay the proportion of the tax assessed according to mileage by the state authorities.

The main ground on which the Telegraph Company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the Company by the Act of July 24, 1866, now title LXV, sections 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster-General of the United States, June 8, 1867. The argument is, therefore, that by virtue of section 5263 the Company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows:

"Sec. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

It is urged that this section, upon its acceptance by this Corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so

constructed over or along such post roads without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the Company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the Corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The Telegraph Company, which is the defendant here, derived its franchise to be a corporation, and to exercise the function of telegraphing, from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires "through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, * * * and over, under, or across the navigable streams or waters of the United States," is granted to it by the Act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built nor owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal Government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460 [26: 1067], this question was very fully considered; and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or a regulation of commerce and with the Act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said:

"The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States."

This authority of the government gives to this Telegraph Company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post roads of the United States. If the principle now contended for be sound, every railroad in the country should be exempt from taxation because they have all been declared to be post roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited, while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that "Its property in the State is subject to taxation the same as other property; and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

A still stronger case in the same direction is that of *Union Pac. R. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 [21:787]. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its Legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its roadbed, depots, stations, *telegraph poles, wires*, bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the Government of the United States, and that its property could not be taxed by the State; but this court held otherwise, and in the opinion used this language:

"It is often a difficult question whether a tax

imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

The case of *Thomson* v. *Union Pac. R. R. Co.* 76 U. S. 9 Wall. 579 [19:792] is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the General Government. The court further said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards, and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the General Government and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the state governments would be paralyzed. While it is of the utmost importance that all powers vested by the Constitution of the United States in the General Government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited."

In *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 858 [19:701] which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court; but this court said that the principle of exemption of federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal Government authorizes the tax."

The tax in the present case, though nominally upon the shares of the capital stock of the Company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the Telegraph Company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of examiner Fisk, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the Company and entirely without that State was over $3,000,000. In the statement of the treasurer of the Company it is said that the value of real estate owned by the Company within the State of Massachusetts was nothing. Since the Corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the Corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the circuit court and not from that of the State, we think it should appear that the Corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this Statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do

not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this Company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the Corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

The result of these views is that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, "that the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said Corporation, with interest thereon," is without error, and *so much of said judgment is hereby affirmed.*

The decree or judgment, however, proceeds and awards an injunction against the Company in the following language added to that above extracted: "and that an injunction shall be issued out of and under the seal of this court, directed to said Corporation and its officers, agents and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said Corporation until said sums due to the said Commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the Telegraph Company, and defeat all its operations within the State of Massachusetts. The Act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States." It is found in this case that 2,884.55 miles of the Company's line out of 2,883.05 on which this tax is assessed, are along and over such post roads; and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

If the Congress of the United States had authority to say that the Company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 18 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 18 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment—executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

Mr. Justice **Bradley** was not present at the argument of this case and took no part in its decision.

THEODORE P. BUCHER, *Plff. in Err.*, v. CHESHIRE RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 555-585.)

Act of charity, what is—Massachusetts Sunday Act—state decisions—negligence of railroads—rule of law.

1. In order to constitute an act of charity, such as is exempted from the Lord's Day Act of Massachusetts, the act which is done must be itself a charitable act.

2. The courts of the United States as a general rule adopt and follow the decisions of the state courts, in questions which concern merely the Constitution and laws of the State.

3. Wherever the decisions of the state courts relate to some law of a local character which may have become established by those courts, or has always been a part of the law of the State, the decisions of the state court upon the subject are usually conclusive, and always entitled to the highest respect in the federal courts.

4. The decisions of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath Day, contrary to the statute of the State, shall not recover against a corporation upon whose road he traveled, for the negligence of its servants, thereby established this principle as a local law of that State.

5. The decisions on this subject by the Massachusetts Court are numerous enough and of sufficiently long standing to establish the rule as the law of that State on that subject.

[No. 132.]

Argued Jan. 11, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment in favor of defendants in an action to recover for injuries sustained by negligence while traveling upon defendants' road upon the Sabbath Day. *Affirmed.*

See 131 Mass. 156.

The facts are fully stated in the opinion.

Mr. **A. A. Ranney**, for plaintiff in error:

This case is brought to recover damages for personal injuries inflicted upon the plaintiff by reason of the joint tort of the defendants, while he was traveling in the State of Massachusetts, as a passenger on a train operated by one of them. The case had but one element of defense, and that was the fact that the day on which the misfortune occurred was Sunday; and the court, on that ground alone, ordered a verdict for the defendants.

The law of Massachusetts is not binding *Sawyer* v. *Oakman*, 1 Lowell, 134.

It is held in *Hough* v. *Texas & P. R. R. Co.* 100 U. S. 214 (25:613) that where a case depends upon principles of general law, and not upon statute regulations, this court is not bound by the decisions of the state courts. That was a railroad case of tort.

Myrick v. *Michigan Cent. R. R. Co.* 107 U. S. 102 (27:325); *Brooklyn C. & N. R. R. Co.* v. *National Bank of the Republic*, 102 U. S. 14 (26:61); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 (17:298); *Oates* v. *First Nat. Bank*, 100 U. S. 239 (25:580); *Branch* v. *Macon & B. R. R. Co.* 2 Woods, 385; *Burgess* v. *Seligman*, 107 U. S. 34 (27:365).

For the sound rule of general law, see *Sutton* v. *Wauwatosa*, 29 Wis. 21; *Schmid* v. *Humphrey*, 48 Iowa, 652; *Carroll* v. *Staten Island R. R. Co.* 58 N. Y. 126; *Mohney* v. *Cook*, 26 Pa. 342; *Merritt* v. *Earle*, 29 N. Y. 115; *Johnson* v. *Irasburgh*, 47 Vt. 28; Bigelow, Torts, 309; 2 Thomp. Neg. 1094; *Strickler* v. *Hough*, 1 Pitts. L. J. 239; *Moulton* v. *Sanford*, 51 Me. 127; *Baker* v. *Portland*, 58 Me. 199; *Norris* v. *Litchfield*, 35 N. H. 271; *Corey* v. *Bath*, Id. 530; *Landers* v. *Staten Island R. R. Co.* 18 Abb. Pr. N. S. 339; Whart. Neg. § 321; Cooley, Torts, 156-7.

The doctrine of the Court of Massachusetts is generally regarded as strained, unwarranted, and unjust.

2 Wood, R. R. 1248; *Wallace* v. *Merrimac River Nav. & Exp. Co.* 134 Mass. 95; *Commonwealth* v. *Louisville & N. R. R. Co.* 80 Ky. 291; *Platz* v. *Cohoes*, 89 N. Y. 219; *Baldwin* v. *Barney*, 12 R. I. 392; *Bailey* v. *Mayor of N. Y.* 3 Hill, 536; *Kerwhaker* v. *Cleveland, C. & C. R. R. Co.* 3 Ohio St. 172; *Opsahl* v. *Judd*, 30 Minn. 126; *Jacobus* v. *St. Paul & C. R. Co.* 20 Minn. 130; *Wood* v. *Erie R. Co.* 72 N. Y. 196.

Mr. **Charles A. Welch,** for defendants in error:

What is known as the Lord's Day extends in the State of Massachusetts from midnight on Saturday to the ensuing midnight; and at the time of the accident hereafter referred to, the General Statutes of Massachusetts of 1860 were in operation, by which it was made an offense, punishable by fine, to travel on the Lord's Day, except from necessity and charity.

Gen. Stat. 1860, chap. 84, §§ 2, 12.

The state courts have put a construction upon this Statute of Massachusetts in this very case, following previous decisions, and this decision has also been subsequently followed and approved.

Bucher v. *Fitchburg R. R. Co.* 131 Mass. 156; *Jones* v. *Andover*, 10 Allen, 18; *Stanton* v. *Metropolitan R. R. Co.* 14 Allen, 485; *Commonwealth* v. *Sampson*, 97 Mass. 407; *Commonwealth* v. *Josselyn*, Id. 411; *McGrath* v. *Merwin*, 112 Mass. 467; *Smith* v. *Boston & M. R. R. Co.* 120 Mass. 490; *Davis* v. *Somerville*, 128 Mass. 594; *Wallace* v. *Merrimac River Nav. & Exp. Co.* 134 Mass. 95; *Day* v. *Highland St. R. Co.* 135 Mass. 113; *Read* v. *Boston & A. R. R. Co.* 1 New Eng. Rep. 890, 140 Mass. 199.

Two other cases may be referred to where the court decided that the plaintiff was not violating the statute.

Cronan v. *Boston*, 136 Mass. 384: *Barker* v. *Worcester*, 139 Mass. 74.

The United States Courts are bound to follow the decision of the Supreme Court of the State upon the construction of a local statute, where those decisions have been uniform.

Burgess v. *Seligman*, 107 U. S. 20, 28 (27: 359, 361); *Sumner* v. *Hicks*, 67 U. S. 2 Black, 532, 534 (17: 355, 356); *Leffingwell* v. *Warren*, Id. 599, 603 (17:261, 262); *Rowan* v. *Runnels*, 46 U. S. 5 How. 134, 139 (12: 85, 87); *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 416, 431 (14: 997, 1003); *Pease* v. *Peck*, 59 U. S. 18 How. 595, 598 (15: 518, 520); *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968).

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The plaintiff in error was plaintiff in that court, and sought to recover of the defendants for injuries which he sustained by reason of their negligence while traveling upon their roads. The court on the trial substantially instructed the jury that the plaintiff could not recover because the injury complained of occurred while he was traveling upon the Sabbath Day, in violation of the law of the State of Massachusetts.

A suit between the same parties in regard to the same transaction had been brought in the Supreme Court of that State, in which, on a trial before a jury, the plaintiff obtained a verdict. This was carried to the court in bank, and was there reversed and sent back for a new trial. The plaintiff then became nonsuit in the state court and brought the present action in the Circuit Court of the United States.

It is important to inquire what was at issue upon the trial in the state court. There the defendant set up the law of the State found in the General Statutes, chapter 84, section 2, which is as follows: "Whoever travels on the Lord's Day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars;" and insisted that the plaintiff, being in the act of violating that law at the time the injury occurred, could not recover. On the 15th of May, 1877, after the plaintiff was injured, the Legislature of Massachusetts passed a statute declaring that this prohibition against traveling on the Lord's Day should not constitute a defense to an action against a common carrier of passengers for any tort or injury suffered by the person so traveling. Mass. Stat. 1877, chap. 232.

The Supreme Court of that State had decided previous to this, in *Stanton* v. *Metropolitan R. Co.* 14 Allen, 485, a similar case, that the plaintiff, being engaged in a violation of law, without which he would not have received the injury sued for, could not obtain redress in a court of justice. Also in *Bosworth* v. *Swansey*, 10 Met. 363, and in *Jones* v. *Andover*, 10 Allen, 18. In the trial of the case now under consideration, before the jury in the state court, the plaintiff does not seem to have controverted the general doctrine thus declared, but insisted that the present case did not come within the statute, because, first, the Act of May 15, 1877, had declared that traveling on Sunday should no longer be a defense to actions for injuries suffered by reason of the negligence of carriers of passengers, although this statute was passed after the accident occurred upon which the right

of action was founded; and second, that at the time he was injured he was, within the meaning of the statute, traveling upon an errand of charity or necessity, specially excepted from its provisions.

The court below sustained both of these propositions of the plaintiff, and the court in bank reversed the trial court upon both of them. It held that the Act of May 15, 1877, did not govern a case where the injury had occurred before its passage; that it was not retroactive, and also held that the facts set out in the bill of exceptions did not show that the plaintiff was traveling at the time of the accident either from necessity or for charity. It may be as well to state here that the facts found in the bill of exceptions relating to this latter question, as it was presented before the Supreme Court of Massachusetts, were identical with those appearing in the bill of exceptions of the case now before us, being in both cases the plaintiff's own statement of his reasons for traveling on that day.

Upon the trial in the Circuit Court of the United States the judge was requested by the plaintiff to charge the jury that the circumstances detailed in the testimony of plaintiff and found in the bill of exceptions concerning the illness of his sister in Minnesota, of which he had received knowledge by letter, and had replied that he would meet her in Chicago at a certain time, and that, having been delayed by accidental circumstances, the travel on Sunday, when he was injured, became necessary to enable him to fulfill that promise, were sufficient to be submitted to the jury in order that they might pass upon the question of whether or not this act of traveling on the Lord's Day was a work of necessity or charity. This the court declined to do, saying that the same question having been submitted to the jury in the trial in the state court, and having been passed upon by the Supreme Court of the State, he did not consider that there was evidence sufficient to go to the jury upon that subject.

This is one of the assignments of error now before us, and upon this point we are of opinion that the court below ruled correctly. It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which the ruling of the state court was made, and we do not place the correctness of the determination of the circuit court in refusing to permit this question to go the jury upon the ground that it was a point decided between the parties, and therefore *res judicata* as between them in the present action, but upon the ground that the Supreme Court of the State in its decision had given such a construction to the meaning of the words "charity" and "necessity" in the statute as to clearly show that the evidence offered upon that subject was not sufficient to prove that the plaintiff was traveling for either of those purposes. The court in its opinion, which is reported in *Bucher* v. *Fitchburg R. R. Co.* 131 Mass. 156, said:

"The act of plaintiff in thus traveling on the Lord's Day was not an act of necessity within the meaning of the statute. * * * In order to constitute an act of charity, such as is exempted from the Lord's Day Act, the act which is done must be itself a charitable act. The act of ascertaining whether a charity is needful is not the charity; but, so far as the statute is concerned, the only question in that case would be, is this act a necessary act? That involves the question, whether the act is one which it is necessary to do on the Lord's Day; and no previous neglect to obtain the requisite information on a previous day creates a necessity for obtaining it on the Lord's Day."

After citing other cases which had been decided in that court, it was further said:

"It is apparent that the plaintiff's duty to his sister was made subservient to his secular business. We are, therefore, of opinion that the ruling should have been given that there was no evidence which would justify the jury in finding that the plaintiff was traveling from necessity or charity, within the meaning of the statute."

Taking, therefore, this construction of the language of the statute, as well as prior decisions to the same purport in which we think we are bound to follow the Supreme Court of the State, we agree that the record in this case as in that does not furnish evidence which should have gone to the jury upon that branch of the subject.

The other assignment of error, in regard to the effect of traveling on the Lord's Day in violation of the Statute of Massachusetts, submitted as a defense to what would otherwise be a liability of the railroad for the negligence of its servants, presents the matter in a somewhat different aspect. It is not easy to see that there was anything in the case as it arose in the circuit court which required a construction of the meaning of that statute, after eliminating what has just been suggested as to the signification of the words "necessity" and "charity." The remainder is a short prohibition against traveling upon the Lord's Day, and provides for the imposition of a penalty for so doing. This is very plain; it admits of no doubt as to its meaning, and its validity has never been controverted. When, therefore, the Supreme Court of Massachusetts, in a long line of decisions, has held that the violation of this statute may be set up as a defense to a liability growing out of the negligence of a railroad company in carrying passengers upon its road, it must have been on some other ground than that to be found in the expressions used in the statute itself. There is no such provision in it, and there is no necessary inference to be drawn from its language that it was intended to control the relations between the passenger and the carrier, or to modify the obligations of the one to the other.

The language of the court in *Stanton* v. *Metropolitan R. Co.*, already cited, is that "Because the plaintiff was engaged in the violation of law, without which he would not have received the injury sued for, he cannot obtain redress in a court of justice." This principle would seem to be as applicable to a man engaged in any other transaction forbidden by law as to that of violating the Sabbath. Whether the doctrine thus laid down is a sound one, and whether, if if it be not sound as it commends itself to our judgment, we should follow it as being supported by the decisions of the Supreme Court of Massachusetts in numerous instances, presents in this case the only serious question for

our consideration. *Hamilton* v. *Boston*, 14 Allen, 475; *Bosworth* v. *Swansey*, 10 Met. 363; *Jones* v. *Andover*, 10 Allen, 18; *Day* v. *Highland St. R. Co.* 135 Mass. 113; *Read* v. *Boston & A. R. R. Co.* 1 New Eng. Rep. 390, 140 Mass. 199.

If the proposition, as established by the repeated decisions of the highest court of that State, were one which we ourselves believed to be a sound one, there would be no difficulty in agreeing with that court, and, consequently, affirming the ruling of the circuit judge in the present case. But without entering into the argument of that subject, we are bound to say that we do not feel satisfied that upon any general principles of law, by which the courts that have adopted the common-law system are governed, that this is a true exposition of that law.

On the contrary, in the case of *Philadelphia, W. & B. R. R. Co.* v. *Havre de Grace Steam Towboat Co.* 64 U. S. 23 How. 209 [16:433], this court had under consideration the same question. It arose in regard to the effect of a statute of Maryland forbidding persons "to work or do any bodily labor, or willingly suffer any of their servants to do any manner of labor on the Lord's Day, works of charity or necessity excepted," and prescribing a penalty for a breach thereof. It was held by this court that where a vessel was prosecuting her voyage on Sunday, and was injured by piles negligently left in the river, this statute making traveling on Sunday an offense and punishing it by a penalty, constituted no defense to an action for damages by the vessel. A number of cases were cited sustaining that view of the subject, and the court, through *Mr. Justice* Grier, used this language: "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libelants, by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for the breach of the statute."

In that case, however, there had been no decision of the courts of Maryland holding that a violation of the Sabbath would constitute a defense to the action against the company which had left the piles in the river. In this view of the matter it is not unworthy of consideration that, shortly after the injury in the present case was inflicted, the General Court of Massachusetts passed a statute, to which we have already referred, declaring that traveling on the Lord's Day should not "constitute a defense to an action against a common carrier of passengers for any tort or injury suffered by a person so traveling."

The question then arises, how far is this court bound to follow the decisions of the Massachusetts Supreme Court on that subject?

The Congress of the United States, in the Act by which the federal courts were organized, enacted that "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." R. S. § 721; Judiciary Act, § 34, 1 Stat. at L. 92. This statute has been often the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded "as rules of decision in trials at common law" is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance.

The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty; nor is it applicable to criminal offenses against the United States,—see *U. S.* v. *Reid*, 53 U. S. 2 How. 361 [13:1028]—or where the Constitution, treaties or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the *laws* of the several States shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law.

It has been held by this court that the decisions of the highest court of a State in regard to the validity or meaning of the Constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of this section. In *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 [17:261], this court said, in regard to the Statutes of Limitations of a State: "The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

In the case of *Luther* v. *Borden*, 48 U. S. 7 How. 40 [12:598], *Chief Justice* Taney said: "The point then raised here has been already decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State; and the well settled rule in this court is that the courts of the United States adopt and follow the decisions of the state courts in questions which concern merely the Constitution and laws of the State." See also *Post* v. *Kendall County*, 105 U. S. 667 [26:1204].

It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the federal courts.

The principle also applies to the rules of evidence. In *Ex parte Fisk*, 113 U. S. 720 [28:1120], the court said: "It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts." See also *Wilcox* v. *Hunt*, 38 U. S. 13 Pet. 378 [10:209]; *Ryan* v. *Bindley*, 68 U. S. 1 Wall. 66 [17:559].

There are, undoubtedly, exceptions to the principle that the decisions of the state courts, as to what are the laws of that State, are in all cases binding upon the federal courts. The case of *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 [10:865], which has been often followed, estab-

lished the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the state court, it was not bound to follow the latter. There is, therefore, a large field of jurisprudence left in which the question of how far the decisions of state courts constitute the law of those States is an embarrassing one.

There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs, and common law. *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 591 [8: 1055]; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518 [14: 249].

When, therefore, in an ordinary trial in an action at law we speak of the common law we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the state courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises.

It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20 [27: 359]. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State.

We are of opinion that the adjudications of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath Day, contrary to the statute of the State, being thus in the act of violating a criminal law of the State, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that State, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts Court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it; and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject.

Mr. Justice **Field** and *Mr. Justice* **Harlan** dissented.

WASHINGTON ICE COMPANY ET AL., *Plffs. in Err.*, *v.* NATHANIEL WEBSTER.

(See S. C. Reporter's ed. 426-447.)

Damages in replevin—action on replevin bond—liability of sureties—interest—estoppel as to value—finding of jury.

1. In an action on a replevin bond, given by the plaintiff in replevin, in Maine, conditioned to pay such damages and costs as the defendant should recover against him, and for the return of the goods replevied in like good order and condition as when taken, in case such shall be the final judgment,—the defendant, if he succeeds in the action and the goods are not returned, is entitled to recover the value of the goods when taken and interest thereon.

2. If a part of the goods was not returned, and a part when returned was not in good order and condition, the obligors in the bond are liable for the value, at the time when taken, of what was not returned, and for the depreciation in value of what was not returned in good order and condition.

3. Under the condition of the bond, the sureties are liable to pay the damages recovered against the principal in the replevin action, in case the principal has not paid them.

4. It makes no difference that part of such interest recoverable by defendant is allowed in the replevin suit, and part in the suit on the bond, so long as there is no duplication.

5. The defendant in replevin is not concluded by the value of the property named in the bond or the writ, when he brings an action on the bond, and is not estopped from showing such value to be greater than there stated.

6. The finding of the jury in the replevin suit of the value of the goods replevied where a judgment has been entered on their verdict is conclusive upon the parties to the replevin suit, and also upon those who became sureties by the bond, to abide its event.

[No. 150.]

Argued Jan. 30, 31, 1888. Decided April 2, 1888.

IN ERROR to the Circuit Court of the United States for the District of Maine, to review a judgment in favor of plaintiff on a bond given in a replevin action to the defendant therein, conditioned to pay such damages and costs as such defendant should recover in such action, and to restore the goods replevied in good condition in case it was so adjudged. *Affirmed.*

See 62 Maine, 341, 68 Maine, 449.

The facts are fully stated in the opinion.

Mr. **Albert P. Gould,** for plaintiffs in error:

The writ in this replevin case was in the form prescribed by statute.

Laws 1821, Vol. 1, chap. 63, § 9.

In Maine, if the defendant in replevin recovers judgment for a return of the goods replevied, and elects to have his damages assessed in the replevin suit, he can recover no damage accruing prior to the judgment in that suit, in his action on the bond.

Dillingham v. *Smith*, 32 Me. 182; *Smith* v. *Dillingham*, 33 Me. 384; *Thomas* v. *Spofford*, 46 Me. 408, 411; *Washington Ice Co.* v. *Webster*, 62 Me. 341, 368; *Stevens* v. *Tuite*, 104 Mass. 328; *Boston Loan Co.* v. *Myers*, 8 New Eng. Rep. 511; 143 Mass. 446.

The assessment at the trial becomes important principally when the goods are *in esse* and may be returned on demand upon the writ of return; if they are not then assessed and the goods are returned and costs paid, the defendant has no further remedy on his bond.

Pettygrove v. *Hoyt*, 11 Me. 66; *Wood* v. *Braynard*, 9 Pick. 322; *Dillingham* v. *Smith*, 30

Me. 370; *Smith* v. *Dillingham*, 33 Me. 384; *Tuck* v. *Moses*, 58 Me. 461.

The measure of damages in trover is the value of the property at the time the right of action accrues, with interest thereon.

Robinson v. *Barrows*, 48 Me. 188; *Pierce* v. *Benjamin*, 14 Pick. 356; *Kennedy* v. *Whitwell*, 4 Pick. 467; *Leighton* v. *Brown*, 98 Mass. 515. *Rowley* v. *Gibbs*, 14 Johns. 385.

It was error in the circuit court to apply to this case the doctrine of estoppel.

To create an estoppel as to the value of the goods replevied by a statement of their value in the replevin bond, the officer's return must state that he has replevied the precise quantity that was described in the writ.

Miller v. *Moses*, 56 Me. 128.

If that return was specific it is conclusive of the quantity replevied, and in litigation in that suit. The return of an officer, as to all matters which are properly the subject of his return, is conclusive.

Baker v. *Baker*, 125 Mass. 7; *Slayton* v. *Chester*, 4 Mass. 478; *Bott* v. *Burnell*, 9 Mass. 96; *S. C.* 11 Mass. 168; *Bean* v. *Parker*, 17 Mass. 591; *Eastabrook* v. *Hapgood*, 10 Mass. 313; *Brown* v. *Davis*, 9 N. H. 76; *Morse* v. *Smith*, 47 N. H. 476; *Campbell* v. *Webster*, 15 Gray, 28; *Chappell* v. *Hunt*, 8 Gray, 427; *Smith* v. *Randall*, 1 Allen, 456; *Johnson* v. *Stone*, 40 N. H 197; *Stinson* v. *Snow*, 10 Me. 263; *Harkness* v *Farley*, 11 Me. 491; *Chase* v. *Gilman*, 15 Me 64; *Craig* v. *Fessenden*, 21 Me. 34; *Agry* v. *Betts*, 12 Me. 415; *Grover* v. *Howard*, 31 Me. 546; *Darling* v. *Dodge*, 36 Me. 370; *Hobart* v. *Bennett*, 77 Me. 401, 404.

The jury is only bound to find the general verdict upon the legal issues presented.

Smith v. *Putney*, 18 Me. 87, 91; *Gordon* v. *Wilkins*, 20 Me. 184, 188; *Thomas* v. *Spofford*, 46 Me. 408.

It is not necessary to allege the value in the writ of replevin.

Litchman v. *Potter*, 116 Mass. 371; *Blake* v. *Darling*, Id. 300; *Gilbert* v. *Thompson*, 9 Cush. 348; *Eastman* v. *Cooper*, 15 Pick. 276.

The judgment is conclusive only upon the matter which was directly in issue upon the former trial.

King v. *Chase*, 15 N. H. 9; *Howard* v. *Kimball*, 65 Me. 330; *Smith* v. *McCool*, 83 U. S. 16 Wall. 563 (21: 325); *Washington, A. & G. S. Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 (18: 550); *Aurora City* v. *West*, 74 U. S. 7 Wall. 82 (19: 42).

Mr. **Benj. F. Butler**, for defendant in error:

Any fact found in a court by a verdict or decree forever after concludes the parties as to that fact so found, when judgment has been entered in accordance with such finding, and the verdict and judgment necessarily involve the fact.

U. S. Bank v. *Beverly*, 42 U. S. 1 How. 134 (11: 75); *Aspden* v. *Nixon*, 45 U. S. 4 How. 467 (11: 1059); *Sherwin* v. *Clarges*, Bull. N. P. 232; 1 Stark. Ev. 4th Am. ed. 200; *Eastman* v. *Cooper*, 15 Pick. 285; *Stockton* v. *Ford*, 59 U. S. 18 How. 418 (15: 395); *Aurora City* v. *West*, 74 U. S. 7 Wall. 82 (19: 42); *Washington, A. & G. S. Packet Co.* v. *Sickles*, 65 U. S. 24 How. 341 (16: 653).

The judgment of a court of competent jurisdiction upon a question directly involved is conclusive.

Russell v. *Place*, 94 U. S. 606 (24: 214); *Washington, A. & G. S. Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 (18: 550); *Lea* v. *Lea*, 99 Mass. 493; *Burlen* v. *Shannon*, Id. 200; *Ingraham* v. *Dawson*, 61 U. S. 20 How. 486 (15: 984); *Nations* v. *Johnson*, 65 U. S. 24 How. 195 (16: 628); Bigelow, Estop. 114, 115, 197; *Hendrickson* v. *Norcross*, 19 N. J. Eq. 417; *Low* v. *Mussey*, 41 Vt. 393; *Franklin* v. *Greene*, 2 Allen, 519.

Sureties upon bonds are bound by facts judicially found against their principals.

Drummond v. *Prestman*, 25 U. S. 12 Wheat. 515 (6: 712); *Stovall* v. *Banks*, 77 U. S. 10 Wall. 583 (19: 1036); *Babbitt* v. *Finn*, 101 U. S. 7 (25: 820); *Douglass* v. *Douglass*, 88 U. S. 21 Wall. 98 (22: 479); *Sweeney* v. *Loome*, 89 U. S. 22 Wall. 208 (22: 727).

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 12th of August, 1870, the Washington Ice Company, a New York corporation, procured from the Supreme Judicial Court of the State of Maine a writ of replevin, directed to the Sheriff of the County of Lincoln, in that State commanding him to replevy "a certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain icehouses situate in the Town of Boothbay, in the County of Lincoln and State aforesaid, and owned or occupied by Nathaniel Webster, of Gloucester, in the County of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, belonging to the Washington Ice Company, * * * now taken and detained by Nathaniel Webster, * * * and them deliver unto the said The Washington Ice Company," and summon the defendant to appear before the court within and for the County of Lincoln on the fourth Tuesday of October, 1870, to answer unto the plaintiffs in a plea of replevin, for that the defendant, on the 1st of August, 1870, at said Boothbay, unlawfully took the goods of the plaintiffs, as aforesaid and them unlawfully detained; "provided they, the said plaintiffs, shall give bond to the said defendant, with sufficient sureties, in the sum of thirty thousand dollars, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said defendant shall recover against them; and also to return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment."

The sheriff made a return to the writ, dated August 13, 1870, as follows: "By virtue of this writ I have taken the ice within named, as the property of the within named Washington Ice Company, and on the nineteenth day of August, A. D. 1870, I delivered said ice to Hiram Perkins, whom the Washington Ice Co. designed as their agent to receive said ice; and, on the nineteenth day, I summoned the within named Nathaniel Webster, by reading this writ in his presence and hearing, for his appearance at court—the quantity replevied, by actual weight, being about twenty-five hundred tons."

Webster pleaded the general issue to the writ, at October Term, 1871, and filed a brief statement and special matter in defense, setting

forth that, at the time of the alleged taking, as stated in the writ, the ice named therein was not the property of the plaintiff, nor had the plaintiff any right to the possession thereof, but it was the property of the defendant and one Babson, and was rightfully in the possession of the defendant, and was wrongfully taken from his possession by the plaintiff; and prayed judgment for the return of the ice in like good order and condition as when it was taken from the possession of the defendant, and for damages for such taking and detention, and for costs.

The case came on for trial before a jury, and evidence was put in; but the case was taken from the jury and submitted to the full court, on the report of the evidence by the judge, and transferred to the Supreme Judicial Court for the Middle District. It was there heard, and is reported as *Washington Ice Co.* v. *Webster*, 62 Me. 341.

It is there stated that the case came before the full court under an agreement that if the action was maintainable, it was to stand for trial, but otherwise a nonsuit was to be entered. On June 26, 1874, the order of the full court was received, in these words: "The nonsuit to stand, judgment for return of the goods replevied, damages to the time of taking to be assessed at *nisi prius*, if the defendant so elect; or he may, if he prefer, resort to his remedy on the bond." The case was then continued to October Term, 1874, when the defendant elected to have his damages assessed by a jury. The case was then continued to April Term, 1875, when leave was granted to the officer who served the writ, to amend his return thereon in accordance with the facts; and thereupon he made the following as his amended return, which was allowed by the court, such amended return bearing date August 18, 1870: "By virtue of this writ, having first taken a bond as prescribed by law, I have this day replevied all the ice by me found in the icehouses within mentioned, all of which said ice I caused to be weighed on delivery at the wharf in said Boothbay, about three miles from said icehouses, being the nearest place thereto where ice could be shipped—twenty-two hundred and ninety-seven tons and nineteen hundred and twenty-one pounds of which was thus weighed on successive days, portions of it on each week day between the twenty-third day of August, 1870, and the sixteenth day of September, 1870, and thirty-three tons and nineteen hundred and thirty pounds thereof was thus weighed on three several days between the twenty-sixth day of September, 1870, and the twenty-sixth day of October, 1870, the whole of said ice thus taken by me weighing twenty-three hundred and thirty-one tons and eighteen hundred and fifty-one pounds, and on the nineteenth day of said August, 1870, I delivered all the said ice at said icehouses to the plaintiff, reserving to myself authority to weigh the same; and, on the nineteenth day of said August I summoned the within named Nathaniel Webster to appear at court, as within directed, by reading this writ aloud in his presence and hearing."

The action of replevin was tried by a jury, and the presiding judge submitted to them to find, in addition to their verdict, answers to two questions; and the jury, on the 14th of May, 1875, returned the following verdict: "The jury find that the defendant was damaged by reason of the taking of the property replevied in the suit, and assess damages for the defendant in the sum of six thousand five hundred and fifty-five dollars." They also returned answers as follows to the questions submitted to them: "First. What was the value of the ice replevied, where it was situated, at the time it was taken in this suit? Answer. Twenty thousand and sixty-nine dollars and thirty-three cents. Second. What damage did the defendant sustain by reason of the taking of the ice in replevin, on account of the preparations he had to make to remove it? Answer. Eight hundred and thirty-five dollars and twenty-five cents." The plaintiff filed exceptions to the rulings of the judge in matters of law, and also moved to set aside the verdict. The evidence was reported to the full court, and the case was transferred to the Supreme Judicial Court for the Middle District, where it was heard, and is reported as *Washington Ice Co.* v. *Webster*, 68 Me. 449. The decision of the court was that the motion and exceptions should be overruled. Thereupon a judgment was rendered by the lower court, on the 4th of May, 1878, that the property replevied be returned and restored to Webster irrepleviable, and that he recover against the Washington Ice Company $7,723.98, damages for the taking and detaining of the property replevied, being the amount of the verdict, with interest thereon to the date of the judgment, and also $477.67, costs of suit.

On the 31st of July, 1878, a writ of return was issued on the judgment. It recited that the Washington Ice Company had replevied the 2331 tons and 1851 pounds of ice, of the value of $20,069.33, and set forth the terms of the judgment for the return, and for the recovery of the $7,723.98 damages for the taking and the $477.67 costs, and commanded the sheriff that he forthwith return and restore the said property to Webster, and collect the said sums of money from the Washington Ice Company, with interest from the 4th of May, 1878. On the 19th of August, 1878, a demand was duly made upon the Washington Ice Company for the return of the ice mentioned in the writ of restitution.

On the 17th of September, 1878, the Washington Ice Company paid to Webster $8,879.36, in full for such damages and costs, and interest. The receipt given by Webster for the amount contained this clause: "This receipt not to affect any further claim of the within named Webster for the ice named in said writ, or for any further damages or costs that may be recovered or recoverable by said Webster."

Before delivering the ice to the plaintiff in the original writ of replevin, the sheriff, as commanded by the writ, and as stated by him in the amended return, exacted a bond in the penalty of $30,000, dated August 12, 1870, executed by the Washington Ice Company, as principal, and Josiah H. Drummond and William E. Gould, to Webster, the condition of which was as follows: "The condition of the above obligation is such that, whereas, the said The Washington Ice Company have this day commenced against the said Nathaniel Webster an action of replevin for a certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain icehouses

situate in the Town of Boothbay, in the County of Lincoln, and State of Maine, owned or occupied by Nathaniel Webster, of Gloucester, in the County of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, which they say the said Nathaniel Webster has unlawfully taken: now, therefore, if the said The Washington Ice Company shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Nathaniel Webster shall recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void; otherwise, to remain in full force."

On the 18th of February, 1879, Webster brought the present action of debt, in the Circuit Court of the United States for the District of Maine, against the Washington Ice Company and Drummond and Gould, founded on the said bond. The defendants appeared, and by their plea prayed oyer of the bond and its condition, and set forth the condition and pleaded that they had kept all the conditions of the bond except the following, namely: "and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment; " that, as to that condition, they had not kept it; that final judgment had been rendered against them in the replevin suit mentioned in the condition, for a return of the goods and chattels replevied therein; that they had not returned the same to the plaintiff according to the requirement of said condition; and that they therefore submitted to the judgment of the court and prayed that they might be heard by the court in equity in the assessment of the damages for the breach of the last mentioned condition. On the 12th of October, 1880, the defendants filed an offer to be defaulted, and that judgment might be rendered against them for $16,000 and legal costs, and execution might issue against them for the same. That offer was declined by the plaintiff on the 1st of November, 1880. At September Term, 1882, the case was tried before the circuit court on the filing of a written stipulation waiving a jury. At the conclusion of the trial, the court directed a judgment for Webster against the defendants, to be entered for $28,990.14 and costs, which was done. To review that judgment, the defendants have brought this writ of error.

There is a bill of exceptions, upon which various questions are raised by the plaintiffs in error. At the trial, the plaintiff introduced in evidence the original writ of replevin in the suit in the state court, the return and the amended return, the pleadings in that suit, the record of the judgment and of the proceedings of the court therein, and the two orders of the full court. The defendants objected to the admission of the following question to the jury and their answer thereto, recited in the record of the proceedings in the replevin suit, namely: "What was the value of the ice replevied, where it was situated, at the time it was taken in this suit? Answer. Twenty thousand and sixty-nine dollars and thirty-three cents." The court overruled the objection and admitted the question and answer, and the defendants excepted.

The plaintiff then introduced in evidence the writ of return, and the fact of the making upon the defendants of the demand for the return of the ice replevied, and the receipt given by him to the Washington Ice Company for the damages, costs, and interest awarded by the judgment of May 4, 1878. He also introduced in evidence the bond sued upon.

The bill of exceptions then proceeds as follows: "The plaintiff thereupon contended that the defendants were estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin and in the replevin bond (being the bond in suit), at whatever time that value is to be assessed, but that the plaintiff was not precluded from showing that they were of greater value.

"The defendants claimed that they were not thus estopped or precluded, and offered evidence to show that the value of the ice replevied was less than ten thousand dollars, at whatever time such value is to be assessed, and submitted to the court the following prayer for a ruling on this subject, viz: That the defendants are not estopped to prove that the value of the goods replevied was less than fifteen thousand dollars by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officer in that writ was commanded to replevy.

"The court rejected the evidence offered, and overruled this prayer of the defendants, and ruled that the defendants are estopped as is contended by the plaintiff, and that the plaintiff is not precluded from showing that the value of the goods replevied was more than fifteen thousand dollars. To which rejection of evidence and ruling the defendants then excepted.

"The defendants contended that the statement of the officer who served the replevin writ, in his returns thereon, of the quantity of goods actually taken by him on the writ of replevin, is competent and conclusive evidence of that quantity, in the trial of this action upon the replevin bond, and submitted to the court a prayer for a ruling to that effect.

"The plaintiff contended that the statement of the officer, in his return, of the quantity of ice replevied, being indefinite in the first return, and in the amended return being of weights taken at a different place from that at which the ice was replevied, and at subsequent times from that of the taking, was not evidence of the quantity of the ice replevied.

"The court overruled the said prayer of the defendants in this respect, and ruled that neither of the returns was conclusive evidence of the quantity taken by the officer upon the replevin writ. To which rulings the defendants then excepted.

"It was admitted by the plaintiff that the damages which were assessed in the action of replevin, for the taking and detention by the plaintiff in that action, of the property replevied therein, with the interest thereon, and the costs recovered in that action, with interest thereon, have been fully paid, and that the judgment in that action, awarding to the defendant in the same the sum of seven thousand seven hundred and twenty three dollars and ninety-eight cents damages, and his costs of suit taxed at four hundred and seventy seven dollars and sixty-seven cents, has been fully satisfied.

"Thereupon the defendants contended that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value, at the date of the judgment in the action of replevin, and of the order therein that the property replevied be returned and restored to the said Nathaniel Webster, with interest thereon; and they offered evidence to prove that the value of ice of like description, character, intrinsic value, and quantity as that replevied, at the place where the ice was replevied, and also at the place where the demand upon the writ of return was made, was less than ten thousand dollars at that time. The court rejected the evidence offered, and overruled this prayer of defendants. To which rejection of evidence and ruling defendants then excepted.

"The defendants thereupon offered evidence to prove that the value of the ice replevied was less than ten thousand dollars at the time the demand was made upon the defendant, the Washington Ice Company, upon the writ of return issued pursuant to the judgment, in the action of a replevin, for a return of the goods, replevied, viz., August 19, A. D. 1878; and presented a prayer to the court for a ruling that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like quantity, description, character and intrinsic value as those replevied, at the date of said demand. But the court rejected the evidence offered, overruled this prayer of the defendants, and ruled that the plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officer upon the replevin writ. To which rejection of evidence and rulings the defendants then excepted.

"The plaintiff contended that the finding of the value of the ice replevied, by the jury which assessed the damages for taking the ice upon the replevin writ, against the plaintiff in that suit, in answer to the question submitted to them in that trial, 'What was the value of the ice replevied, where it was situated, at the time it was taken in this suit?' as appears in the record of the proceedings in the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendants of the value of the ice, in determining the amount which the plaintiff is entitled to recover in this action, and moved the court for an entry of judgment against the defendants, for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum.

"The defendants resisted this motion, and contended that the value of the ice replevied was not a legal issue in the replevin action, and that they were not precluded from showing that the value of the ice was less than the sum thus found; and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond; and they further contended that, if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action, interest thereon should be cast only from the date of the demand upon the writ of return, and not from the date of that finding by the jury.

"The court overruled the defendant's position, sustained the motion of the plaintiff, and ruled that the finding of value by the jury in the action of replevin was conclusive against the defendants, and ordered judgment to be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum, that being the amount of the said sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of said finding, May 14, 1875. To which rulings of the court, order, and decision, and entry of judgment for damages, and each and every of them, defendants then excepted."

The positions of the parties as thus set forth in the bill of exceptions are those taken by them on the argument before this court. The material question in the case is what damages the defendants shall pay for the failure to return the 2,331 tons and 1,851 pounds of ice to the plaintiff, after judgment for its return was rendered. The jury in the replevin suit assessed the damages of Webster at the sum of $6,555. They also found the value of the ice replevied, where it was situated, at the time it was taken in the replevin suit, to have been $20,069.33. The ice was taken, under the writ of replevin, on the 13th of August, 1870. The verdict of the jury was rendered on the 14th of May, 1875. The interest on $20,069.33, at the rate of 6 per cent per annum, from August 13, 1870, to May 14, 1875, a period of four years and nine months, was $5,719.75. Add to that the sum of $835.25, found by the jury to be the damage sustained by Webster by reason of the taking of the ice in replevin, on account of the preparations he had to make to remove it, and it makes a total of $6,555, which was the exact amount assessed by the jury as damages by reason of the taking of the property replevied. Thus, in the judgment in the replevin suit, Webster recovered, as damages, in addition to the $835.25, interest at the rate of 6 per cent per annum on $20,069.33, the value of the ice, where it was situated at the time it was taken, from August 13, 1870, to May 14, 1875; and, in the present suit, he has recovered on the bond the sum of $20,069.33, as the value of the ice, where it was situated, at the time it was taken, and interest on that sum, at the rate of 6 per cent per annum, from May 14, 1875, to the date of the verdict of the jury in the present suit, such interest amounting to $8,920.81. Therefore, in the two suits, taken together, Webster has recovered, as the value of his ice unlawfully taken from him by the writ of replevin on the 13th of August, 1870, its value as it was situated at that time, $20,069.33, and interest thereon from that date, at 6 per cent per annum, to the date of the verdict of the jury in the present suit on the bond. This is equal and exact justice, and no more, so far as he is concerned. So far as the principal and the sureties in the bond are concerned, they obligated themselves that the principal should return and restore the goods taken on the writ of replevin, "in like good order and condition as when taken." The article taken was ice, a perishable commodity. None of

that taken on the 18th of August, 1870, can be supposed to have been in existence when the judgment of May 4, 1878, for its return, was rendered, or when the writ of return of July 31, 1878, was issued, or when the demand of August 19, 1878, for the return, was made. The same quantity of ice which was taken on the writ was, by the bond, to be returned, in like good order and condition as when taken. If a part of it had been returned in like good order and condition, and the rest of it had not been returned at all, or returned not in such like good order and condition, the obligors in the bond would have been liable for the value, at the time when taken, of what was not returned, and for the depreciation in value of what was not returned in like good order and condition. In no other manner could the condition of the bond have been satisfied, and the defendant in the writ of replevin have been made whole, according to the intent and purpose of the writ and of the bond, and of the statute of Maine under which the bond was given. The writ and the bond were in the form prescribed by statute.

The principal argument on the part of the defendants in the present suit is, that in the Statute of Maine (Rev. Stat. 1857, 1871, chap. 96, sec. 11) which provides that, in a replevin suit, "If it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs," the words "damages for the taking" mean all damages resulting from the taking and detention of the goods; that, if the defendant in replevin recovers judgment for a return of the goods replevied, he may, at his election, have the damages which he has sustained by reason of the taking and detention of them, to the time of such judgment, assessed in the replevin suit, or he may recover those damages in a suit on the bond, but cannot have both; that, if he elects, as he did in the present case, to have his damages assessed in the replevin suit, he cannot, in a subsequent suit on the bond, founded on a failure to return the goods, recover any damages which accrued prior to the judgment in the replevin suit, and, therefore, cannot recover for any depreciation in the value of the goods which occurred between the time of the taking and the date of the judgment of return; that any damages collectible for such depreciation must, if the defendant makes the election referred to, be assessed in the replevin suit, as an item of damages resulting from the detention of the goods; and that, as the plaintiff in this suit failed to have such damages assessed in the replevin suit, he cannot recover them in the present suit.

This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle. By the terms of the bond, it was made enforceable against the principal and sureties if the principal should not pay such damages and costs as Webster should recover against it, and should not also return and restore the goods replevied in like good order and condition as when taken. Under the condition of the bond, the sureties were liable to pay the damages recovered against the principal by the judgment of May 4, 1878, in case the principal had not paid them, as it did. By the judgment in the present suit, they are only made liable according to their obligation, that their principal shall return and restore the goods in like good order and condition as when taken. Such we consider to have been the effect of the rulings of the state court in the replevin suit, in 62 and 68 Maine.

In the case in 62 Me. the court, commenting upon the above recited provision of the Revised Statutes of 1871; chapter 96, section 11, says, p. 361: "When the defendant makes a good title to the goods replevied, he is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time of their replevin till their restoration, and for their deterioration." It also says, p. 362: "The damages are to be assessed to the time of the verdict for the defendant, upon the principles adopted in trover, save that the value of the property is not to be included therein." It also says, p. 363: "It seems, therefore, fully settled that in a replevin suit, when damages are not assessed at *nisi prius*, or where a nonsuit is entered, the defendant, when the property replevied is not returned, may recover all damages sustained, in a suit upon the replevin bond." It also says, p. 363, that the plaintiff "is bound by his replevin bond to restore the goods in like good order and condition as when taken. He is responsible, if judgment is against him, for the damaged or deteriorated condition of the goods when restored." Again, it says, p. 364: "When goods not held under legal process are replevied, and after entry of the action the plaintiff becomes nonsuit and a return is ordered, but the goods replevied are not forthcoming on demand, the defendant, in a suit on the bond, is entitled to recover, as damages, the value of the goods when taken, and interest thereon from the service of the writ to the time of the rendition of judgment." Again, p. 364: "If the market value of the goods replevied shall be less at the time of the demand on the writ of return, than when the goods are taken, the loss must fall on the plaintiff, by whose wrongful act the defendant is deprived of his property. Besides, the plaintiff, having possession, might have sold them, which the defendant could not do."

It is contended for the defendants that, in this suit on the replevin bond, Webster is entitled to recover, as damages, only the value of the goods replevied, on the 19th of August, 1878, the date of the demand on the writ of return, with interest thereon; and some expressions of the court in the decision in 62 Me. supposed to tend in that direction, are referred to. But they are wholly inconsistent with the other expressions of the court, above quoted, and contrary to reason and justice, in their application to the present case, and also to authority.

One of the expressions thus relied on by the defendants is this, p. 363: "The damages being assessed to the time of the verdict, if the goods replevied are not forthcoming on demand on the writ of return, the defendant, in a suit by him on the replevin bond, will be entitled to recover, as damages, the value of the goods replevied at the date of the demand on the writ of return, with interest thereon, the damages and costs assessed in the replevin suit, and interest. *Swift* v. *Barnes*, 16 Pick. 194." But a

reference to the case of *Swift* v. *Barnes* shows that the remark of the court had reference to a case where the value of the property replevied had risen, at the time of the demand on the writ of return, beyond what it was at the time it was taken. The Massachusetts Statute and practice in regard to replevin are the same as in Maine. The principle declared in *Swift* v. *Barnes* was that the successful defendant in replevin was entitled to a full indemnity; that the plaintiff in replevin, who caused the property to be valued, might well be bound by the valuation, when it was made to appear that the action was groundless; that it by no means followed that the other party, who had no agency in the valuation, was also to be bound; that the plaintiffs in the suit on the bond were entitled to a full indemnity for the damages sustained by the nonperformance of the condition of the bond, and that could not be obtained unless they should be allowed to recover the actual value of the property replevied at the time when it ought to have been restored on the writ of restitution; and that, in the case then before the court, that was the true measure of damages.

In *Parker* v. *Simonds*, 8 Met. 205, it is said that the property in *Swift* v. *Barnes* had risen in value after it was replevied; and, in *Parker* v. *Simonds*, as some of the property had been sold at the time of the demand, and some was deteriorated and depreciated in value by use, the court said that the value at the time of the demand would not be the measure of damages without a proper allowance for the depreciation.

The rule in Massachusetts seems well settled. In *Leighton* v. *Brown*, 98 Mass. 515, which was a suit on a replevin bond, the value of the property, at the time of the demand for its return, was greater than the penal sum of the bond; but though the obligors contended that the proper measure of damages was its appraised value or its value at the time it was replevied, the court said: "The appraisal made in the replevin suit is conclusive against the party by whom it was made. *Parker* v. *Simonds*, 8 Met. 205. But it is not admissible in evidence against the present plaintiff, who, as defendant in the replevin action, had no agency in procuring this valuation. *Kafer* v. *Harlow*, 5 Allen, 348. In the present case, the value was greater at the date of the final judgment ordering a return than at the date of the appraisal. The value at the date of a demand for the restoration of the property in compliance with the order of return is the measure of damages for which the plaintiff contends, and to which, in the opinion of the court, he is entitled. *Swift* v. *Barnes*, 16 Pick. 194."

In *Tuck* v. *Moses*, 58 Me. 461, the market value of the replevied property had increased from the time it was replevied to the time of the judgment for a return; and it was held, in a suit on the bond, that the defendants were liable for the value of the property at the date of the judgment for a return, with interest at 6 per cent from the date of that judgment to the date of the judgment on the bond.

It is, therefore, manifest that the court, in its opinion in 62 Me. did not mean that the time of the demand on the writ of return was to be taken as the time for fixing the value of the property in any other case than one where there had been an increase in the value from the time of the taking, to the benefit of which increase the defendant in the replevin suit was entitled.

We see nothing inconsistent with these views in *Stevens* v. *Tuite*, 104 Mass. 328. In that case the defendant in a replevin suit had a judgment therein for a return, and for damages assessed by computing interest on the appraised value of the goods replevied, from the date of the writ of replevin to the date of the judgment; and, in a subsequent suit on the bond, he sought to recover, not only the value of the property, with interest from the date of the demand under the judgment, but damages for inconvenience and loss resulting from the interruption of the possession of the property, which was the machinery of a manufactory, and damages for the expense, trouble, and delay attending the restoration of the establishment to its original condition. It was held that these damages were included in the damages recoverable in the replevin suit. The case was a peculiar one, and the defendant in the replevin suit did not, as in the present case, ask merely for an allowance, as damages, of a continuation of the interest on the value of the property when taken, from the time of the verdict in the replevin suit to the time of the verdict in the suit on the bond; and the court did not pass on that question.

The decisions in Maine support the views taken by the circuit court. In *Smith* v. *Dillingham*, 33 Me. 384, in a suit on a replevin bond, the value of the property replevied, as valued in the writ, was allowed, with interest from the date of the bond. The interest was objected to. No damages had been assessed in the replevin suit. The court said: "If damages for the taking had been assessed, as the statute provides, up to the time when the nonsuit was ordered, the estimate of damages in this suit for the detention would have commenced at that period. But the record shows that no such assessment was made. The wrong done to the plaintiffs consists in the taking of their property, and in the delay of making compensation for it. There is nothing in the statute which precludes the allowance of interest on the value of the property from the time when it was taken." It certainly can make no difference in principle that part of such interest is allowed in the replevin suit and part in the suit on the bond, so long as there is no duplication.

In *Thomas* v. *Spofford*, 46 Me. 408, the case of *Smith* v. *Dillingham* is cited by the court, as authority for the proposition that in a suit on the replevin bond the plaintiff may recover damages for detention, although they were not assessed in the judgment in the replevin suit.

The opinion of the court in 68 Me. contains nothing to support the views of the defendants. In that opinion it is said, p. 459: "When this cause was first tried, the presiding justice was of opinion that the action was not maintainable, and that the defendant's claim for damages for the plaintiffs' unlawful taking could only be determined in a suit upon the replevin bond. By agreement of parties, the case was withdrawn from the jury, to be reported to the full court. If the action could not be maintained upon the evidence offered and introduced by

the plaintiffs, a nonsuit was to be entered. If the action could be maintained, it was to stand for trial; and the court were also authorized to pass upon the several propositions in respect to damages, made by the defendant's counsel. Upon a full hearing of the questions of law raised upon the report, it was determined that the action was not maintainable; and a nonsuit in pursuance of the agreement of the parties was ordered. It was further decided that the defendant had a right to have his damages assessed. 62 Me. 841."

The trial court had instructed the jury as to damages as follows, p. 452: "The defendant is entitled to the value of that ice, at the time it was taken, and where it was situated, for any lawful use to which it could be put. If it was valuable to use there, he is entitled to its value for use. If it was valuable for sale, he is entitled to its value for sale. If it was valuable to send to market, he is entitled to whatever value it bore at the time and place for any market, not what it might bring at another market,—I don't mean that—but its value at Boothbay, on August 13, 1870, for any purpose to which it might be put." On this the Supreme Judicial Court remarked, p. 461: "To these instructions there can be no reasonable objections urged. The value at the time and place of taking is the rule."

The contention of the defendants that, on the recovery of the judgment in replevin, the plaintiff in replevin was only bound to restore the goods or to pay their money value at that time, and that the liability for the breach of the replevin bond would be discharged if the plaintiff in replevin paid such sum of money as would enable the defendant then to go into the market and buy goods of like description and value, is not sound. Ice is a peculiar article of property. The ice in question was taken in August, 1870, at a time of year when, as we all know, ice has a larger value than at some other times of the year. The defendant in the replevin suit was entitled to the value of that ice as of that time, and of the place where it was taken, as stated in the case in 68 Me. for any lawful use to which it could be put. It was also said by the court in that case, p. 462: "As the taking by the plaintiffs was wrongful, the defendant is entitled to full indemnity. The measure of damages is the actual value of the property to the plaintiffs as an article of merchandise or sale." Under these views, the defendant would not necessarily be made whole by a sum of money sufficient to enable him to purchase in the market a like quantity of ice, eight years after it was taken.

It is also contended for the defendants in this suit that the circuit court erred in rejecting the evidence offered by them to show that the value of the ice replevied was less than $10,000, at whatever time such value was to be assessed, and in ruling that the plaintiff was not precluded from showing that the value of the goods replevied was more than $15,000 named in the replevin writ and the bond.

We do not think the court erred in rejecting the evidence so offered by the defendants. The writ of replevin stated that the quantity of ice was "about thirty-eight hundred tons," "of the value of fifteen thousand dollars." The bond of the 12th of August, 1870, recited that the action was for "about thirty-eight hundred tons of ice," "of the value of fifteen thousand dollars." The first return of the sheriff, dated August 13, 1870, specified the quantity of ice as "about twenty-five hundred tons." The amended return specified the quantity as being 2,331 tons and 1,851 pounds. The jury, in the trial of the replevin suit, found that the value of the ice replevied, where it was situated, at the time it was taken, was $20,069.33. The condition of the bond must be held to mean that the quantity of goods replevied was to be restored, leaving it to be ascertained what that quantity was. It must be assumed, in the absence of evidence to the contrary, that the quantity taken by the jury as the basis of the value they found, was the quantity named in the amended return of the sheriff. The sureties in the bond were, by its terms, so connected with the replevin suit that they are bound by the adjudications necessarily made in it. The jury could not have found any basis for the calculation of the interest as damages, unless they had found, as they did, the value of the ice, where it was situated, at the time it was taken. The sureties are bound by that finding.

There was, therefore, no error in excluding the evidence so offered by the defendants, or in permitting the plaintiff to show, as he did conclusively, by the record in the replevin suit, that the value of the ice, where it was situated, at the time it was taken, was greater than the $15,000 named in the writ of replevin and the bond.

This is in accordance with the decisions in the Supreme Judicial Court of Maine. In *Thomas* v. *Spofford*, 46 Me. 408, the court below had ruled that the plaintiff in the suit on the replevin bond was estopped from showing that the property was of greater value than that stated in the writ of restitution, which was the value stated in the writ of replevin, the bond being for double that value, but the Supreme Judicial Court said: "The defendant in replevin is not concluded by the value of the property named in the bond or the writ. If he was to be thus estopped from denying that value, he would be at the mercy of his opponent, whose interest it always is to fix as low a value as possible. * * * It seems clear, on the authorities and fair reason, that the defendant in replevin is not concluded or estopped by the sum named in the bond as the actual value." To the same effect is *Miller* v. *Moses*, 56 Me. 128, 141. In *Tuck* v. *Moses*, 58 Me. 461, 477, it is held that the plaintiff in replevin is bound by the value which he puts upon the property in his writ, but that with the defendant in replevin it is otherwise; and, as he has no hand in fixing the value in the writ, he is not estopped from showing it to be greater than is there stated.

The defendants submitted to the court a prayer for a ruling that the statement of the sheriff, in his return, of the quantity of ice actually taken by him on the writ of replevin was competent and conclusive evidence of that quantity, in the trial of the suit on the replevin bond. The bill of exceptions states that the court overruled such prayer, and ruled that neither one of the returns was conclusive evidence of the quantity taken by the officer upon the re-

plevin writ, and that the defendants excepted to such rulings. No practical question arises upon this exception, for it does not appear by the bill of exceptions that either side offered any evidence for the purpose of showing that the quantity of ice replevied varied from the quantity stated in the amended return. The evidence offered to be given by the defendants to prove that the value of the ice replevied was less than $10,000 at whatever time such value was to be assessed, was not an offer to prove that the quantity of ice replevied varied from that stated in the amended return; and the plaintiff, neither offering nor giving any evidence that such quantity varied from that stated in the amended return, relied upon the finding of the jury in the replevin suit as to the value of the ice replevied.

The defendants complain of the admission in evidence of the answer of the jury in the replevin suit as to the value of the ice replevied where it was situated, at the time it was taken, and also of the ruling of the court that such answer was evidence in this suit, and conclusive against the defendants, of the value of the ice, in determining the amount which the plaintiff is entitled to recover in this suit. It is contended for the defendants that it was discretionary in the jury, in the trial of the replevin suit, to answer the question referred to, and that it was no part of the legal issue in that trial. But, as has been shown, the rule adopted in that trial, for finding the damages, was to assess the interest on what was found to have been the value of the ice at the time and place of taking, and that such value was an indispensable element in arriving at a verdict. Such value was found by the jury, in finding the verdict; and a judgment having been entered thereon, the fact so found is conclusive, not only upon the parties to the replevin suit, but upon those who became sureties by the bond, to abide its event. The sureties became bound by the result of the replevin suit by virtue of their agreement contained in the bond.

In *Drummond* v. *Prestman*, 25 U. S. 12 Wheat. 515 [6: 712], the record of a judgment confessed by a principal to a creditor for a debt due was held to be admissible in evidence to charge a surety who had guarantied the debt to the creditor. In *Stovall* v. *Banks*, 77 U. S. 10 Wall. 583 [19: 1036] it was held that the sureties in the bond of an administrator were bound by a decree against the administrator, made in a suit to which they were not parties, finding assets in his hands which he had not paid over.

The sureties in the replevin bond were represented in the replevin suit by the plaintiff therein, and were identified with it in interest, and claimed in privity with it, so as to be concluded by the proceedings in that suit. 1 Greenl. Ev. § 523. The question of the value of the ice at the time it was taken in replevin was essential to the finding of the verdict in the replevin suit; and in such case, it is not necessary to the conclusiveness of the former judgment that there should have been a formal issue in the prior suit as to such question. *Id.* § 534.

On the whole case, we are of opinion that there is no error in the record, and that the judgment must be affirmed; and it is so ordered.

YALE LOCK MANUFACTURING COMPANY, *Appt.*,
v.
THOMAS L. JAMES.

(See S. C. Reporter's ed. 447-464.)

Infringement of patent—reissue—when not sustained.

1. In a suit to recover for the infringement of reissued letters patent, No. 8783, granted to the Yale Lock Manufacturing Company, as assignee, for an improvement in postoffice boxes, on an application for a reissue filed May 23, 1879, *held*, that although the patentee might have fallen into an erroneous conclusion as to the defectiveness or insufficiency in the specification of the original patent, yet the original patent was not defective nor insufficient, either in its descriptive portion or in its claims.

2. *Held* further, that inasmuch as the patentee abandoned, under pressure from the Patent Office, clauses in his application and in his claim, he cannot insist that it was the intent of the office to include in the claim and patent those clauses and parts which he had abandoned.

3. *Held* further, that there was no infringement by defendant of the patent.

[No. 162.]

Argued Feb. 3, 6, 1888. Decided April 9, 1888.

APPEAL from a judgment of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity for infringement of letters patent. *Affirmed.*

Reported below, 22 Blatchf. 294.

The facts are fully stated in the opinion.

Mr. **Frederic H. Betts,** for appellant:

The patentee can reissue in case the original patent embodied the claims which the reissue is intended to cover (*Parker & W. Co.* v. *Yale Clock Co.* 123 U. S. 89 (*ante*, 100); or to meet a possible construction of the original (*Eames* v. *Andrews*, 122 U. S. 40, 68 (30:1064, 1072); or to remove ambiguity or obscurity (*Campbell* v. *James*, 104 U. S. 370 (26:791).

The patentee may, if he applies in due season, enlarge his claim.

Morey v. *Lockwood*, 75 U. S. 8 Wall. 230 (19: 339); *Campbell* v. *James*, *supra*; *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 (26:783).

Nothing but a clear mistake, or inadvertence, and a speedy application for its correction, is admissible when it is sought merely to enlarge the claim.

Mahn v. *Harwood*, 112 U. S. 362 (28:668).

Due diligence in applying for a reissue is *prima facie* proved, if the application is within two years.

Wollensak v. *Reiher*, 115 U. S. 100 (29:351).

In the construction of patents, the specific mention of limitations in one claim implies the absence of such limitations in others, where they are not mentioned.

Bogart v. *Hinds*, 26 Fed. Rep. 150; *Burden* v. *Corning*, 2 Fish. Pat. Cas. 477; *Lake Shore & M. S. R. Co.* v. *National Car Brake Shoe Co.* 110 U. S. 229 (28:129).

The acceptance by the Commissioner of Patents of the surrender of the original patent, and the grant by him of a reissue, is *prima facie* evidence of the existence of the statutory prerequisites to wit: (1) That the original patent was "inoperative" or "invalid," and (2) that the defects were due to inadvertence, accident or mistake.

Clark v. *Wooster*, 119 U. S. 322, 326 (30:392, 393); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20:33); *Goodyear Dental Vulcanite Co.* v. *Smith*, 1 Ban. & Ard. 205.

The presumption of the existence of such statutory prerequisites is a conclusive presumption, unless it shall clearly appear on the face of the papers that there could have been no inadvertence, accident or mistake.

Seymour v. *Osborne*, *supra*; *Milligan & H. Glue Co.* v. *Upton*, 97 U. S. 3 (24:985); *Union Paper Collar Co.* v. *Van Dusen*, 90 U. S. 23 Wall. 530 (23:128); *Graham* v. *Mason*, 4 Cliff. 88; *Mahn* v. *Harwood*, 112 U. S. 362 (28:668).

The following are instances in which patents have been sustained:

Wooster v. *Blake*, 8 Fed. Rep. 432; *Webster Loom Co.* v. *Higgins*, 105 U. S. 591 (26:1181); *Miller* v. *Pickering*, 16 Fed. Rep. 540; *Shuter* v. *Davis*, Id. 564; *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 (23:952); *Hobbs* v. *King*, 8 Fed. Rep. 91; *Rogers* v. *Sargent*, 7 Blatchf. 507; *Furbush* v. *Cook*, 2 Fish. Pat. Cas. 668; *Eames* v. *Cook*, Id. 146; *Waterbury Brass Co.* v. *New York & B. Brass Co.* 3 Fish. Pat. Cas. 48; *Parker* v. *Stiles*, 5 McLean, 44.

Suggestions from another, in order that they may be sufficient to defeat a patent subsequently issued, must embrace the plan of the improvement, and must enable an ordinary mechanic to construct and put the improvement in successful operation.

Agawam Woolen Co. v. *Jordan*, 74 U. S. 7 Wall. 583 (19:177); *Putnam* v. *Hickey*, 5 Fish. Pat. Cas. 334; *Matthews* v. *Skates*, 1 Fish. Pat. Cas. 602; *Alden* v. *Dewey*, 1 Story, 336; *Thomas* v. *Weeks*, 2 Paine, 92; *Dixon* v. *Moyer*, 4 Wash. 68; *National Feather Duster Co.* v. *Hibbard*, 21 Off. Gaz. 685.

Although the idea of the invention and hints concerning it came to a patentee from others, still if he was the first who gave to that idea a useful and practical form, his rights are not to be defeated.

Teese v. *Phelps*, 1 McAll. 48; *Bell* v. *Daniels*, 1 Fish. Pat. Cas. 372; *Spaulding* v. *Tucker*, Deady, 649; *McMillin* v. *Barclay*, 5 Fish. Pat. Cas. 189; *Pitts* v. *Hall*, 2 Blatchf. 229; *Pitts* v. *Edmonds*, 2 Fish. Pat. Cas. 52.

The government cannot, after the patent has issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him.

U. S. v. *Burns*, 79 U. S. 12 Wall. 246 (20: 888); *Cammeyer* v. *Newton*, 94 U. S. 225 (24:72); *Campbell* v. *James*, 17 Blatchf. 43; *Forehand* v. *Porter*, 15 Fed. Rep. 256.

A bill in equity will lie against an officer of the United States for his unauthorized use of a patent, solely in the service of the government.

U. S. v. *Lee*, 106 U. S. 196 (27:171); *Louisiana* v. *Jumel*, 107 U. S. 726 (27:453); *Tracy* v. *Swartwout*, 35 U. S. 10 Pet. 94 (9:359); *Poindexter* v. *Greenhow*, 114 U. S. 287 (29:191); *Hagood* v. *Southern*, 117 U. S. 70 (29:811); *Adsit* v. *Brady*, 4 Hill, 632; *Keenan* v. *Southworth*, 110 Mass. 474.

To construe the instrument it is proper to ascertain the intention of the parties, by considering the character in which the party undertakes, the nature and subject of the undertaking, and the terms employed in the instrument.

Auburn City Bank v. *Leonard*, 40 Barb. 119; *Stanton* v. *Camp*, 4 Barb. 274; *Brockway* v. *Allen*, 17 Wend. 40; *Newell* v. *West*, 13 Blatchf. 114; *Townsend* v. *Corning*, 23 Wend. 435; *Pinckney* v. *Hagadorn*, 1 Duer, 89.

When a reissue counts upon a prior assignment of the original patent to the complainant, this makes, with the act of the commissioner granting the reissue, a *prima facie* case that it was valid to reissue to the complainant.

Middletown Tool Co. v. *Judd*, 3 Fish. Pat. Cas. 141; *Cook* v. *Ernest*, 2 Off. Gaz. 89-93; *Perry* v. *Parker*, 1 Wood. & M. 280; *Washburn & M. Mfg. Co.* v. *Haish*, 4 Fed. Rep. 900.

Mr. **G. A. Jenks**, *Solicitor-Gen.*, for appellee:

The patent is not evidence of the supposed invention having been made at any time earlier than its own date or the date of the application.

Wing v. *Richardson*, 2 Cliff. 450.

The reissue must be for the same invention.

Giant Powder Co. v. *California Powder Works*, 98 U. S. 127 (25:81); *Heald* v. *Rice*, 104 U. S. 753 (26:916).

If by the record it appears that there could not have been any inadvertence, accident or mistake, in respect of the matters sought to be covered by a reissue, then, either the reissue must be construed so as to include such matters, or must be held to be invalid.

James v. *Campbell*, 104 U. S. 371 (26:791); *Leggett* v. *Avery*, 101 U. S. 259 (25:866); *Hopkins & D. Mfg. Co.* v. *Corbin*, 103 U. S. 789 (26: 611).

The reissue must be held void by reason of the laches of the patentee.

Miller v. *Bridgeport Brass Co.* 104 U. S. 350 (26:783).

No action can be maintained against the defendant in this case.

James v. *Campbell*, 104 U. S. 359 (26:787); *Carr* v. *U. S.* 98 U. S. 433 (25:209); *Cary* v. *Curtis*, 44 U. S. 3 How. 246 (11:581).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought by the Yale Lock Manufacturing Company, a Connecticut corporation, against Thomas L. James, to recover for the alleged infringement of reissued letters patent No. 8783, granted to the plaintiff, as assignee of S. N. Brooks, administrator of L. Yale, Jr., deceased, July 1, 1879, for an "improvement in postoffice boxes," on an application for a reissue filed May 23, 1879 (the original patent No. 119212, having been granted to Silas N. Brooks, administrator of Yale, September 19, 1871, on an application filed September 30, 1868; and having been reissued to said Brooks, as administrator, July 9, 1872, as No. 4963 on an application for reissue filed May 7, 1872; and having been again reissued to said Brooks, as administrator, April 24, 1877, as No. 7625, on an application for reissue filed April 19, 1875). The circuit court dismissed the bill, and the plaintiff has appealed from its decree.

Among other defenses, the answer sets up that each of the three reissues was not for the same invention as the original patent, but contained material new matter, and was therefore invalid.

Reissue No. 8783 was the subject of a suit in

equity, brought in the Circuit Court of the United States for the District of Connecticut, by the present plaintiff, against the Scovill Manufacturing Company, in which *Judge* Shipman, in June, 1880, gave a decree for the plaintiff as to the first and second claims of the patent. 18 Blatchf. 248.

The original patent contained the following description of the invention: "This invention relates to an improvement in *the construction of* the fronts of postoffice boxes, and consists in making said fronts, including the doors and box frames, of metal, *and in securing the frames to the wooden pigeon holes by rivets connecting the frames with each other at top, bottom, and sides.* The body of *these* boxes is to be made of wood, in the usual manner, *namely*, a series of pigeon holes; but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes, and is connected with the other frames above, below, and on each side of it in such manner that the frames make a continuous frontage, no part of which can be removed (from the outside) without pulling down other parts *and breaking the wood work, so that a surreptitious removal of the front of any box, in order to get possession of its contents, is practically impossible.* Each frame, made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside of the wood work. The sides of the frame *b b* enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals; and each frame has attached to it one leaf of two or more hinges, *c c*. The door *is of iron*, solid *at top*, where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. I prefer to locate rods *f f* behind the plate, to prevent the introduction of a hand if the glass be broken, *and so to form* the door that, when shut, it enters within the frame (*see g g*), so that it cannot be lifted from its hinges. When the frames are all in place, each frame is riveted through the wood work to its four neighbors (see *h h*, Fig. 2), and *thus* a continuous *iron* frontage *is formed. Each* door has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together and forming, in the hands of the postmaster, a perfect safeguard against all entrance to the box by means of the key, as is more particularly set forth in *my application for a patent therefor, made equal date with this.*"

That patent had two claims, as follows: "1. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames, and the wood work entering between the said frames, the combination being substantially as described. 2. *The above, in combination with the flanges, making part of the frames and protecting and inclosing the exterior of the wood work, substantially as set forth.*"

The first reissue, No. 4968, contained the following description of the invention: "This invention relates to an improvement in the fronts of postoffice boxes, and consists in making said fronts, including the doors and box frames, of metal, *said box frames being constructed so as to overlap and cover, in whole or in part, the front edges of the wooden pigeon holes to which they are affixed.* The body of *the* boxes is to be made of wood in the usual manner, *viz.*, a series of pigeon holes; but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes, and is connected with the other frames above, below, and on each side of it in such manner that the frames *will* make a continuous frontage, no part of which can be removed from the outside without pulling down other parts. Each frame, made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside *or edges* of the wood work. The sides of the frame *b b* enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals; and each frame has attached to it one leaf of two or more hinges, *c c*. The door *may be of any desirable metal*, solid where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. I prefer to locate rods *f f* behind the plate, to prevent the introduction of a hand if the glass be broken. The door *is so constructed* that, when shut, it enters within the frame, so that it cannot be lifted from its hinges. When the frames are all in place, each frame is riveted through the woodwork to its four neighbors (see *h h*, Fig. 2), and *in this way forms* a continuous *metal* frontage. *The* door *for each frame* has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together and forming, in the hands of the postmaster a perfect safeguard against all entrance to the box by means of the key, as is more particularly set forth in *letters patent granted to me on the 24th day of October, 1871, and numbered 120177.*"

That reissue contained two claims, as follows: "1. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames, and the wood work entering between the said frames, the combination being substantially as described. 2. *The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and inclose wholly or in part the front edges of said pigeon holes.*"

In order to a comparison of the specification and claims of the first reissue with the specification and claims of the original patent, the parts of each which are not found in the other are above put in italics.

The specification and claims of reissue No. 8783 are as follows: "This invention consists in an improvement in the construction of postoffice boxes; and its chief feature is the combination of a tier of pigeon holes made of wood with a continuous frontage of metal, such frontage consisting of doors and their frames, which latter cover the ends of the boards which form the pigeon holes. A series of wooden pigeon holes, open at the rear, and covered at the front, or on the outside, by a permanent glass front, is very old; and such a series was used for postoffice boxes, and in hotels as a receptacle for keys, cards, letters, etc. There has also been in use a series of wooden pigeon holes, each provided at one end with a door, as described in the patent granted

to Jacob Beidler, May 28, 1866; but in this patent the door is described as hinged to the wood, and the construction is consequently insecure, as an ordinary pocket knife or small chisel will, even in inexperienced hands, suffice to cut away the wood or pry off the door, so that the boxes may be entered. Pigeon holes made of iron or other metal are difficult to construct and very costly; but such pigeon holes, each provided with an ordinary metal door, would be sufficiently secure. Such a degree of security at a comparatively low cost is attained by covering the front of a series of wooden pigeon holes with a continuous metallic frontage, that is, a frontage which presents a continuous surface of metal, or, in other words, a surface which covers the ends of the wooden pigeon holes in such manner that those portions of the wood in which the metallic frames are attached cannot be attacked when the doors making part of the frontage are closed. In constructing Yale's invention the body of the boxes or the series of pigeon holes is to be made of wood in any usual manner, and the fronts thereof, viz., the doors and their frames are to be made of iron or other suitable metal. Each door frame is of such size that it aids in covering the ends of the wooden partitions that form the pigeon holes to which it is applied, and these frames (see Fig. 1) are of such size and shape, that, where a series of them are combined with a series of pigeon holes, they cover the whole of the ends of the wood. Each door frame is a plate of metal, *a a*, which, when in place, overlaps a part of the ends of the wood work surrounding the pigeon hole, the outside of the frame inclosing a greater area than the orifice of the pigeon hole, and each frame has an ear, *b b*, which enters the pigeon hole; but this ear may be either continuous or notched out at intervals. The door is of iron or other metal, solid at top and having an opening, *e*, below, in which a plate of glass is secured, and is hinged to the frame as at *c c*. It is preferable to locate rods *f f* behind the plate, so as to prevent the introduction of a hand if the glass be broken, and so to form and hinge the door that, when shut, it enters within the frame, so that it cannot be lifted from its hinges when shut. When the frames are all in place, each frame is riveted or bolted to the wood work, to fasten it thereto, and is also riveted or bolted to its four neighbors, to secure the frames to each other. (See *h h*, Fig. 2) Thus each frame is secured to the wood work, so that it cannot be removed till the rivet or the wood work is cut away or broken. When all the frames are in place, a continuous metallic frontage protecting the wood work is presented upon the outside of the series of boxes, that is, the side where the public can approach the boxes. Each door has a lock attached to it, the bolt of which is actuated through the intervention of an arm, *k*, in the manner and for the purposes set forth in a patent granted for the invention of Linus Yale, Jr., on the 24th day of October, 1871, No. 120177. An iron door in an iron frame is not claimed as of Yale's invention, as such doors have been used in safe vaults and for furnaces.

"What is claimed as the invention of said Linus Yale, Jr., deceased, is, 1. The combination, substantially as specified, of a series of metallic door frames and doors with a series of wooden pigeon holes, whereby a series of postoffice boxes with a continuous metallic frontage is formed. 2. The combination, substantially as described, of a series of wooden pigeon holes with a series of metallic door frames and doors, and with rivets or bolts which attach the frames to the wood work, whereby a continuous metallic frontage secured to the woodwork of pigeon holes is obtained. 3. The combination, substantially as described, of a series of wooden pigeon holes with a series of metallic door frames and doors, and with rivets or bolts which attach the frames both to the wood work and to each other, the combination being substantially such as described. 4. The combination of a metallic door with a glass panel and with a frame to which the door is hinged, said frame being so constructed as to cover a part of the ends of the wooden partitions forming pigeon holes and being applied thereto, the combination being substantially as specified. 5. The combination of a postoffice box or pigeon hole, open at the rear, with a metallic frame and door to protect the front end of it."

Claims 4 and 5 were disclaimed by the plaintiff November 29, 1880.

Claim 1 of the first reissue was the same as claim one of the original patent, while claim 2 of the first reissue was in these words: "2. The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and inclose wholly or in part the front edges of said pigeon holes."

In the opinion of the circuit court in the present case (22 Blatchf. 294), *Judge* Shipman says: "The defendant, as postmaster in the City of New York, and not otherwise, used in the postoffice, provided and equipped for him by the United States Government, wooden postoffice boxes, with metallic fronts and doors and open at the rear. They were manufactured by the Johnson Rotary Lock Company. The doors and door frames made a continuous metallic frontage. The door frames were secured to each other and to the wood work as follows: At about the middle of each vertical edge of each door frame there was a triangular hole, which, with the corresponding hole in the adjoining door frame, made a rectangular hole, through which the metal fastening bolt, completely filling such hole, was passed, the heads of such bolts overlapping the contiguous edges of adjoining metallic fronts, and the bolt itself passing through the wooden partition between the adjoining pigeon holes, and being secured at the back thereof, within the postoffice room, by a nut screwed upon the end of the bolt. There were other boxes constructed substantially as above described, excepting that the metal front of each pigeon hole was fastened to the wood work by means of flanges and screws, but the screws which attached the frames to the wood work did not attach the frames to each other. Neither series of boxes would have infringed either claim of the original patent. Each series infringes the first and second claims of the present reissue, unless these claims are to receive a construction which shall compel the metallic frontage to be made continuous by rivets, bolts, or fastenings which

shall attach the frames both to the wood work and to each adjoining frame. The plaintiff insists that these claims should not receive such a construction, because it has been found that the invention of the specification of the reissue, although a broader one than was described in the original patent, is the invention which the history of the art and the patent show should have been described, and because the first reissue was promptly applied for, and, as issued, included in its second claim, in the view of the plaintiff, the same invention which is described in the 1st and 2d claims of the reissue. The defendant says, among other things, that, since the cases of *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 [26:783], and *James* v. *Campbell*, Id. 356 [26:786], it has been settled by the supreme court that the Commissioner of Patents, in allowing the 1st and 2d claims, exceeded his jurisdiction, because the invention which was first applied for and was 'complete in itself,' was clearly, specifically, and fully described in the original specification and in the claim, and an expanded claim would necessarily include an invention which was not sought to be described in the original patent; and, furthermore, that there could have been no inadvertence or mistake, because the original patent and the accompanying documents show that the patentee 'did not intend it' (the patent) 'to embrace any such broad invention' as was described in the reissue. The defendant also says that the patentee, in his application for the the first reissue, ineffectually endeavored to alter the description of the invention, so as to omit the fastening of the door frames to each other as a necessary integral part of the invention, and that the second claim of the first reissue cannot fairly be construed to permit such omission, and, therefore, that the patentee is estopped from insisting upon a broad construction of the 1st and 2d claims of the present reissue, and that these claims are objectionable on account of the laches of the patentee. The 'file wrapper and contents' of the first reissue were not a part of the record in the *Scovill Case.*"

In order to show the changes made in the specification and claims of the first reissue, as they passed through the Patent Office, the specification and claims of that reissue as granted, and the specification and claims of the same as applied for, are here placed in parallel columns, the parts of the latter which are not contained in the former being in italics and brackets, and being numbered severally from 1 to 8:

As Applied For.	*As Granted.*
"This invention relates to an improvement in the fronts of postoffice boxes, and consists in making said fronts, including the doors and box frames, of metal, said box frames being constructed so as to overlap and cover, in whole or in part, the front edges of the wooden pigeon holes to which they are affixed [1 *and in securing said frames to said pigeon holes by rivets or screws.*] The body of the boxes is to be made of wood in the usual manner, viz., a series of pigeon holes, but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes	"This invention relates to an improvement in the fronts of postoffice boxes, and consists in making said fronts, including the doors and box frames, of metal, said box frames being constructed so as to overlap and cover, in whole or in part, the front edges of the wooden pigeon holes to which they are affixed. The body of the boxes is to be made of wood in the usual manner, viz., a series of pigeon holes, but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes is and [2 *may be*] connected A with the other frames above, below, and on each side of it in such manner that the frames will make a continuous frontage, no part of which can be removed from the outside without pulling down other parts, [3 *or the several frames may be secured or otherwise fastened directly to the wooden pigeon holes, each one independent of the other, if desired.*] Each frame made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside or edges of the wood work. The sides of the frame *b b* enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals, and each frame has attached to it one leaf of two or more hinges, *c c*. The door may be of any desirable metal, solid where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. [4 *Cast with the door and over the opening e for glass may be a network or ornamental open work, admitting light, and at the same time preventing the introduction of a hand if the glass be broken, or rods f f may be located behind the plate for the same purpose.*] The door is so constructed that, when shut, it enters within the frame [5 *see g g*], so that it cannot be lifted from its hinges. When the frames are all in place, each is frame [6 *may be*] riveted A through the woodwork to its four neighbors (see *h h*, Fig. 2), and in this way form a continuous metal frontage [7 *or each separate frame may be screwed or otherwise fastened to the wood work independent of its neighboring frames.*] The door for each frame has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together, and forming, in the hands of the postmaster, a perfect safeguard against all entrance to the box by means of the key, as is more particularly set forth in letters patent granted to me on the 24th day of October, 1871, and numbered 120,177.
	"What I claim as the invention of the said Linus Yale, Jr., deceased,

is, First. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames and the wood work entering between the said frames, the combination being substantially as described. Second. The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and enclose, wholly or in part, the front edges of said pigeon holes, [3 Third. *The combination of several metallic box frames with each other and with pigeon holes, said box frames being secured to said pigeon holes independently of each other, by means of screws or other similar fastening, as described.*]"

is, 1. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames and the wood work entering between the said frames, the combination being substantially as described. 2. The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and enclose, wholly or in part, the front edges of said pigeon holes."

On the 8th of May, 1872, the Patent Office Examiner called the attention of the applicant to the fact that the following matters in the new specification were not warranted by the original patent, namely: the words "or screws," in the part marked "one," the words "may be," in the parts marked "2" and "6," the parts marked "3," "4," and "7," and the third claim, being the part marked "8."

On the 9th of May, 1872, the applicant appealed to the Commissioner of Patents in person, because the examiner had refused to examine the case on its merits, in view of the introduction of such new matter; but, on the next day, the applicant virtually withdrew his appeal, by amending his application as follows: He erased part "1;" he erased the words "may be," in parts "2" and "6," and substituted in each case the word "is;" he erased parts "3" and "4" and substituted for the latter the words, "I prefer to locate rods *f f* behind the plate to prevent the introduction of a hand if the glass be broken." He also erased part "7," and claim 3, part "8," and submitted the case for further action.

The application was then reconsidered, and twice rejected, and from the second rejection the applicant appealed to the examiners in chief who reversed the decision of the examiner, and the reissue was granted, July 9, 1872.

In view of these facts, *Judge* Shipman, in his decision in the present case said: "It is unquestionable that the patentee, when he made his original application, intended to say that his invention did not consist simply in making, by his combination of metallic doors, door frames, and wooden boxes a continuous metallic frontage, but that it also consisted in the way in which the frontage was made continuous; viz. by the connection of the adjoining frames with each other. His definite and exact specification shows that he supposed that his patentable invention was thus limited. He described, with precision and clearness, that his metallic frontage was to be so constructed that the frames were to be fastened to each other at top, bottom, and sides, and not merely to the wood work. 'A specific invention, complete in itself,' was described 'fully and clearly, without ambiguity or obscurity.' Under the definitions which are given in the decisions which have been referred to, and in *Swaine T. & Mfg. Co.* v. *Ladd*, 102 U. S. 408 [26: 184] of the inadvertence, accident, or mistake which permits a reissue, when a patent is said to be inoperative on account of a defect or insufficiency in the specification, which arose through such inadvertence or mistake, and also of the nature of the defectiveness or insufficiency which is meant by the statute, there was no mistake, although the patentee might have fallen into an error of judgment, or into an erroneous conclusion of fact; and, furthermore, the original patent, according to the definitions contained in the recent, and, perhaps, in the earlier cases, was not defective nor insufficient, either in its descriptive portion or in its claims. The second claim of the first reissue, construed in the light of the contemporaneous facts which are shown in the 'file wrapper and contents,' cannot be fairly construed to mean a metallic frontage, irrespective of the fastening of the frames to each other through the wood work. Were this claim to be construed without study of the history of the application as it made its way through the Patent Office, and of the amendments which it was compelled to undergo, it would probably receive the construction which naturally belongs to the first claim of the present reissue. But the patentee abandoned, under pressure from the Patent Office, the clauses in the application which made the fastening of the frames to each other to be optional, and abandoned also a proposed third claim, which described the box frames as secured to the pigeon holes 'independently of each other, by means of screws or other similar fastening.' In view of the fact that the Patent Office excluded from the descriptive part of the specification suggestions of any other method of fastening than that by which the frames were to be fastened to each other, it would be singular if the intent of the office was to include in the second claim such other method of construction. If this claim has properly, and the applicant knew that it was intended to have, a narrow construction—and of this knowledge I think there can be little doubt—the plaintiff would not insist that the 1st and 2d claims of the present reissue ought, in view of the decision in *Miller* v. *Bridgeport Brass Co.*, *supra*, to be so construed as to be any broader than the 3d claim, which requires the combination of door frames, doors, and pigeon holes to be by means of rivets or bolts which attach the frames both to the wood work and to each other."

It was held that there was no infringement; and, on that ground, the bill was dismissed.

We concur in these views of the circuit court, and in the result which it reached. In view of the numerous recent decisions of this court on the subject of reissued patents, it would serve no good purpose to expand or amplify the views so well expressed by the judge at circuit. They are supported by the decisions in *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 [26:788]; *Mahn* v. *Harwood*, 112 U. S. 354 [28:665]; *Parker & W. Co.* v. *Yale Clock Co.* 123 U. S. 87 [*ante*, 100]; *Matthews* v. *Iron Clad Mfg. Co.* 123 U. S. 347 [*ante*, 477].

Our conclusion makes it unnecessary to consider the defense raised in the answer, and urged in argument, that the postoffice boxes

used by the defendant were used by him as Postmaster of the United States at the City of New York; that the boxes were the property of the United States and were rented by it to sundry persons; that the rent was a part of the postal revenue of the United States and was not a source of personal emolument to the defendant; that it was not within the power of the defendant to remove or alter the boxes; and that the use of such boxes at the postoffice, while the defendant was postmaster, was not an infringement of the patent by him, and did not make him liable to this suit.

Decree affirmed.

JOHN F. HARTRANFT, Collector of Customs for the DISTRICT OF PHILADELPHIA, *Plff. in Err.*,

v.

JOSEPH M. OLIVER ET AL., Trading as JOSEPH M. OLIVER & SON.

(See S. C. Reporter's ed. 525–530.)

Duty Act of March 3, 1883—refunding excess of duties—goods in government custody.

1. Under the Act of March 3, 1883, goods, though imported before the Act took effect, yet, if kept after that period in bonded warehouses or a public store, are subject only to the duties thereafter leviable when they are entered for consumption.

2. If, previous to such entry, duties have been paid on goods imported before the Act took effect, which are kept in a public store or bonded warehouse until after the Act took effect, the importer is entitled to a refund of the difference between the amount paid and the amount which would be leviable if they were imported after the Act took effect.

3. Goods on board of a ship, in charge of a custom house officer, preliminary to their removal to a public store or a bonded warehouse, during the time necessary for that purpose, are in the custody of the government and are, within the intent of the Act, subject only to such duties as are leviable when the goods are freed from such custody.

[No. 190.]

Argued March 22, 1888. Decided April 9, 1888.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment for plaintiffs in an action to recover an excess of duties exacted and paid. *Affirmed.*

Statement by *Mr. Justice* **Field:**

In 1883 the plaintiffs were merchants in the City of Philadelphia, and during that year they imported from Leghorn, Italy, by the bark Pellegra Madre, 155 cases of salad olive oil, and ten cases of lamp olive oil. The bark arrived at the Port of Philadelphia on Saturday, the 30th of June, 1883, and was entered at the custom house of that port between the hours of one and two in the afternoon. It was not practicable on that day after that time to remove the cases from the vessel into any public store or bonded warehouse; and the next day, July 1, 1883, was Sunday. On the 7th of July the cases were entered in bond at the custom house, and on the same day the plaintiffs made a withdrawal entry for the goods, and offered to pay the defendant, who was at the time Collector of the port, duty thereon at the rate of 25 per cent *ad valorem*, as provided by section six of the Act of Congress of March 3, 1883, 22 Stat. at L. 494; but the defendant refused to permit the withdrawal entry, or to accept the duty at that rate, and exacted duty on the 155 cases of salad olive oil, gauging $645\frac{53}{100}$ gallons, at the rate of one dollar per gallon, and on the ten cases of lamp olive oil, gauging one hundred gallons, at the rate of 25 cents per gallon, the whole making the sum of $670.63, which was paid by the plaintiffs within ten days after liquidation of the entry, under protest, they claiming that the oil was only subject to duty at the rate of 25 per cent *ad valorem*. The difference between the amount of duties exacted and paid, and the amount which the plaintiffs claimed were leviable upon the goods was four hundred and thirty-five dollars and sixty-two cents ($435.62). From the decision of the Collector the plaintiffs appealed to the Secretary of the Treasury, who approved the decision; and thereupon they brought this action in the Court of Common Pleas for the County of Philadelphia in Pennsylvania to recover the alleged excess of duties exacted. On petition of the Collector the action was removed to the Circuit Court of the United States, where issue was joined, and the action tried, resulting in a special verdict, finding the several facts stated above; and also that from the time of the arrival and entry of the bark in the Port of Philadelphia, June 30, 1883, until after payment of the duty exacted, July 7, the "vessel remained with unbroken hatches, and with a custom house inspector in charge of the same."

Upon the special verdict the court rendered judgment for the plaintiffs for the amount claimed, with interest; and to review this judgment the case is brought here on writ of error.

In his general circular to collectors of customs of May 19, 1883, the Secretary of the Treasury, in giving construction to section 10 of the Act of March 3, 1883, said "that all goods imported before said Act takes effect, and which are entered in bond on or before that date, and for which permits to land, designating the warehouse, have been issued, and which have not then been delivered on payment of duties, are to be regarded as subject to duty under said Act. This rule will prevail, whether the goods are actually within the walls of a bonded warehouse on that day, or on the dock, or on shipboard in port, or undergoing transportation in bond, either after appraisal or under the Immediate Transportation Act."

Mr. **G. A. Jenks,** *Solicitor-Gen.*, for plaintiff in error:

The duties did not accrue until the vessel arrived at the port of entry.

U. S. v. *Vowell*, 9 U. S. 5 Cranch, 372 (3: 129); *Arnold* v. *U. S.* 13 U. S. 9 Cranch, 120 (3: 676); *Meredith* v. *U. S.* 38 U. S. 13 Pet. 494 (10: 262); *U. S.* v. *Lyman*, 1 Mason, 482; *Prince* v. *U. S.* 2 Gall. 204; *Perots* v. *U. S.* Pet. C. C. 256; *U. S.* v. *Cobb*, 11 Fed Rep. 76; *U. S.* v. *Benzon*, 2 Cliff. 512; *U. S.* v. *Macdonald*, 72 U. S. 5 Wall. 658 (18: 516).

Mr. **Edward L. Perkins,** for defendants in error:

Duties accrue on the arrival of the vessel at the port of entry; but their amount, under the Act, is to be ascertained when entered for consumption.

U. S. v. *Vowell*, 9 U. S. 5 Cranch, 368 (3: 128); *Arnold* v. *U. S.* 13 U. S. 9 Cranch, 104 (3: 671); *Harris* v. *Dennie*, 28 U. S. 3 Pet. 305 (7: 688).

A thing within the intention is within the statute, though not within the letter; and a thing within the letter is not within the statute, unless within the intention.

People v. *Utica Ins. Co.* 15 Johns. 358; *Oates* v. *First Nat. Bank*, 100 U. S. 244 (25: 582); *U. S.* v. *Kirby*, 74 U. S. 7 Wall. 482 (19: 278).

Statutes levying duties are to be construed liberally in favor of the importer and against the government.

U. S. v. *Wigglesworth*, 2 Story, 369; *U. S. Hodson*, 77 U. S. 10 Wall. 406 (19: 939); *Cliquot's Champagne*, 70 U. S. 3 Wall. 145 (18: 121); *Hartranft* v. *Wiegmann*, 121 U. S. 616 (30: 1015); *McAndrew* v. *Robertson*, 29 Fed. Rep. 246.

Private bonded warehouses are public storehouses within the meaning of the Acts of Congress.

U. S. v. *Macdonald*, 72 U. S. 5 Wall. 647 (18: 512).

The government has recognized the importing vessel as a warehouse.

Treas. Regulations, 1884, arts. 788, 753, pp. 331, 309.

Mr. Justice **Field** delivered the opinion of the court:

The duties exacted by the Collector, and paid by the importers, who were plaintiffs below, were imposed by a clause in section 2504, title 33 of the Revised Statutes, p. 478. As the vessel, in which they were brought, arrived at the Port of Philadelphia, and was entered at the custom house on the 30th of June, 1883, they would be deemed imported on that day, so as to be subject to the duties thus prescribed, were it not for provisions in the Act of March 3, 1883, and the custody taken of the vessel and goods by an officer of the custom house on the day of its arrival in port, and kept by him until after the first of July following. That Act declared that on and after the first day of July, 1883, certain designated sections should be a substitute for title 33 of the Revised Statutes. 22 Stat. at L. 489. One of these sections provides that the duties on all preparations known as "expressed oils," not specifically enumerated or provided for in the Act, shall be 25 per cent *ad valorem*. Olive oils, both salad and lamp, are expressed oils within the meaning of this section, and are not specifically enumerated or provided for elsewhere in the Act. Section 10 of the Act declares "that all imported goods, wares, and merchandise, which may be in the public stores or bonded warehouses on the day and year when this Act shall go into effect, except as otherwise provided in this Act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this Act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference, between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date." 22 Stat. at L. 525.

The plain meaning of this section is that, though goods are imported before the Act takes effect, yet if they are kept until after that period in a public store or bonded warehouse, that is, in the custody and under the control of officers of the customs, they shall be subjected only to the duties thereafter leviable when they are entered for consumption. If, previously to such entry, duties have been paid on goods imported before the Act took effect, which are afterwards kept in a public store or bonded warehouse, that is, in the custody and control of officers of the government, the importer is entitled to a refund of the difference between the amount paid and the amount which would be leviable if they were imported after the Act took effect. In other words, goods imported before the Act took effect, if kept in the custody and control of the government, are to be charged with duties according to the law in force when they are entered for consumption; that is, when passed over to the control of the importer or owner. The place in which the goods are thus kept is not the essential fact, but the custody of the government, and the consequent exclusion of control over them by the owner, which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse; and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom house inspector, they are in the same condition, and cannot be removed without a like permit. By statute, collectors are required to put one or more inspectors on board of every vessel immediately on her coming within a collection district; and no merchandise can be unloaded or removed from the vessel without a permit in writing from the collector. Rev. Stat. §§ 2875, 2876.

The Act of Congress of March 28, 1854, which is now embraced in section 2971 of the Revised Statutes, in providing for the deposit of goods in public stores and bonded warehouses, declares that "any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the government;" and in the construction of this clause the Treasury Department has decided that the period limited for their remain-

ing in a public store or a bonded warehouse includes the time on shipboard, after the arrival of the ship in port. Treasury Regulations, 1857, art. 488.

We are, therefore, of opinion that, within the spirit and intent of the 10th section of the Act of March 3, 1883, the goods were not chargeable with duties, whilst on board the bark, in custody of an officer of the customs, at any greater rate than they would have been chargeable if in custody of such officer in a public store or bonded warehouse of the government; and that therefore duties were only leviable on the goods by the Act which went into effect on the first of July, 1883. The intent of the Legislature is to be followed, even if not strictly within the letter of the statute. It follows that the construction placed upon the section by the Secretary of the Treasury in his circular of May 19, 1883, to collectors of customs, is correct, so far as it recognizes as subject to duties under it goods imported before the Act took effect, whether "actually within the walls of a bonded warehouse on that day, or on the dock, or on shipboard in port, or undergoing transportation in bond, either after appraisal or under the Immediate Transportation Act;" but is incorrect so far as it limits the application of the rule to goods imported before the Act took effect, "which are entered in bond on or before that date, and for which permits to land, designating the warehouse, have been issued, and which have not then been delivered on payment of duties." If goods thus imported can be brought within the provisions of the 10th section in any case, when not actually in a public store or bonded warehouse, they should be deemed within those provisions when, by reason of the custody of officers of the customs, it is impracticable to remove them from the vessel, whether they are at the time entered in bond or not.

Judgment affirmed.

BENJAMIN F. BOWERMAN ET AL., *Piffs. in Err.*,
v.
WILLIAM C. ROGERS ET AL., Assignees of BENJAMIN F. BURGESS and WALTER BURGESS.

(See S. C. Reporter's ed. 585–590.)

Liability of agents for not bringing action to recover back illegal duties paid.

Upon the facts of the case, *held*, that it was the duty of the defendants, as agents of the plaintiffs, to have brought a suit against the collector to recover back the excess of duties paid on importation of goods for the plaintiffs, the defendants having assumed such duty and having been relied upon by the plaintiffs to perform it; and also *held* that the defendants are liable to the plaintiffs, for such excess, by reason of having omitted to bring such suit against the collector until the time required by statute for such suit had elapsed.

[No. 187.]

Argued Feb. 16, 1888. Decided March 19, 1888.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of plaintiffs, for a failure of defendants to sue for excess of duties within the time required by statute. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edwin B. Smith,** for plaintiffs in error:

Implied promises, or promises in law, exist only when there is no express promise between the parties.

Hawkins v. *U. S.* 96 U. S. 697 (24:610); *Cutter* v. *Powell*, 2 Smith, Lead. Cas. 17; *Whiting* v. *Sullivan*, 7 Mass. 107; *Galloway* v. *Holmes*, 1 Doug. (Mich.) 330; *Weston* v. *Davis*, 24 Me. 375; *Britton* v. *Turner*, 6 N. H. 491.

Here was a declaration which excludes any implied promise.

Ladd v. *Franklin*, 37 Conn. 62; *Roberts* v. *Barker*, 1 Cromp. & M. 808.

An executory contract is one in which a party binds himself to do, or not to do, a particular thing.

Marshall, *Ch. J.*, in *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 136 (3:177).

There was no acceptance.

Taylor v. *Rennie*, 35 Barb. 276; *Myers* v. *Smith*, 48 Barb. 614; *Emmott* v. *Biddel*, 2 Foster & F. 142.

To make a valid contract it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must communicate that fact to each other.

Frith v. *Lawrence*, 1 Paige, 442; *Minneapolis & St. L. R. Co.* v. *Columbus Rolling Mill*, 119 U. S. 151 (30:377); *Brown* v. *N. Y. Cent. R. R. Co.* 44 N. Y. 79; *Nundy* v. *Matthews*, 84 Hun, 78; *Topping* v. *Swords*, 1 E. D. Smith, 610; *Baxter* v. *Bishop*, 65 Iowa, 582; *Pew* v. *Gloucester First Nat. Bank*, 130 Mass. 397.

Whatever contract existed between these parties was a New York contract; and New York decisions would indicate the legal rules applicable to the formation, as well as to the performance of the contract.

McIntyre v. *Parks*, 3 Met. 207; *Hazard* v. *New England M. Ins. Co.* 1 Sumn. 224; *S. C.* 33 U. S. 8 Pet. 586 (8:1053); *Vassar* v. *Camp*, 11 N. Y. 441; *Trevor* v. *Wood*, 36 N. Y. 307; *Howard* v. *Daly*, 61 N. Y. 365, 366; *Wayne County Sav. Bank* v. *Low*, 6 Abb. N. C. 90; *Chiles* v. *Nelson*, 7 Dana, 281; *Levy* v. *Cohen*, 4 Ga. 1; *Tayloe* v. *Merchants F. Ins. Co.* 50 U. S. 9 How. 390 (13: 187).

Unless Burgess & Sons, by what was contained in these letters, were bound to permit Bowerman Brothers to commence and conduct this litigation, and to pay them for so doing, then the latter was not bound.

Tuttle v. *Love*, 7 Johns. 470; *Tucker* v. *Woods*, 12 Johns. 190; *Eliason* v. *Henshaw*, 17 U. S. 4 Wheat. 225 (4:556); *Head* v. *Providence Ins. Co.* 6 U. S. 2 Cranch, 127 (2:229); *Essex Turnpike Corp.* v. *Collins*, 8 Mass. 299; *Carr* v. *Duval*, 39 U. S. 14 Pet. 77 (10:361); *First Nat. Bank* v. *Hall*, 101 U. S. 48 (25:824); *Martin* v. *Black*, 21 Ala. 729; *Hutcheson* v. *Blakeman*, 3 Met. (Ky.) 80; *Allen* v. *Roberts*, 2 Bibb, 98; *Emerson* v. *Graff*, 29 Pa. 358; *Slaymaker* v. *Irwin*, 4 Whart. 380; *Beckwith* v. *Cheever*, 21 N. H. 41; *McKinley* v. *Watkins*, 13 Ill. 143; *Maclay* v. *Harvey*, 90 Ill. 525; *Esmay* v. *Gorton*, 18 Ill. 486, 487; *Van Valkenburg* v. *Rogers*, 18 Mich. 180; *Forster* v. *Ulman*, 2 Cent. Rep. 848, 64 Md. 531; *Knight* v. *Cooley*, 34 Iowa, 218; *Greve* v. *Ganger*, 36 Wis. 369.

The mere determination of the mind, unacted upon, can never be an acceptance.

Trevor v. *Wood*, 36 N. Y. 310; *The Palo Alto*, 2 Ware, 357, 358; *Hallock* v. *Commercial Ins. Co.* 26 N. J. L. 280; *Mactier* v. *Frith*, 6 Wend. 103; *Trounstine* v. *Sellers*, 35 Kan. 447.

It was erroneous for the court to assume the existence of a consideration.

Thorne v. *Deas*, 4 Johns. 84, 97; *Burnet* v. *Bisco*, Id. 236; *Smedes* v. *Bank of Utica*, 20 Johns. 379; *Rose* v. *U. S. Tel. Co.* 3 Abb. Pr. N. S. 408; *S. C.* 6 Robt. 307; *Boniface* v. *Relyea*, 5 Abb. Pr. N. S. 267; *S. C.* 6 Robt. 405; *Doupe* v. *Genin*, 1 Sweeny, 32; *Coleman* v. *Eyre*, Id. 483; *People* v. *Shall*, 9 Cow. 778.

The jury should have been permitted to determine what the fact was.

Pendleton v. *Empire Stone Dressing Co.* 19 N. Y. 18; *Smith* v. *Long Island R. R. Co.* 32 Hun, 39; *Powell* v. *Powell*, 71 N. Y. 71; *Hart* v. *Hudson River Bridge Co.* 80 N. Y. 622.

All that passed in relation to the particular subject matter which is the basis of this action was in writing; hence, whether or not it amounted to a legal contract was for the court. Taken by itself, the correspondence does not show a contract, and the motion to dismiss should have been granted.

Etting v. *U. S. Bank*, 24 U. S. 11 Wheat. 59 (6:419); *Barreda* v. *Silsbee*, 62 U. S. 21 How. 168 (16:93); *Iasigi* v. *Brown*, 58 U. S. 17 How. 188, 196 (15:208, 213); *West* v. *Smith*, 101 U. S. 270 (25:812); *Goodlett* v. *Louisville & N. R. R. Co.* 122 U. S. 411 (30:1234).

Mr. **Everett P. Wheeler**, for defendants in error:

An agent is bound to great diligence and care for his principal; not the utmost possible, but all that a reasonable man, under similar circumstances, would take of his own affairs.

1 Pars. Cont. 85.

A factor has a lien upon property in his possession.

Story, Ag. § 376; *Bryce* v. *Brooks*, 26 Wend. 367, 375.

Factors and agents are bound to follow the instructions of their principals strictly.

Brown v. *McGran*, 39 U. S. 14 Pet. 479 (10: 550); *Johnson* v. *N. Y. Cent. R. R. Co.* 33 N. Y. 610; *Wilson* v. *Wilson*, 26 Pa. 393; *Scott* v. *Rogers*, 31 N. Y. 676; *Hays* v. *Stone*, 7 Hill, 128; *Hilton* v. *Vanderbilt*, 82 N. Y. 591.

And when they fail to follow the instructions of their principals they make themselves liable for the whole amount of the loss caused thereby.

Rundle v. *Moore*, 3 Johns. Cas. 36; *Hamilton* v. *Cunningham*, 2 Brock. 350, 366; *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 U. S. 276 (28:722); 1 Pars. Cont. 85.

The question of whether Burgess & Sons relied upon the Bowermans to bring the suits against the government, was a fact material to the issue and was properly admitted.

King v. *Fitch*, 2 Abb. App. Dec. 508, 515, 524.

The rule as to the inadmissibility of parol evidence to contradict or vary a valid written instrument, or to prove the facts of which, as between the parties thereto, the writing is the best evidence, does not apply where one of the parties in the action is a stranger to the instrument.

Sprague v. *Hosmer*, 82 N. Y. 466; *McMaster* v. *Ins. Co. of North America*, 55 N. Y. 222; *Rex* v. *Kingston-upon-Hull*, 7 Barn. & C. 611; *The Lady Franklin*, 75 U. S. 8 Wall. 325 (19:455); *The Thames*, 81 U. S. 14 Wall. 98 (20:804).

The injury to Burgess & Sons, caused by the failure of the Bowermans to comply with their agreement to commence the necessary suits, was of itself a sufficient consideration for the promise.

1 Pars. Cont. 431; *White* v. *Baxter*, 71 N. Y. 254; *Townsley* v. *Sumrall*, 27 U. S. 2 Pet. 170, 182 (7:386, 390).

Mr. Justice **Miller** delivered the opinion of the court:

The writ of error in this case is to a judgment of the Circuit Court of the United States for the Southern District of New York. This judgment was entered upon a verdict rendered by a jury in favor of the plaintiffs, Benjamin F. and Walter Burgess, under the peremptory instructions of the court, for the sum of $6,105.77, against the defendants, Bowerman Brothers.

Burgess & Sons were dealers in sugars and molasses, residing in Boston, and Bowerman Brothers were sugar brokers, residing in New York. Burgess & Sons had a large part of the articles in which they dealt, either for themselves or as agents for others, landed in New York, and entered at the custom house there. In such cases they employed Bowerman Brothers as their agents, and it is not disputed that this agency extended to the entry of these goods at the custom house in New York, as well as to the sale of them afterward. With regard to two shipments of goods so entered there, from two different vessels, a question arose as to the duties assessed upon them by the collector. This controversy proceeded as far as the payment of the duties through Bowerman Brothers, followed by an appeal from the decision of the collector to the Secretary of the Treasury, and a protest against the final action of the department. All this was attended to and faithfully performed in due time by the defendants. They, however, did not bring suit to recover back the duties so paid; and the single question to be decided here is whether it was the duty of Bowerman Brothers, under the circumstances of their employment, to have brought such a suit against the collector for the excess of duties claimed to have been imposed by him on these importations.

The case arises in this way. Suits were brought by other parties who had paid similar duties upon like importations, and recoveries had against the collector upon precisely the same grounds mentioned in the protest of the plaintiffs in this suit, and in a case brought to this court the error of the Treasury Department was established. But the statute allowing recoveries to be had against the collector for excessive duties which have been paid requires the suits to be brought within ninety days after such payment has been made, and that period had elapsed before the decisions in those cases. It was for that reason too late for Burgess & Sons to cause suit to be brought to recover back their alleged excessive payments.

Bowerman Brothers maintain that, as mere sugar brokers, it was no part of their duty to

cause suit to be brought on account of the imposition of excessive duties, and that they are not liable, therefore, for the failure to do so, by reason of which it is very clear the sum recovered in this suit was lost to the plaintiffs. On the other hand, Burgess & Sons insist that, whether it was a part of their duty as brokers to institute such suit or not, they had come under an obligation to do it by reason of conversation or correspondence which passed between the parties. The whole of this correspondence, and the verbal testimony of one of the plaintiffs which is very brief, is found in the bill of exceptions; and we concur with the judge who tried the case below that this correspondence itself makes out the obligation of Bowerman Brothers to have caused the institution of such a suit.

About the only piece of verbal testimony that is of any consequence in the consideration of this matter is the statement of Mr. Burgess on the stand, that his firm fully relied upon the defendants to attend to the matter of bringing such a suit. Some of the letters produced, which passed between them, make this very plain.

On January 27, 1881, the plaintiffs wrote to the defendants as follows:

"We notice the tests and have seen the sample. They are certainly very beautiful sugars for their class. Now, we feel anxious as to the duties on the dry test; but if they should be decided against us we must protest as soon as duties are paid, and place the matter in the hands of a first class lawyer, the one employed by Messrs. Knowlton, perhaps, unless you know of a better, to commence the suit as soon as possible, but we hope all this will not be necessary.

* * * * * * * *

"If the sugars are marked up on dry test, it is necessary to formally protest against the decision of the collector and then appeal to the Secretary of the Treasury. This is the first step, and when the duties are paid to enter suit."

To this the defendants replied on the next day: "Your favor of yesterday is received and contents noted, all of which will be duly attended to."

Several other letters then follow concerning other importations and protests made by Bowerman Brothers on behalf of plaintiffs against the duties levied on those goods. On March 31, 1881, the plaintiffs wrote to the defendants: "Of course you will duly appeal from the government assessing duties by tests." On April 15, the defendants wrote to Burgess & Sons as follows:

"We have your favor of yesterday and enclose herewith the Secretary of the Treasury's reply to our appeal of March 5 (sugars per 'Santiago,' Jan. 25, '81.) The collector's decision is affirmed. We suppose you will wait the decision in the Welch suit before commencing proceedings.

"Please advise us."

To this the plaintiffs replied on April 16, as follows:

"We are in receipt of your favor of yesterday enclosing the reply of the Secretary of the Treasury to your appeal of March 5 regarding sugars *ex* Santiago, Jan. 25. We would await the decision in the Welch suit before commencing proceedings, if there is time.

"Please keep us posted in the sugar case."

On April 27, 1881, Bowerman Brothers wrote to plaintiffs as follows:

"Your favor of yesterday is received. The Kioto sugars are about half out of ship, and we send you to-night, by express, samples and tests of each mark. Our market is quiet but strong. We hear that the government has decided to appeal from the decision (in New York) in the *Welch Case*. Sales reported as below."

On June 18, 1881, Bowerman Brothers again wrote to plaintiffs as follows:

"We presume you have in mind The Santiago's cargo—centrifugal, Angelita—which arrived here July 6, 1880, the most of which was raised on polariscope test, one fourth cent and 25 per cent above the legitimate rate of entry on Dutch standard, and will commence suit against the government in due season."

To this latter the plaintiffs, Burgess & Sons, replied on June 20, as follows:

"We have your favor of the 18th, in which, you say, 'We presume you have in mind The Santiago's cargo—centrifugal, Angelita—which arrived July 6, '80, the most of which was raised on polariscope test, one fourth—and 25 per cent above the legitimate rate of duty on Dutch standard, and will commence suit against the government in due season.'

"The cargo you refer to did not pay at all, as we understand duty above the Dutch standard, it having just escaped on dry test.

"Of course we must not let any of our cases escape due attention. We attend here to all our Boston cases and enter suits as fast as they come around, and we suppose you can do the same as our agents in New York. Are we right? Please look into every case and keep us timely informed and whether there is anything for us to do personally or by power."

We think the whole of this correspondence leads to the inevitable conclusion that the defendants, either expressly or by fair implication, assumed the duty of causing suit to be brought within a reasonable time; living, as they did, in New York, where the transactions all occurred, where the suit must be brought, and being frequently admonished by the letters of plaintiffs to see that suit was brought in due time. This is especially evident from the last letter quoted above, in which the expectation of plaintiffs is distinctly stated that defendants would cause suit to be brought "in due season," and an inquiry made whether they are right in that supposition. They had by the statement in their letter, "Please look into every case and keep us timely informed and whether there is anything for us to do personally or by power," which is not denied, raised an implied acknowledgment on the part of the defendants that they would attend to this matter.

Taking the evidence altogether, it is very clear that Burgess & Sons understood that Bowerman Brothers would attend to the whole affair from the beginning to the end, and, without regard to their special occupation as mere sugar brokers, would take charge of all that was necessary to secure the rights of the plaintiffs in the matter of paying duties, making proper protests, getting the goods through the custom house, and seeking redress by suit

against the collector if that became necessary. And that they might be sure that they were not mistaken in this understanding, the letter of the 20th of June was written, which required in good faith that if Bowerman Brothers did not consider themselves charged with the duty of having a suit brought in due time, that they should have made a disclaimer of it by an immediate answer. It cannot be denied that the loss by Burgess & Sons of the sum of money found in the verdict, was due to the failure of Bowerman Brothers to fulfill faithfully the obligation in this particular which they had assumed in this correspondence, and which Mr. Burgess swears his firm relied upon them to perform.

The judgment of the Circuit Court is affirmed.

FRANK E. DEWOLF ET AL., *Appts.*,
v.
FLORENCE W. HAYS.

(See S. C. Reporter's ed. 614–618.)

Action to set aside deed, decided upon the facts.

Action to set aside a deed, executed by a married woman, of her property, and to compel its reconveyance to her, dismissed upon the facts of the case; it appearing that the deed was made by her upon a prudent and fair settlement with the grantee, made deliberately, and under the advice of competent counsel.

[No. 868.]

Submitted Jan. 6, 1888. Decided April 9, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of California. *Reversed and remanded, with directions to dismiss the bill.*

The original suit was a bill in equity, filed May 7, 1884, by Florence W. Hays, the widow of John J. Hays, against Frank E. DeWolf and wife and Horace M. Barnes, to set aside a deed of real estate from DeWolf and wife to Barnes, and to compel a conveyance to the plaintiff. Upon a hearing on pleadings and proofs, the circuit court entered a decree for the plaintiff, and the defendants appealed to this court.

The case is stated in the opinion.

Messrs. **Benjamin F. Thurston** and **Louis T. Haggin,** for appellants:

Parties who seek relief from the effect of a deed or agreement to which they themselves are parties, on the ground of mistake or of fraud, must proceed with diligence to assert their claims.

In a case like the present the strictest diligence is enjoined by the law, especially since a portion of the land in question has been, during the last six years, sold in small parcels to *bona fide* purchasers for value.

Wollensak v. *Reiher*, 115 U. S. 96 (29: 350); *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 806, 812 (24: 324, 326); *Beaubien* v. *Beaubien*, 64 U. S. 23 How. 190 (16: 484); *Stearns* v. *Page*, 48 U. S. 7 How. 819 (12: 928); *Moore* v. *Greene*, 60 U. S. 19 How. 69 (15: 533); *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178, 185 (22: 482, 485); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); *Badger* v. *Badger*, 69 U. S. 2 Wall. 87, 95 (17: 836, 839); *Wood* v. *Carpenter*, 101 U. S. 135 (25: 807); *Lansdale* v. *Smith*, 106 U. S. 391 (27: 219).

On the subject of presumption of acquiescence after considerable delay, see:

Fisher v. *Boody*, 1 Curt. 206, 219; *Prevost* v. *Gratz*, 19 U. S. 6 Wheat. 481 (5: 311); *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); *Piatt* v. *Vattier*, 34 U. S. 9 Pet. 405, 416 (9: 178, 177); *Stearns* v. *Page*, 1 Story, 204, 217; *Wagner* v. *Baird*, 48 U. S. 7 How. 234 (12: 681); *Lawrence* v. *Blake*, 8 Clark & F. 504; *Hough* v. *Richardson*, 3 Story, 659.

A court may afford relief under a prayer for general relief, provided it is such relief as is agreeable to the case made by the bill.

1 Daniell, Ch. 378, note 5 and cases; *English* v. *Foxall*, 27 U. S. 2 Pet. 595 (7: 531); *Hobson* v. *McArthur*, 41 U. S. 16 Pet. 182 (10: 930).

The special relief prayed at the bar must essentially depend upon the frame and structure of the bill.

Story, Eq. Pl. § 42 and note 3; *Hiern* v. *Mill*, 13 Ves. Jr. 120; *Walker* v. *Devereaux*, 4 Paige, 229.

In equity, relief is granted only *secundum allegata et probata;* and under the prayer for general relief it can give such relief only as the case stated by the bill and sustained by the proof will justify.

Scudder v. *Young*, 25 Me. 153; *Grimes* v. *French*, 2 Atk. 141; *Dorner* v. *Fortescue*, 3 Atk. 124; *Halsted* v. *Meeker*, 18 N. J. Eq. 136; *Thomason* v. *Smitheon*, 7 Port. (Ala.) 144; *Peck* v. *Peck*, 9 Yerg. 301; *Isaacs* v. *Steel*, 4 Ill. 97; *Jordan* v. *Clark*, 16 N. J. Eq. 243; *Simplot* v. *Simplot*, 14 Iowa, 449; *Landis* v. *Olds*, 9 Minn. 90; *Wilson* v. *Horr*, 15 Iowa, 489.

Messrs. **W. Hallett Phillips** and **Ben. Morgan,** for appellee:

The conveyance in which Mrs. Hays made a sacrifice of her entire separate property was made under the influence of her husband.

Vernon v. *Bethell*, 2 Eden, 113.

Her consent to the surrender of her property was imperfect; there was no freedom of judgment, no liberty of action.

1 Story, Eq. Jur. § 239; 2 Pom. Eq. Jur. §§ 948, 951; *Hall* v. *Hall*, 37 L. J. Ch. (Probate) 40.

It is immaterial that the respondents neither had any hand in inducing the conveyance, nor were aware of the influences which induced it.

Wheeler v. *Smith*, 50 U. S. 9 How. 83 (13: 56); *Central Bank* v. *Copeland*, 18 Md. 318.

The objection of the lapse of time, six years, before the bringing the suit, cannot avail the defendants.

Allore v. *Jewell*, 94 U. S. 512 (24: 264); *Connecticut Gen. L. Ins. Co.* v. *Eldredge*, 102 U. S. 547 (26: 245).

Mr. Justice **Gray** delivered the opinion of the court:

The question upon which the decision of this case turns is one of fact; and upon full consideration of the evidence, we are unable to adopt the conclusion of the circuit court.

Hays and wife and DeWolf and wife, connections by marriage and intimate friends, took up their residence in California in 1871. Hays was in ill health, and DeWolf had the confidence of Hays and wife and often transacted business for them. In 1872, De Wolf and wife owned a ranch of 4,160 acres in Fresno County, California, and at his suggestion Mrs. Hays purchased an undivided half of the tract for the price of $23,425, part of which

she paid out of her separate funds and for the rest of which she gave them her promissory note for $10,135, secured by mortgage of the land.

It is alleged in the bill, and shown by the evidence, that afterwards DeWolf and wife, without consideration, assigned the note and mortgage to one Haggin, and he commenced an action of foreclosure which was dismissed upon the plaintiff's executing and delivering to Haggin a deed of the land; that in 1877 the same was conveyed, without consideration, by Haggin to one Dimmock, and by him to Mrs. DeWolf; and that in all these transactions Haggin, as well as Dimmock, acted as agent of the DeWolfs.

The bill alleges, and the answers deny, that the plaintiff executed and delivered the deed to Haggin "at the urgent solicitation of her husband, who was at the time an invalid, unable to attend to business, and who importuned the plaintiff to make said deed, urging as a reason that he was unwilling to die and leave her involved in a litigation which might result in her pecuniary ruin, and the plaintiff, yielding to his entreaties and persuasions, consented to and did make said deed;" and that DeWolf and wife, at the time of the execution of that deed, "well knew that the same was made by the plaintiff under the influence of her said husband and because of his persuasion and solicitation, and was not her free and voluntary act."

In March, 1884, DeWolf and wife conveyed the land to Barnes. The bill alleges that this conveyance was made "for the purpose of covering up and concealing their title to the same, the better to cheat and defraud the plaintiff." The answers deny that it was made with that or any other fraudulent or wrongful purpose.

It appears by the evidence that, at and before the time of the making of the deed to Haggin, Mrs. Hays and her husband had very little other property, while Haggin and DeWolf were wealthy; and that her husband was very ill of consumption complicated with other diseases (of which he died a year afterwards) and was, as his attending physician testified, "extremely nervous and sensitive, and easily affected by almost everything surrounding him," and less fit to transact business than he had previously been. Mrs. Hays testifies that she was induced to make the deed by the persuasions and entreaties of her husband, who was greatly worried by the fear of leaving her without means in a network of legal trouble.

But the other circumstances, preceding and attending the execution of the deed, which are clearly established by the evidence, give a different color to the matter.

In May, 1876, Mrs. Hays brought an action in a court of the State against DeWolf and wife, alleging that she had been induced to make her original purchase by their fraudulent representations as to the value of the property, and demanding damages for the fraud, as well as that the note and mortgage might be declared void. Haggin's action to foreclose the mortgage was brought in November, 1876.

Mr. Rearden, a counselor at law, whose integrity and veracity are not impugned, and who had long been acquainted with Hays and wife and their affairs, and was one of her counsel, testifies that while those two suits were pending the question of a compromise and settlement was discussed between himself and the opposing counsel, by which of them first suggested he did not remember; that he had conversations on the subject at his office in San Francisco with Hays alone, and afterwards with him in the presence of his wife at their residence in Redwood; that "they stated a number of facts which, if proved, might possibly be defenses to the note and mortgage;" that the reasons Hays gave him for wanting to settle the matter were that "They were practically without means to carry on any extensive litigation, which seemed to be opening up, and his health was bad, and he did not want to risk his labor and time on the great uncertainties of this business;" and that he carefully suggested to Hays various items of the possible expenses of the litigation, and, among other things, that one of the pending suits "would possibly cost him all the way from $1,500 to $2,500."

It was after Hays had talked with Rearden, that, as Mrs. Hays testifies, he entreated her and she consented "to wipe out the whole thing, the DeWolf suit and the Haggin suit and everything, if they could just get out of it, and not continue in it at all."

Mrs. Hays further testifies that, at Rearden's request, she went without her husband to San Francisco "to see the DeWolfs in relation to this matter of the deed and the suit," and negotiations were had at Rearden's office between Mrs. Hays and Rearden on the one side and DeWolf and his counsel on the other, lasting a great part of two days, before a settlement was effected. The only evidence of any knowledge on the part of the defendants that Mrs. Hays was acting under the influence of her husband is her testimony that she then told DeWolf "that she wanted to wipe out the whole thing on account of her husband's ill health, and that she did it because it was a wife's duty, in other words, to do what he told her to do."

The terms of the settlement, as then agreed upon and some days afterwards carried out, were that the mortgage note was delivered up to Mrs. Hays, two debts of hers of about $1,200 were paid by DeWolf, and Hays and wife executed the deed conveying the land to Haggin, and a deed of release of all claims against the DeWolfs. These deeds were dated January 16, 1887; and annexed to each of them was a certificate of a notary public to its acknowledgment by Hays and wife, and that she, upon being examined apart from her husband, and made acquainted with its contents, acknowledged her execution and did not wish to retract it.

The plaintiff, in her present bill, filed in 1884, does not allege any fraud or undue influence in the original transaction in 1872, by which she purchased the property and gave the note and mortgage for part of the price; but, on the contrary, claims title under that purchase, and offers to pay the amount of the mortgage note and interest, deducting any rents and profits received by the defendants. The uncontradicted testimony of well informed witnesses proves that at the time of the settlement in 1877 the value of the undivided half of the land did not exceed the amount of the mortgage, al-

though it has since greatly increased because of the introduction of irrigation. In the state of facts then existing, the settlement appears to have been a prudent and fair one, made deliberately and under advice of competent counsel. Independently of any question of laches, therefore, no ground is shown for maintaining this suit.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the bill.

JOEL JOHNSON, *Appt.*,
v.
GEORGE CHRISTIAN ET AL.

(See S. C. Reporter's ed. 642-646.)

Jurisdiction of U. S. Courts—amendment of record.

1. The facts on which the jurisdiction of the Circuit Courts of the United States rests must, in some form, appear on the face of the record of suits prosecuted before them; and it is error for a court to proceed without its jurisdiction is shown.

2. If the party in regard to whom the necessary citizenship is not shown actually possesses such citizenship, the record cannot be amended in this court so as to show the fact; but the court below may, in its discretion, allow that to be done when the case gets back there.

3. A suit in equity, for a perpetual injunction, to restrain the enforcing a judgment in ejectment, rendered in the United States Circuit Court, brought in the same court, is merely an incident of and ancillary to the ejectment suit; and the circuit court has jurisdiction of the case without any averment of the citizenship of the parties.

[No. 195.]

Submitted April 2, 1888. Decided April 16, 1888. Petition submitted April 28. Decided May 14, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, in favor of plaintiffs in a suit in equity brought for the release of land from a deed of trust. *Reversed.*

On petition for reconsideration, decree of April 16 vacated and case ordered to stand for hearing on the merits at the next term, in its order.

The facts are stated in the opinions.

Messrs. **D. H. Reynolds** and **A. H. Garland,** *Atty-Gen.*, for appellant:

The court below erred in enjoining appellant instead of dismissing appellees' bill.

Conway v. *Ellison*, 14 Ark. 360; *Herndon* v. *Higgs*, 15 Ark. 392; *Dickson* v. *Richardson*, 16 Ark. 114; *Earle* v. *Hale*, 31 Ark. 472.

To maintain the suit in ejectment by Johnson, he must have shown: (1) a legal estate in himself; (2) right of entry; (3) defendants in possession.

Daniel v. *Lefevre*, 19 Ark. 201.

The dispute was on the legal estate and the right of entry, which are matters that law passes upon and not equity; and there is no averment that they were prevented from interposing their defense by accident of any kind, or by the fraud of appellant, and the suit should have been dismissed.

Goolsby v. *St. John*, 25 Gratt. 146; *Hendrickson* v. *Hinckley*, 58 U. S. 17 How. 443 (15:123); *New York L. Ins. Co.* v. *Bangs*, 103 U. S. 780 (26: 608); *Crim* v. *Handley*, 94 U. S. 652 (24: 216); *Very* v. *Watkins*, 18 Ark. 551; *Murphy* v. *Harbison*, 29 Ark. 340.

Robinson, the vendor of Christian & Stuart, is a necessary party.

Hoe v. *Wilson*, 76 U. S. 9 Wall. 501 (19:762).

Mr. **U. M. Rose,** for appellees:

Persons dealing with an agent, in the business for which he was appointed, may rely on a continuance of his authority until they are informed of its revocation.

Hatch v. *Coddington*, 95 U. S. 48 (24: 389); *Southern L. Ins. Co.* v. *McCain*, 96 U. S. 84 (24: 653).

Under all the circumstances it is clear that Mrs. Johnson and the appellant are estopped to deny the agency.

Schimmelpenich v. *Bayard*, 26 U. S. 1 Pet. 264 (7:188).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Arkansas, by George Christian and Jerry Stuart, against Joel Johnson, to obtain a decree for the release of certain land from liability under a deed of trust. The defendant appeared and answered, a replication was filed and proofs were taken. The court, on final hearing, made a decree in favor of the plaintiffs. The defendant has appealed to this court.

On looking into the record, we can find no evidence of the jurisdiction of the circuit court. The bill commences in this way: "The complainants, George Christian and Jerry Stuart, citizens of the County of Chicot and State of Arkansas, would respectfully represent," etc. Joel Johnson is the sole defendant, but there is no allegation as to his citizenship, nor does that appear anywhere in the record. Under these circumstances, this court must take notice for itself of the absence of the averment of the necessary facts to show the jurisdiction of the circuit court, and must reverse the decree, in accordance with the settled practice.

It is only necessary to refer to the case of *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237 [30: 380], where it was said, citing numerous cases: "It was settled at a very early day that the facts on which the jurisdiction of the circuit courts rests must, in some form, appear on the face of the record of all suits prosecuted before them;" and that "It is error for a court to proceed without its jurisdiction is shown."

It was also said in the same case, citing *Morgan* v. *Gay*, 86 U. S. 19 Wall. 81 [22: 100] and *Robertson* v. *Cease*, 97 U. S. 646 [24: 1057], that, if the party in regard to whom the necessary citizenship was not shown actually possessed such citizenship, the record could not be amended in this court so as to show the fact, but that the court below might, in its discretion, allow that to be done when the case should get back there.

In accordance with these views, the decree of the Circuit Court is reversed, with costs; and the case is remanded to that court for further proceedings.

Thereafter, upon petition of counsel for appellees for reconsideration, upon the ground that the reversal had been "based upon an obvious oversight," etc., on May 14, 1888,

Mr. Justice **Blatchford** delivered the following opinion of the court:

In this case, on the 16th of April last, this court made a decree reversing with costs the decree of the circuit court and remanding the case to that court for further proceedings. This was done upon the view that the record contained no evidence of the jurisdiction of the circuit court, arising out of the citizenship of the parties; but the fact was overlooked that the bill states that the defendant had obtained a judgment in ejectment in the same court (the Circuit Court of the United States for the Eastern District of Arkansas), and was seeking to oust the plaintiffs from the possession of the land involved, by a writ of possession founded on the judgment. The bill further sets forth that the plaintiffs in this suit, who are the appellants, had not been admitted to interpose in the ejectment suit an equitable defense to the same, which they state with particularity in the bill in this suit, and which they seek to avail themselves of herein. One of the prayers of the bill is for a perpetual injunction restraining the defendant from enforcing or attempting to enforce against the land the judgment in ejectment. The answer admits the recovery of the judgment in the same court.

This is sufficient to give the circuit court jurisdiction of the case, without any averment of the citizenship of the parties; and not only is the present suit in equity merely an incident of and ancillary to the ejectment suit, but no other court than the one which rendered the judgment in the ejectment suit could interfere with it or stay process in it, on the grounds set forth in the bill. *Milwaukee & M. R. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609, 688 [17: 886, 895]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Pacific R. R. Co.* v. *Missouri Pac. R. Co.* 111 U. S. 505 [25: 498].

The decree made by this court on the 16th of April last is therefore vacated, and the case will stand for hearing on the merits at the next term of this court, in its order on the docket.

JULIA A. NUTT, EXTX. of HALLER NUTT, Deceased, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 650–655.)

Claim of Julia A. Nutt—report upon—appropriation.

1. The report of the Quartermaster-General to Congress of Dec. 22, 1882, made under the Act of Aug. 7, 1882, for the relief of Julia A. Nutt, was for the information of Congress, and is not an award in pursuance of an arbitration.

2. Such report is not an account stated; in order to constitute an account stated, the statement of the account must be adopted by one party and submitted as correct to the other.

3. The appropriation made by Congress in the Act of July 5, 1884, of part of the amount recommended by the Quartermaster-General to be paid to her, is not an adoption of his report by Congress, and is not a recognition that a larger amount was due.

[No. 1380.]

Submitted April 2, 1888. Decided April 16, 1888.

APPEAL from a judgment of the Court of Claims, dismissing petition of appellant. *Affirmed.*

The facts are stated in the opinion.

Mr. **M. F. Morris**, for appellant:

The reference of the claim by Congress constituted a submission to arbitration, and the Quartermaster-General's finding was an award upon which suit can be maintained.

Gordon v. *U. S.* 74 U. S. 7 Wall. 188 (19: 35); *Chorpenning* v. *U. S.* 94 U. S. 397 (24: 126).

But whether there was here a technical arbitration or not it is certain that, in the language of the court in the case of the *U. S.* v. *Kaufman*, 96 U. S. 567 (24: 792), the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake.

Messrs. **A. H. Garland**, *Atty-Gen.*, and **Heber J. May**, *Asst. Atty-Gen.*, for appellee:

The report of the Quartermaster-General was not an award.

Hayburn's Case, 2 U. S. 2 Dall. 409 (1: 436); *U. S.* v. *Ferreira*, 54 U. S. 13 How. 50, 51 (14: 46); *Bruce* v. *U. S.* 1 Ct. Cl. 343; *Gordon* v. *U. S.* 74 U. S. 7 Wall. 188 (19: 35); *S. C.* 7 Ct. Cl. 46; *Gilbert* v. *U. S.* 1 Ct. Cl. 108; *Lavalette* v. *U. S.* Id. 147; *Carmick* v. *U. S.* 2 Ct. Cl. 126; *Chorpenning* v. *U. S.* 3 Ct. Cl. 140; *S. C.* 11 Ct. Cl. 625, 12 Ct. Cl. 110, 94 U. S. 397 (24: 126); *Ludington* v. *U. S.* 15 Ct. Cl. 453; *Huffman* v. *U. S.* 17 Ct. Cl. 55; *Kaufman* v. *U. S.* 11 Ct. Cl. 659; *Dodd* v. *U. S.* 21 Ct. Cl. 117.

The claim cannot be treated as an account stated.

Whitwell v. *Willard*, 1 Met. 216; *McWilliams* v. *Allan*, 45 Mo. 573.

A stated account properly exists only where accounts have been examined and the balance admitted as the true amount between the parties, without having been paid.

Reinhardt v. *Hines*, 51 Miss. 344; *McCall* v. *Nave*, 52 Miss. 494; *Stebbins* v. *Niles*, 25 Miss. 267; *Zacarino* v. *Pallotti*, 49 Conn. 36.

Mrs. Nutt has brought her claim within the purview of the Act and cannot accept the part of it which benefits her, and reject the part which is adverse to her interests.

U. S. v. *Adams*, 74 U. S. 7 Wall. 463 (19: 249); *U. S.* v. *Child*, 79 U. S. 12 Wall. 232 (20: 360); *U. S.* v. *Justice*, 81 U. S. 14 Wall. 535 (20: 753); *Baird* v. *U. S.* 96 U. S. 430 (24: 703).

Mr. Justice **Matthews** delivered the opinion of the court:

An Act of Congress, approved August 7, 1882, for the relief of Julia A. Nutt, widow and executrix of Haller Nutt, deceased, 22 Stat. 784, declared: "That the Quartermaster-General of the United States is hereby authorized and directed to examine and adjust the claims of Julia A. Nutt, widow and executrix of Haller Nutt, deceased, late of Natchez, in the State of Mississippi, growing out of the occupation and use by the United States Army, during the late rebellion, of the property of the said Haller Nutt during his lifetime, or of his estate after his decease, including live stock, goods, and moneys taken and used by the United States or the armies thereof; and he may consider the evidence heretofore taken on said claim, so far as applicable, before the commissioners of claims, and such other legal evidence as may be adduced before him in behalf of the legal representatives of Haller Nutt, de-

ing ships. During the time he was attached to the vessel the claimant was required to have his quarters on board, and was obliged to wear his uniform, to mess there, and was not permitted by the rules of the service to live with his family. The Wabash, during the time of the claimant's service thereon, was not in what was technically known as a commission for sea service. Duty on board a receiving ship since 1843 has not been regarded as sea service by the Navy Department. An order of the department issued that year declared that "the receiving ships at the several stations are not to be considered vessels in commission for sea service, except, as may sometimes be the case, while going from one port to another."

In the case of *U. S.* v. *Symonds*, 120 U. S. 46, 50 [30: 557, 558] it was decided: "That the sea pay given in paragraph 1556 may be earned by services performed under the orders of the Navy Department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations and requirements that are incident or peculiar to service on the high sea. It is of no consequence in this case that The New Hampshire was not, during the period in question, in such condition that she could be safely taken out to sea beyond the main land. She was a training ship, anchored in Narragansett Bay during the whole time covered by the claim of appellee, and was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. Within the meaning of the law, Symonds, when performing his duties as executive officer of The New Hampshire, was at sea."

We are unable to find any ground of distinction between the present case and that of Symonds. It results that the claimant was entitled by law to pay for sea service.

The judgment of the Court of Claims is accordingly affirmed.

UNITED STATES, *Appt.*,
v.
ASHER C. BAKER.

(See S. C. Reporter's ed. 646-650.)

Student in Naval Academy, when an officer—midshipman—when officer of navy.

1. A student at the Naval Academy appointed a midshipman in the navy was, while he was a midshipman, serving as an officer or enlisted man in the navy, within the meaning of the Act of 1888, chapter 97, 22 Stat. at L. 473.

2. One who was, on Sept. 30, 1867, appointed a midshipman in the navy, continued to be after the passage of the Act of 1870, chapter 295, 16 Stat. at L. 330, 334, as he was prior to its passage, an officer of the navy, on the active list, and serving as such an officer, by virtue of his having been appointed midshipman and continuing to be a student in the Naval Academy, although he might be properly styled, after the passage of the Act of 1870, a cadet midshipman.

3. No legislation which took place after the 14th of July, 1872, can affect the question, arising under the Act of 1888, as to the service of such officer in the navy prior to the 14th of July, 1872.

[No. 1394.]

Submitted April 2, 1888. Decided April 16, 1888.

APPEAL from a judgment of the Court of Claims, in favor of claimant for the difference of pay provided by the Act of March 3, 1883. *Affirmed.*

The facts are stated by the court.

Messrs. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** *Asst. Atty.*, for appellant.

Messrs. **John Paul Jones,** and **Robert B. Lines,** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court.

This is an appeal by the United States from a judgment of the court of claims, awarding to the claimant $886.71, on the following facts:

On the 30th of September, 1867, the claimant was appointed a midshipman in the navy, by a form of appointment which stated that he was "appointed to the grade of midshipman in the United States Navy." By section 12 of the Act of July 15, 1870, chapter 295, 16 Stat. at L. 334, it was provided that "The students in the Naval Academy shall hereafter be styled cadet midshipmen;" and that "When cadet midshipmen shall have passed successfully the graduating examination at said academy, they shall receive appointments as midshipmen, ranking according to merit, and may be promoted to the grade of ensign as vacancies in the number allowed by law in that grade may occur." After the passage of that Act, the form of appointment was changed by striking out the words "appointed to the grade of midshipman," and inserting the words "appointed a cadet midshipman;" but no appointment in the amended form was issued to the claimant. After completing his academic course at Annapolis the claimant was, on the 14th of July, 1872, promoted to the grade of ensign; on the 6th of December, 1876, to that of master; and on the 10th of January, 1884, to that of lieutenant, in which grade he was serving when his petition was filed.

By the Act of March 3, 1883, chapter 97, 22 Stat. at L. 473, it was provided as follows: "And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service." The claimant alleged in his petition that the lowest grade having graduated pay held by him since last entering the service was, under the Act of July 15, 1870, chapter 295, 16 Stat. at L. 330, § 3, now section 1556 of the Revised Statutes, that of ensign, and that he was, under the Act of 1883, entitled to have credit given to him upon his grade of ensign for all of his service prior to the date of his commission as ensign, namely, 4 years, 9 months, and 14 days, from September 30, 1867, to July 14, 1872, which included all of the time of his service as midshipman. The question is as to whether he is entitled to the difference of pay resulting from such credit. The court of claims decided in his favor, awarding to him for that pay the sum of $886.71.

The single question involved is whether the

claimant, while he was a midshipman, was serving as an officer or enlisted man in the navy, within the meaning of the Act of 1883. The contention on the part of the United States is that the claimant, whilst a student at the Naval Academy, did not, in the sense of the Act of 1883, serve either as an officer or an enlisted man; and that, in that view, it is immaterial whether, as a student, he is or is not to be regarded as an officer of the navy. It is denied by the United States that the entry of a pupil into the academy is his entry into the naval service, and that the period of his pupilage is actual service, within the meaning of the Act of 1883; and it is argued that he does not enter into actual service until he is appointed either in the line of the navy, the marine corps, or the engineer corps; that, as a student, he does not serve, but is preparing to serve; that he does not render service to the Government, but is receiving favors from it; that he can only commence service after his graduation, such service depending upon his graduating merit; and that the compensation of $500 a year given to him is not a payment for service rendered, but is a gratuity and an allowance made to him for his support in his preparation for service to be rendered.

When the claimant was appointed a midshipman in the navy, on the 30th of September, 1867, the Act of July 16, 1862, chapter 183, 12 Stat. at L. 583, was in force. The first section of that Act divides the active list of line officers of the navy into nine grades, the first of which is "rear-admirals," the eighth of which is "ensigns," and the ninth of which is "midshipmen." The 11th section of that Act provides that the students at the Naval Academy shall be styled midshipmen, until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according to merit. Thus, section 1 of that Act creates the grade of midshipman as one of the nine grades of the active list of line officers of the navy, and section 11 declares that the students at the Naval Academy shall shall be styled midshipmen. If these statutory provisions were not varied as respects the claimant prior to July 14, 1872, when he was promoted to the grade of ensign, he was all the time an officer in the line of the navy, and serving as such officer.

Section 12 of the Act of July 15, 1870, chapter 295, 16 Stat. at L. 334, provides that the "students in the Naval Academy shall hereafter be styled cadet midshipmen," and that, when they "shall have passed successfully the graduating examination at said academy, they shall receive appointments as midshipmen, ranking according to merit, and may be promoted to the grade of ensign as vacancies in the number allowed by law in that grade may occur." The provisions of that section do not seem to have been applied to the case of the claimant. He did not thereafter receive an appointment as cadet midshipman, nor does he appear to have received an appointment as midshipman after he passed successfully the graduating examination at the academy; but he was promoted to the grade of ensign after he had completed his academic course at Annapolis.

It is very questionable whether the 12th section of the Act of 1870 applies to persons who had been theretofore appointed midshipmen. It would rather seem to be limited in its provisions to persons thereafter to be appointed to the distinct grade of cadet midshipmen, and therefore not to include the case of the claimant. But even if section 12 of the Act of 1870 applies so far to those who were then students in the Naval Academy, that they were, thereafter to be styled cadet midshipmen, yet they were still to discharge the same duties as before, and be subject to the same naval discipline and control as before, and to receive the same pay as before. We see nothing in the Act of 1870 to exclude the claimant from the position which he occupied prior to the passage of that Act, as a member of a grade in the active list of line officers of the navy, so far as respected his service at the Naval Academy after the date of the passage of that Act whether he was thereafter to be styled a cadet midshipman or to continue to be styled a midshipman.

No legislation which took place after the 14th of July, 1872, can affect the question arising under the Act of 1883, as to his service as an officer in the navy prior to the 14th of July, 1872. Section 15 of the Act of 1862 provided that the "annual pay of the several ranks and grades of officers of the navy on the active list," thereinafter named, comprehending the nine grades mentioned in the first section of the same Act, should be as thereinafter specified in the 15th section, and the last provision was this: "Midshipmen shall receive five hundred dollars."

It is impossible not to conclude that the claimant continued to be, after the passage of the Act of 1870, as he was prior to its passage, an officer of the navy, on the active list, and serving as such an officer, by virtue of his having been appointed a midshipman and continuing to be a student in the Naval Academy, even though he might have been properly styled, after the passage of the Act of 1870, a cadet midshipman.

The judgment of the Court of Claims is affirmed.

UNION TRUST COMPANY OF NEW YORK ET AL., *Appts.*,
v.
WILLIAM R. MORRISON.

(See S. C. Reporter's ed. 591–613.)

Surety, when entitled to protection—sale of railroad on foreclosure.

1. A surety of a railroad company on an injunction bond, given to protect the rolling stock and property of such company from execution and sale, is entitled to protection and indemnity from a receiver of the property on mortgage foreclosure; and, if he has paid the judgment against him on the bond, is entitled to be reimbursed the amount paid by him, out of the property and assets of the company, prior to a mortgage given by the railroad upon such property.

2. Where the bondholders purchased the railroad on foreclosure sale, subject to the lien of all claims against it then before the court by intervening petition which should be decreed to be paid, upon final adjudication, as paramount liens, the purchasers were bound to take notice of the surety's claim for indemnity which had been presented to the court by petition; and no further notice to them was necessary, and the property, in their hands, is subject to such claim.

[No. 64.]
Argued Nov. 10, 1887. Decided April 2, 1888.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Illinois, that the appellee had an equitable lien, for the payment of his claim, against the railroad property sold under a decree of foreclosure, and transferred to the St. Louis and Cairo Railroad Company. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. S. Corning Judd, **Wm. Ritchie,** *Edward B. Esher* and *Edward S. Judd*, for appellants:

The right of subrogation does not arise in favor of a surety until he has actually paid the debt for which he is liable as surety.

Sheld. Subrogation, §§ 105, 127; *Conwell* v. *McCowan*, 53 Ill. 363; *Darst* v. *Bates*, 51 Ill. 439; *Dering* v. *Winchelsea*, 1 White & T. Lead. Cas. Eq. ed. 1876, 152; *Pennsylvania Bank* v. *Potius*, 10 Watts, 152; *Kyle* v. *Bostick*, 10 Ala. 592; *Snyder* v. *Blair*, 33 N. J. 211.

The surety is entitled to recover the amount paid, not the amount extinguished by that payment.

Bonney v. *Seeley*, 2 Wend. 488; *Reed* v. *Norris*, 2 Myl. & C. 374, 375; *Memphis & L. R. R. Co.* v. *Dow*, 120 U. S. 301, 302 (30: 601).

Morrison has, in fact, simply incurred a fresh obligation to pay. This is not sufficient.

Maxwell v. *Jameson*, 2 Barn. & Ald. 51; *Taylor* v. *Higgins*, 3 East, 169; *Romine* v. *Romine*, 59 Ind. 351, 352; *Ex parte Sergeant*, 1 Glyn & J. 183; *S. C.* affirmed, 2 Glyn & J. 23; Eden, Bankr. 158, 159; *Taylor* v. *Mills*, Cowp. 526, 527.

The bank is a volunteer, and not entitled to subrogation.

Freem. Judg. § 468; *Shinn* v. *Budd*, 14 N. J. Eq. 286; *Bank of U. S.* v. *Winston*, 2 Brock. 254; *Dering* v. *Winchelsea*, 1 White & T. Lead. Cas. Eq. ed. 1876, 151; *Cumming* v. *Hackley*, 8 Johns. 206.

The surety stands in such a relation to his principal that he cannot be permitted to speculate upon him.

Wynn v. *Brooke*, 5 Rawle, 106, 110.

It is the surety's duty to make the best terms he can for his principal.

Reed v. *Norris*, 2 Myl. & C. 375.

The purchasers at the foreclosure sale took the property free from all equities which were subordinate to those of the mortgage creditors.

2 Jones, Mort, §§ 1653, 1654.

This is true of railroad as of other mortgages.

Morgan County v. *Thomas*, 76 Ill. 147; *Sullivan* v. *Portland & K. R. R. Co.* 94 U. S. 806 (24: 324); *Menasha* v. *Milwaukee & N. R. R. Co.* 52 Wis. 420; *Wright* v. *Milwaukee & St. P. R. Co.* 25 Wis. 46.

The purchaser takes free from taxes.

Cooper v. *Corbin*, 105 Ill. 224.

The surety can acquire no greater right than the creditor.

Houston v. *Huntsville Branch Bank*, 25 Ala. 257; *Colvin* v. *Owens*, 22 Ala. 794; *Dozier* v. *Lewis*, 27 Miss. 683.

The surety's remedy cannot be greater than, or different from, that of the creditor.

Winslow v. *Otis*, 5 Gray, 363; *Tubbs* v. *Williams*, 9 Ired. L. 1; *Pierson* v. *Catlin*, 18 Vt. 86; *Ohio L. Ins. & T. Co.* v. *Winn*, 4 Md. Ch. 264.

Holbrook's rights under his judgment are subordinate to the mortgage.

Pennock v. *Coe*, 64 U. S. 23 How. 117 (16: 436); *Dunham* v. *Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254 (17: 584); *Scott* v. *Clinton & S. R. R. Co.* 6 Biss. 534; *Central Trust Co.* v. *East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 897; *Hammock* v. *Farmers L. & T. Co.* 105 U. S. 91 (26: 1116); *Foedick* v. *Schall*, 99 U. S. 255 (25: 343); *Douglass* v. *Cline*, 12 Bush, 631, 632.

The chancellor will always observe great caution in establishing such a preference as appellee here claims.

Miltenberger v. *Logansport, C. & S. W. R. Co.* 106 U. S. 311 (27: 126); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 458, 479 (29: 971, 978); *Meyer* v. *Johnston*, 53 Ala. 349; *Blair* v. *St. Louis, H. & K. R. Co.* 22 Fed. Rep. 475.

There is no allegation or proof as to the nature of the claim upon which Holbrook's original judgment was rendered.

Union Trust Co. v. *Illinois Midland R. Co.* 117 U. S. 478, 479 (29: 978).

Holbrook might have made his claim out of the income of the road while the mortgagor remained in possession.

Gilman v. *Illinois & M. Tel. Co.* 91 U. S. 603 (23: 405); *Mississippi Valley & W. R. Co.* v. *U. S. Express Co.* 81 Ill. 537.

Appellee cannot, as against the mortgagee or his grantee, assert any superior equity.

Sheld. Subrogation, § 132; *Mitchell* v. *De Witt*, 25 Tex. (Suppl.) 180; *Burns* v. *Huntingdon Bank*, 1 Penr. & W. 395; *Pott* v. *Nathans*, 1 Watts & S. 155; *Armstrong's Appeal*, 5 Watts & S. 352; *Knouf's Appeal*, 91 Pa. 82.

The surety cannot, by subrogation, obtain a preference over creditors of the principal whose lien attached before the surety became bound.

Brandt, Suretyship, § 268; *Farmers & D. Bank* v. *Sherley*, 12 Bush, 304; *Fishback* v. *Bodman*, 14 Bush, 117; *Johnson* v. *Morrison*, 5 B. Mon. 106; *Glass* v. *Pullen*, 6 Bush, 350, 351.

In fact, appellee is a volunteer.

Bank of U. S. v. *Winston*, 2 Brock, 254; *Neptune Ins. Co.* v. *Dorsey*, 3 Md. Ch. 340; *Swann* v. *Patterson*, 7 Md. 170; *Gadsden* v. *Brown*, 1 Speer, Eq. 42; *Shinn* v. *Budd*, 14 N. J. Eq. 237; *Armstrong's Appeal*, 5 Watts & S. 356; *Patterson* v. *Pope*, 5 Dana, 243.

As toward other creditors, Morrison must be deemed to have trusted to his principal, and not to the property.

Johnson v. *Morrison*, 5 B. Mon. 107; *Wiggin* v. *Dorr*, 3 Sumn. 419, 420; *Hopkinsville Bank* v. *Rudy*, 2 Bush, 329; *Burns* v. *Huntingdon Bank*, 1 Penr. & W. 398, Gibson, *C. J.*; *Parsons* v. *Briddock*, 2 Vern. 608; *Wright* v. *Morley*, 11 Ves. Jr. 22; *Smith* v. *Anderson*, 18 Md. 520; *McCormick* v. *Irwin*, 35 Pa. 111.

By executing the injunction bond Morrison destroyed the effect of the Holbrook judgment as a lien on the personalty, and released the latter.

Launtz v. *Gross*, 16 Bradw. 331.

Consequently Morrison could claim no lien on the personalty.

Carroll v. *The T. P. Leathers*, Newb. Adm. 432; *Roberts* v. *The Huntsville*, 3 Woods, 387; *The Madgie*, 31 Fed. Rep. 926; *Gue* v. *Tide Water Canal Co.* 65 U. S. 24 How. 257 (16: 635); *Hammock* v. *Farmers L. & T. Co.* 105 U. S. 91 (26: 1116); Jones, R. R. Securities, §§ 157, 158.

This court has never applied the rule of preference to a claim of the nature of this.

Galveston, H. & H. R. R. Co. v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *Dunham* v. *Cincinnati, P. & C. R. Co.*, 68 U. S. 1 Wall. 254 (17: 584); *Porter* v. *Pittsburgh Bessemer Steel Co.* 120 U. S. 671 (30: 833); *S. C.* 122 U. S. 283 (30: 1211); *Huidekoper* v. *Hinckley Locomotive Works*, 99 U. S. 258 (25: 344); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 (29: 963); *Penn* v. *Calhoun*, 121 U. S. 251 (30: 915).

What is to be deemed a current debt?

Burnham v. *Bowen*, 111 U. S. 780, 781 (28: 598).

A judgment against the mortgagor subsequent to the mortgage, but prior to the receivership, must be held subject to the mortgage.

Central Trust Co. v. *East Tennessee V. & G. R. Co.* 30 Fed. Rep. 897; *Hiles* v. *Case*, 9 Biss. 549; *Hammock* v. *Farmers L. & T. Co.* 105 U. S. 91 (26: 1116); *Duncan* v. *Mobile & O. R. R. Co.* 2 Woods, 542; *Newport & C. Bridge Co.* v. *Douglass*, 12 Bush, 675.

Not only is this claim not of the nature of a current debt but it comes within no reasonable limit as to time.

Scott v. *Clinton & S. R. R. Co.* 6 Biss. 535; *Turner* v. *Indianapolis, B. & W. R. Co.* 8 Biss. 318; *Blair* v. *St. Louis, H. & K. R. Co.* 22 Fed. Rep. 474.

Appellee's claim was barred by the excludatory orders entered previous to the foreclosure sale.

Koontz v. *Northern Bank*, 88 U. S. 16 Wall. 196 (21: 465); 2 Jones, Mort. § 1647; *Miller* v. *Sherry*, 69 U. S. 2 Wall. 250 (17: 880); *Hamlin* v. *McCahill*, Clarke, Ch. 249; *Cockrill* v. *Maney*, 2 Tenn. Ch. 49; *Brightman* v. *Brightman*, 1 R. I. 112; *Sapp* v. *Wightman*, 108 Ill. 158.

To fix a purchaser, pending suit, with notice of equities arising out of the suit, the pleadings, etc., must be clear, explicit and direct as to the nature of the claim.

Brightman v. *Brightman, supra*; *Shaloross* v. *Dixon*, 7 L. J. N. S. Ch. 180.

Until the surety pays the debt of his principal, he has no demand upon him.

Kyle v. *Bostick*, 10 Ala. 592.

Appellee should not have been permitted to file his supplemental petition of June 5, 1882.

Finch v. *Anthony*, 10 Allen, 477; *Vaughan* v. *Vaughan*, 30 Ala. 330; *Hill* v. *Hill*, 10 Ala. 527; *Godfrey* v. *Tucker*, 33 Beav. 280; *Milner* v. *Milner*, 2 Edw. Ch. 114; *Miller* v. *Sherry*, 69 U. S. 2 Wall. 237 (17: 827); *Griffith* v. *Griffith*, 1 Hoffm. Ch. 161; *S. C.* 9 Paige, 316; Bennett, Lis Pendens, §§ 32, 95, 188; 1 Dan. Ch. Pr. 402, 403; Story, Eq. Pl. § 904; *Schulze* v. *Fox*, 53 Md. 42; Freem. Judg. § 199.

Messrs. Gustav Koerner and *Charles W. Thomas*, for appellee:

The Chattel Mortgage Act of Illinois had no reference to railroad property.

Hammock v. *Farmers L. & T. Co.* 105 U. S. 77 (26:1111); *Peoria & S. R. R. Co.* v. *Thompson*, 103 Ill. 187.

Property subject to liens, claims and debts of various characters and ranks which is brought within the cognizance of a court of equity for administration, and conversion into money and distribution, is a trust fund.

Union Trust Co. v. *Illinois Midland Co.* 117 U. S. 455 (29: 970).

The property of a corporation is to be treated in equity as a trust fund primarily for the payment of its debts.

Farmers L. & T. Co. v. *Missouri I. & N. R. Co.* 21 Fed. Rep. 264.

Mr. Justice **Bradley** delivered the opinion of the court:

This case grows out of the foreclosure of a mortgage given by the Cairo and St. Louis Railroad Company on the 2d day of October, 1871, to the Union Trust Company, to secure the payment of two thousand five hundred bonds of $1,000 each, with interest semi-annually. Morrison, the appellee, intervened in the proceedings, by petition, claiming a lien on the property mortgaged, by reason of having become liable as surety on an injunction bond given to obtain an injunction to prevent an execution sale of a portion thereof. The court below by a decree dated May 4, 1884, allowed his claim, amounting to the sum of $15,352.19, with interest from May 20, 1882. The purchasers at the foreclosure sale (who purchased on behalf of the bondholders), having transferred the property to the St. Louis and Cairo Railroad Company (organized for that purpose), said company was allowed to become a party to the proceedings for the purpose of appealing from the decree; and did appeal from the same in connection with the Union Trust Company. The case is now before us on that appeal.

The facts necessary to be understood in the determination of the case are as follows:

The Cairo and St. Louis Railroad Company was a corporation of Illinois owning and operating a railroad in that State, extending from Cairo to a point opposite St. Louis. The mortgage referred to purported to convey and embrace all the property and assets of the company, real, personal and mixed, then held and owned, or thereafter to be acquired, and the tolls, incomes, rents, issues and profits thereof; and it contained provisions authorizing the mortgage trustee (the Union Trust Company) to take possession of said property and assets in case of default, for a certain period of time, in the payment of interest, or of the installments of a sinking fund provided for; and gave said trustee power, on such default, to declare the principal due. The railroad company made default in the payment of interest in October, 1873, and at every subsequent period of payment, and never paid any installments of the sinking fund.

Meantime, the company was harassed by suits, and, amongst others, one Henry Holbrook, on the 26th of November, 1872, recovered a judgment against it in the Circuit Court of St. Clair County, Illinois, for the sum of $9,500, besides costs. Execution was issued, but not levied. But in October, 1874, an *alias* execution was issued, and the Sheriff of St.

Clair County threatened to levy upon the rolling stock of the company, a great part of which was in that county, opposite St. Louis. The company, believing the judgment to have been fraudulently and wrongfully obtained, filed a bill in equity in the St. Clair Circuit Court to enjoin Holbrook from proceeding to its collection. An injunction was granted accordingly on the 30th of December, 1874; but only upon the condition that the company should give an injunction bond, with sureties, for the payment of judgment and costs, if the injunction should be dissolved. Morrison, at the request of the company, executed such bond as surety. In February, 1877, the bill for injunction was dismissed, and in June, 1879, the decree of dismissal was affirmed by the Supreme Court of Illinois, and the injunction was definitively dissolved. Thereupon Holbrook sued Morrison on the injunction bond, and on the 30th of September, 1880, recovered judgment against him for the sum of $18,965.

Prior to this time, in November, 1877, the Trust Company declared the principal of the bonds due, and filed a bill in the court below to have a receiver appointed and the mortgage foreclosed. Henry W. Smithers was appointed receiver, with power to operate the road and equip it and keep it in repair, and to pay all amounts due and owing by the railroad company for labor or supplies that might have accrued in the operation and maintenance of the railroad property within six months immediately preceding. The receiver, on taking possession of the property, found a number of suits against the company pending on appeal, and claims for protection on the part of those who had become sureties on the appeal bonds; and on the 29th of December, 1877, he presented a petition to the court, asking its advice and instruction in regard to said bonds, and whether he should protect the sureties in the event of adverse decisions in any of the cases. He stated the fact that such appeal bonds were given by some of the officers of said railroad company, with others as sureties, in order to protect the rolling stock or other personal property of said railroad company from levy or sale under execution pending the determination of the appeals; in each of which cases execution on the judgment or decree was either levied on personal property of said railroad company or the levy thereof threatened at the time of taking the appeal and giving the bond. He mentioned the *Holbrook Case* [72 Ill. 419] in particular, which was then pending before the Supreme Court of Illinois on appeal, and called attention to the injunction bond given in that case; and he expressed his concurrence in the statement of the sureties generally, that they had become such on the assurance of being protected, and that their action had been to the benefit of all parties interested in the property of the company, since, in default of payment, it would have been sacrificed to meet the demands. The court, on consideration, made a decree authorizing the receiver, in his discretion, to prosecute or defend the appeals and cases, according as the interests of the receivership should in his judgment be best promoted; and to protect such sureties as in his judgment ought to be protected in equity and good conscience by reason of the protection afforded to the property and assets of the company by means of the giving of such bonds. And, for the purpose of this decree, the receiver was authorized to use and pay out any moneys coming into his hands as such receiver, over and above expenses for operation and repairs. The receiver, for alleged lack of funds coming into his hands, failed to protect any sureties except two, one Rosborough and one Pellet.

On the 16th of May, 1881, a decree was made in the foreclosure suit, ascertaining the amount due on the bonds and coupons to be $4,801,157.53, and directing a sale of the mortgaged premises to satisfy the same. The decree required all persons having claims or liens against the railroad and property, or against the proceeds of the sale thereof, to file intervening petitions on or before the first day of July, 1881.

In accordance with this order, Morrison, on the 30th day of June, 1881, filed his intervening petition, setting up the facts respecting his becoming surety on the injunction bond, the preservation of the rolling stock by means thereof, the proceedings in the case, and the proceedings against himself on the bond, resulting in the judgment rendered against him on September 30, 1880. He also set out the copy of a mortgage on four locomotive engines given to him by the railroad company in June, 1875, by way of indemnity against his liability on the injunction bond; which mortgage was duly recorded in the clerk's office for St. Clair County, but was never enforced by him; he stating the fact to be, that the said company and the receiver had used the said locomotive engines continuously since the execution of the said mortgage, and the same were then in the possession of the receiver, and were to be sold at the sale of the property under the said decree of foreclosure. He further set out a copy of the petition presented to the court by the receiver, asking for instructions as before stated, and bringing to the notice of the court the Holbrook judgment and appeal and the injunction bond given in that case. He further stated that the receiver, since his appointment, had not been able, out of the earnings of the railroad, to pay the judgment of Holbrook, and thus protect the sureties on the injunction bond. His petition closed with a prayer for a decree that he should be fully protected from all the consequences of signing the said bond, and from the judgment recovered against him and for further relief.

On the 5th of July, 1881, an order was made declaring that no claim presented or filed after the first of July, 1881, should be received or filed; and that all claims not so filed on or before that date should be forever barred from any benefit under the decree, or from the property, or the proceeds of its sale.

On the 14th of July, 1881, the railroad and other property covered by the mortgage were duly sold in accordance with the decree of May 16; and Josiah A. Horsey and Charles J. Canda, on behalf of the bondholders, became the purchasers for the sum of $4,000,000; which sale was, on the same day, ratified by the court, and an order was made referring to a special master, Frank H. Jones, all the intervening claims and petitions filed in the cause, to take proof and report his conclusions of fact and law thereon for the consideration of the court;

and to give notice to the parties of the time and place of taking testimony.

On the first of August, 1881, an order was made referring it to a master to examine and report the amount of receiver's certificates remaining unpaid, and of all claims against the receivership, or railroad assets in the receiver's possession, as shown by intervening petitions or claims filed in the cause before July 1, for labor, supplies or other claims; and whether there was sufficient showing in the several cases to warrant funds to be paid into court to cover the same; also the probable amount of costs and fees. The object of this order was to ascertain how much money the purchasers should be required to pay into court, and how much of their bid might be paid in bonds.

On the 19th of August, 1881, the Union Trust Company and the receiver filed a joint answer to Morrison's petition of intervention, in which all its material statements were admitted; but whilst admitting that the sheriff of St. Clair County did threaten to levy on the railroad company's locomotives and rolling stock they denied that, as against the bondholders and the Union Trust Company mortgage, the execution was a lien on said locomotives and stock paramount to that of the mortgage; they also denied that the chattel mortgage alleged to have been given by the railroad company upon certain locomotives for the purpose of securing the sureties on the injunction bond, could have any effect or create any lien on said property paramount to that of the Union Trust Company mortgage. The respondents admitted that the railroad company and the receiver had continually used the engines and property owned by the company in 1875; but whether they were the same which were included in the alleged chattel mortgage, they could not say. They admitted that the receiver had not paid, and had not been able out of the earnings of the road to pay, the judgment of Holbrook, and submitted to the court, that if he had been able, he would not have had any right or authority to pay the same. They further alleged upon information and belief that the judgment remained wholly unpaid, that neither Morrison nor the railroad company had paid it; and they submitted to the court that there was no liability on the part of the receivership or of the property for the payment of the judgment.

On the 22d of December, 1881, an order was made by the court, by which, after reciting that Horsey and Canda had paid to the commissioner the full amount of their bid for the railroad property and assets, namely, in cash, $100,000, and the residue in first mortgage bonds of the railroad company, it was ordered and decreed that the commissioner should execute a deed of conveyance of the said property and assets to the said Horsey and Canda, to be held subject to all taxes legally due, to the lien of all unpaid receiver's certificates; "and also subject to the lien of any and all claims against the said railroad property and assets which are now before this court by intervening petitions, and which shall be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by said mortgage or deed of trust."

On the 19th of January, 1882, the receiver was also directed to make a conveyance to the purchasers, in order to cover certain real estate, rolling stock and other property which had been acquired by him during his receivership; and to deliver the possession of all such real estate and other property to the purchasers or their grantees, when the commissioner's deed should be presented to him and demand should be made. The receiver made such conveyance on the 30th of January, 1882; and on the 31st, Horsey and Canda conveyed all the property to the St. Louis and Cairo Railroad Company, the appellants; and on the following day, February 1, 1882, the receiver delivered the railroad and all its appurtenances to said company.

As the Union Trust Company and the receiver, in their answer to Morrison's intervening petition, raised the objection that he had not paid the Holbrook judgment (though, of course, he was bound to pay it), he filed a supplemental petition on the 5th of June, 1882, stating that he had paid the judgment on the 29th of May previous, amounting on that day, for principal and interest, to the sum of $15,352.19, and repeated his original application for relief. To this supplemental petition the Union Trust Company and the receiver filed an answer by which they denied that Morrison had paid the judgment; recited the previous orders requiring claims to be filed by the first of July, 1881, and barring those not so filed; the sale of the property, the conveyance thereof to Horsey and Canda, and by them and the receiver to the new company, and the delivery of the railroad property to said company; and averred that there were no proceeds of the sale in the hands of the receiver out of which payment could be made to Morrison upon his claim.

On the 19th of December, 1883, the special master, Frank H. Jones, to whom, at the time of the sale of the railroad, had been referred intervening claims and petitions filed in the cause, made a report, in which he set forth in detail all the facts and circumstances in relation to the intervening petition and claim of Morrison, as they have been already stated, and the evidence taken by him thereon. The only point contested by the respondents was the fact of payment by Morrison, and its effect under the previous orders of the court. The evidence reported by the master, however, showed that Morrison did actually pay the judgment at the time stated in his supplemental petition, and the master so found. The exception taken on this point by the respondents, based on the fact that Morrison, in order to make the payment, raised the money on his note, and that it did not appear that he had paid his note, is too trivial for serious consideration. The conclusion reached by the master was that the claim was barred because Morrison had not actually paid Holbrook's judgment when he filed his original petition, and did not pay it until after the time had expired for claims to be presented, namely, July 1, 1881.

Morrison excepted to the report; and on the 5th of May, 1884, the court sustained the exception, and allowed the claim, and decreed that Morrison had an equitable lien for the payment thereof against the property sold under the decree of foreclosure, and transferred to the St. Louis and Cairo Railroad Company, with leave to apply to the court for further re-

ceased, or in behalf of the United States, and shall report the facts to Congress to be considered with other claims reported by the Quartermaster-General: *Provided*, That no part of said claims, upon which said commissioners of claims have passed on the merits, shall be considered by the Quartermaster-General.

On December 22, 1882, the Quartermaster-General, acting under and pursuant to this Act, reported to Congress, through the Secretary of War, that he had examined the claims of Mrs. Julia A. Nutt, as widow and executrix, and the nature and manner of his investigation, and the circumstances and evidence relating to the same. He further reported as follows: "All the evidence considered, as well as the additional information I have been able to gather, warrants me in recommending that Julia A. Nutt be paid the following items, which, in my judgment, are sufficiently proved by the evidence, viz.:" He then states various items of property, with their value, the total amounting to $256,884.05. This report was transmitted direct by the Secretary of War to Congress, but was not transmitted to or acted upon by the accounting officers of the Treasury. On July 5, 1884, Congress passed an Act (23 Stat. at L. 552) "for the allowance of certain claims reported by the accounting officers of the United States Treasury Department, and for other purposes." This statute enacts: "That the Secretary of the Treasury be, and he is hereby, authorized and required to pay, out of any money in the treasury not otherwise appropriated, to the several persons in this Act named, the several sums mentioned herein, the same being in full for, and the receipt of the same to be taken and accepted in each case as a full and final discharge of the several claims examined and allowed by the proper accounting officers under the provisions of the Act of July 4, 1864, since January 6, 1883, namely:" Then follows a list of the names of the persons, with the amount payable to each, under the head of the several States of Tennessee, Kentucky, West Virginia, Indiana, Pennsylvania, Ohio, Maryland, Missouri, District of Columbia, Colorado, Illinois, Indian Territory, Iowa, Kansas, and, finally, under the head of Mississippi, as follows: "To Julia A. Nutt, widow and executrix of Haller Nutt, deceased, of Adams County, the sum of $35,556.17." This amount was paid to and accepted by the claimant. The payment and receipt of this sum under the Act of July 5, 1884, however, it is contended, does not operate as a full and final discharge of her claim against the Government, because it is not within the description contained in the Act of "Claims examined and allowed by the proper accounting officers under the provisions of the Act of July 4, 1864." The right to recover the full amount of the claim, after deducting this payment, is rested by counsel for the claimant upon the Act of August 7, 1882, and is based upon the following propositions:

1. The reference of the claim by Congress, with the consent of the claimant, to the Quartermaster-General constituted, under the special provisions of the act of reference, a submission to arbitration, and the Quartermaster-General's conclusion or finding was an award pursuant to arbitration upon which suit can be maintained.

2. If the reference to the Quartermaster-General, and the finding by him, do not constitute an arbitration and award, they are at least the equivalent of an account stated between private individuals.

3. Even if of itself the finding of the Quartermaster-General did not constitute an account stated, it became such by its acceptance by Congress and the appellant.

There is nothing, however, in the language of the Act of August 2, 1882, to justify the inference that the finding reported by the Quartermaster-General is an award in pursuance of an arbitration. On the contrary, the terms of the Act distinctly negative that idea. There is no recital of a mutual submission by the parties of any controversy to an arbitrator. The Quartermaster-General was authorized and directed by Congress to examine and adjust the claims in question, but not for the purpose of settling and adjudging any controversy in relation thereto between the United States and the claimant. He was required to report the facts to Congress, not to publish an award to the parties; and the object for which his report was required was that the claim should be "considered with other claims reported by the Quartermaster-General." This report evidently is purely for the information of Congress itself, in order that it, being thus advised, might thereafter deal with the claim as in its judgment should seem best.

On this point the language of this court in *Gordon* v. *U. S.* 74 U. S. 7 Wall. 188, 195 [19:85,87] is applicable. It was there said: "The various Acts and resolutions of Congress in this case emanated from a desire to do justice and to obtain the proper information as a basis of action, and were not intended to be submissions to the arbitrament of the accounting officer. They were designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject, or rescind, or to otherwise act in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial, not a judicial, capacity."

To the same effect is the case of *Chorpenning* v. *U. S.* 94 U. S. 397, 398 [24:126, 127]. It was there said: "The resolution relied upon by the appellant was wholly unilateral. It contained no stipulation of payment, express or implied. Congress, for its own reasons, simply directed an examination and adjustment. It gave no promise, and came under no obligation to the other party, and asked and received none from him. The Government and the claimant stood, and continued to stand, wholly independent of each other. The Government could at any time before payment recall what it had done, and the claimant was at liberty up to the same period to refuse concurrence and assert *aliunde* his legal rights, if any he had. Prior to that time there could be no vested right and no commitment of either party, not subject to the exercise thereafter of such discretion, affirmative or negative, as might be deemed proper. The case presents the same legal aspect as if it were between individuals. If a merchant should direct his clerk or other agent to investigate and adjust the claim of a third party upon a prescribed basis, and the adjustment

was made accordingly, can it be doubted that the merchant might thereafter, because he had come to the conclusion that the claim was tainted with fraud, or had been already fully paid, or for any other reason, or as a matter of choice, without assigning any reason, decline to recognize what had been done as of any validity, and withdraw the authority under which the proceeding had been taken? The reason of the right would be that there was no binding mutuality of assent, no consideration, and hence no legal obligation resting upon either party."

The same reasons dispose of the second proposition, and show that the report of the Quartermaster-General is no more an account stated between the parties than it is an arbitration and award. In order to constitute an account stated between individuals, the statement of the account must be adopted by one party and submitted as correct to the other. But here Congress did not adopt the report of the Quartermaster-General as its statement of what was due from the United States; nor was the report submitted to the claimant as a correct statement of indebtedness.

The acceptance by Congress and the appellant, referred to in the third proposition, can only mean the appropriation made by Congress in the Act of July 5, 1884, but certainly that cannot be considered an adoption of the report of the Quartermaster-General. It does not purport to be an appropriation of a partial payment, as a credit upon a larger sum admitted to be due. Even though it be admitted that the language of the Act in its first clause, declaring that the receipt of the money appropriated in each case shall be taken as a full and final discharge of the several claims, does not apply, yet there is no inference that the appropriation actually made was intended to be a recognition of a larger amount in fact due. The presumption is the other way; and the right conclusion is that Congress appropriated all that it meant to acknowledge.

The judgment of the Court of Claims dismissing the petition is therefore affirmed.

UNITED STATES, *Appt.*
v.
EDWARD T. STRONG.

(See S. C. Reporter's ed. 656–658.)

Naval officer—pay of.

A Lieutenant Commander in the United States Navy, performing duty as executive officer, on board a receiving ship at Boston, under an order designating his employment as "shore duty," is entitled to receive pay for sea service.

[No. 1381.]

Submitted April 2, 1888. Decided April 16, 1888.

APPEAL from a judgment of the Court of Claims, in favor of claimant for the difference between shore pay and sea pay. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **A. H. Garland,** *Atty-Gen.*, **Robert A. Howard,** *Asst. Atty-Gen.*, and **F. P. Dewees,** *Asst. Atty.*, for appellant:

Sea service means, in the United States Navy, service rendered at sea under the orders of a department and in vessels employed by authority of law.

R. S. § 1571; Naval Regulations, 1876, 85, par. 38; *U. S.* v. *Symonds*, 120 U. S. 46 (30: 557); *Schoonmaker* v. *U. S.* 19 Ct. Cl. 172; *Carpenter* v. *U. S.* 15 Ct. Cl. 247.

Naval regulations in force at the time of the passage of the third section of the Act of 1860, 12 Stat. at L. 27, have the force of law.

Gratiot v. *U. S.* 45 U. S. 4 How. 80 (11: 884); *Ex parte Reed*, 100 U. S. 13 (25: 538); R. S. 1547.

Mr. **Linden Kent,** for appellee.

Mr. Justice **Matthews** delivered the opinion of the court:

The claimant, Edward T. Strong, being a Lieutenant Commander in the United States Navy, by an order of the Secretary of the Navy of February 4, 1886, was directed to report for duty as executive officer on board the United States receiving ship Wabash at Boston, Massachusetts. The order designated his employment as "shore duty." In compliance with the order he reported for such duty on board the ship on February 20, 1886, and continued from that time to discharge the required duties on board such ship until May 11, 1886, when he was relieved from duty thereon. During that period he was allowed and paid only as for shore duty. He claimed to be entitled to receive pay for sea service. Judgment was rendered in his favor by the court of claims for $111.20, being the difference between shore pay and sea pay. From this judgment the United States prosecutes the present appeal.

From the findings of facts it appears that The Wabash is a receiving ship built of wood, about thirty-one years old, stationed at the navy yard in Boston for over twelve years past. The vessel is and has been used as a naval recruiting station whilst at the Boston Navy Yard. There is a roof built over the deck. The ship is connected and communicates with shore by a rope. There is a large boat or scow that plies between the ship and the wharf by means of a crank and connected with the rope. Steam is used only for heating purposes and pumps. All the anchors have never been taken up at the same time. Row boats were also used in going to and from the ship. The Wabash has remained in the same place in which she was anchored since October 28, 1875, and has been and was, during the time of service thereon by the claimant, under the orders and direction of the Secretary of the Navy. During the period of the claimant's service thereon she was not in a safe condition for cruising. She is a sailing and steam vessel, and had on board sails, spars, and tackle; she was capable of being taken out to sea under steam, her machinery and boilers being sufficient for that purpose; she could have been taken out to sea under sail, but in the condition of her boilers and machinery and her sailing apparatus, without repairs, it would not have been, in either case, advisable or safe. The duties of executive officer of the vessel performed by the claimant were similar to those of executive officers on cruising ships. In addition to those he had other duties, which were more exacting and arduous than those on board cruis-

serious litigation; and this the mortgagees did not see fit to undertake. To save the property from being taken, to prevent the catastrophe which its taking would have caused, and the serious questions which would have arisen had it actually been sold, the intervener gave his bond to obtain an injunction. It was not done for the purpose of being subrogated to the questionable rights of Holbrook under his judgment, but to prevent the certain injury to the property itself, which the attempted enforcement of those rights would have involved. It is unnecessary, therefore, to discuss the rights of an execution creditor, levying on the personal property of a railroad company in Illinois, as against those of a mortgagee. We express no opinion upon that subject. The claim was presented upon the equities arising in favor of the intervener for taking the action he did, and thus securing the results which followed, and upon the other circumstances of the entire case taken together; and it was upon these grounds that the claim was allowed by the court below.

The decree of the Circuit Court is affirmed.

ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, *Appt.*,

v.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 658–680.)

Insolvent railroad company—application of earnings—unpaid rent—proceeds of sale—conflicting claims.

1. If current earnings of an insolvent railroad company are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.

2. A lessee of a railroad, being in no default at any time on account of rent, has a legal right to appropriate any surplus of its gross earnings to the payment of interest on bonds or for the improvement and additional equipment of its road, and is not bound to accumulate, out of such surplus, a fund to meet possible contingencies in the future in respect to rent.

3. Where the earnings of the road have been applied by the lessee to the payment of the interest on the first mortgage bonds, leaving the rent unpaid, the equity of the lessor, if in fact it exists, is against the holders of the first mortgage bonds who have actually received the money to which the lessor claims to be equitably entitled, and not against the proceeds of the sale of the railroad on foreclosure.

4. It is also held, on the facts of the case, that the petitioner had failed to establish any diversion and misappropriation of the earnings, applicable to the payment of rent of the leased line, to entitle him in equity to charge the fund in court for the payment of the arrearage due to him in preference to the second and third mortgage bondholders.

5. Where the lessor has actually received since the lease was made, in payment of rent, more than the entire net earnings of the leased property, such lessor has no equitable ground for payment of the amount due for rent out of the fund arising from the sale of the property on mortgage foreclosure, in preference to those who are secured by prior mortgage liens.

[No. 192.]

Argued March 22, 1888. Decided April 16, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana, awarding to petitioner an amount due for rent which accrued while the road was in the possession of a receiver appointed under the foreclosure proceedings, and directing payment thereof; and dismissing the petition so far as it sought to establish a claim for rent prior to the time when the receiver took possession of the property, as against the proceeds arising from its sale, and so far as it sought to recover the value of the supplies turned over to the Indianapolis and St. Louis Railroad at the time of the execution of the lease. *Affirmed.*

Statement by *Mr. Justice* **Matthews:**

The decree appealed from in this case was rendered upon an intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, filed October 30, 1882, in a suit then pending in the Circuit Court of the United States for the District of Indiana, wherein Hinman B. Hurlbut was complainant, and the Indianapolis and St. Louis Railroad Company defendant, the object of which suit was to foreclose the second and third mortgages, in which Hurlbut was the surviving trustee, upon the railroad and other property of the defendant. A decree of foreclosure and sale had been rendered therein on May 22, 1882, in pursuance of which the mortgaged premises were sold on July 28, 1882, for the sum of $1,396,000, subject to the outstanding first mortgage, and, at the date of the filing of the intervening petition of the present appellant, they had become by purchase the property of the Indianapolis and St. Louis Railway Company. The proceeds of the sale were under the control of the court for purposes of distribution; and the matter had been referred to a master in chancery to hear evidence in support of the claims of any creditor claiming the right to share in that distribution, and to make report thereon.

The petition alleges, and it so appears, that by a decree of the Circuit Court of the United States for the District of Indiana, rendered July 26, 1882, in a certain suit in equity, in which said petitioner was complainant and the said Indianapolis and St. Louis Railroad Company and others were defendants, he obtained a decree against said Indianapolis and St. Louis Railroad Company for the payment of the sum of $664,874.70, besides costs, which decree remains unsatisfied and unreversed. This amount, it is claimed by the petitioner, is a lien upon the proceeds of the sale of the Indianapolis and St. Louis Railroad, prior in equity to that of the bondholders secured by the second and third mortgages.

The indebtedness for which this decree was rendered arose under an agreement entered into between the petitioner and the Indianapolis and St. Louis Railroad Company on September 11, 1867, whereby it was provided that the Indianapolis and St. Louis Railroad Company should manage, operate and carry on the business of that portion of petitioner's road known as its principal or main line, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, a distance of 189 miles, and of the Alton branch thereof, extending from Alton Junction, in the State of Illinois, to Alton, in said State, a distance of

four miles, for the period of ninety-nine years from the first day of June, 1867; that said Indianapolis and St. Louis Railroad Company should pay annually during said term to the petitioner 30 per cent of the gross earnings of the said main line and Alton branch until such gross earnings for the year should amount to $2,000,000, and 25 per cent of any excess over $2,000,000, until the whole earnings for the year should amount to $3,000,000, and 20 per cent of any excess over $3,000,000 of gross earnings for such year; and, further, that the said payment should amount in each and every year to at least the sum of $450,000, which amount was agreed upon as a minimum rental, to be paid absolutely without reference to the percentage which it formed of the gross earnings of any year, and without leaving or creating any claim or charge upon the earnings of any future year. The petition further shows that at the time of the execution of the said operating contract, the Indianapolis and St. Louis Railroad was not built; and that the Indianapolis and St. Louis Railroad Company was organized and created for the express purpose of furnishing to the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company and the Pittsburg, Fort Wayne and Chicago Railway Company a through line to the Mississippi River, by means of its connection with the petitioner's road, the St. Louis, Alton and Terre Haute Railroad, under the foregoing contract; and that while the Indianapolis and St. Louis Railroad Company nominally under that contract was the lessee of the petitioner's road, yet in fact it was leased and operated for the benefit of the other two companies named, who furnished the money to build the said Indianapolis and St. Louis Railroad, and who entered into a contract with the petitioner, guaranteeing performance of said agreement on the part of the Indianapolis and St. Louis Railroad Company, and who had entered into a contract between themselves for the management and operation of the continuous line of railroad from Indianapolis, in the State of Indiana, to East St. Louis, in the State of Illinois, including the Indianapolis and St. Louis Railroad and the petitioner's road. It was further alleged in the petition that the Pennsylvania Railroad Company, which, together with the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, are made defendants to the petition, had succeeded to the rights and obligations under these several contracts and arrangements of the Pittsburg, Fort Wayne and Chicago Railway Company; and that the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company were equal owners of the capital stock of the Indianapolis and St. Louis Railroad Company, and that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company is the holder, substantially, of all the second mortgage bonds of the Indianapolis and St. Louis Railroad Company.

The petition further alleges that the eastern terminus of the St. Louis, Alton and Terre Haute Railroad is the western terminus of the Indianapolis and St. Louis Railroad, the two thus forming a continuous line from Indianapolis to East St. Louis on the Mississippi River, the road of the petitioner being the only outlet for the Indianapolis and St. Louis Railroad west of Terre Haute; that a very large proportion of the earnings of the Indianapolis and St. Louis Railroad Company are derived from business received by it from the petitioner's leased line; and avers that the earnings of the leased road over and above the amount authorized to be retained by the Indianapolis and St. Louis Railroad Company for the purpose of operating the same at all times have been and are the property of the petitioner.

The petitioner further claims that the rental for the use and occupation of said continuous line constituted a part of the operating expenses of the Indianapolis and St. Louis Railroad Company; that the operating contract was executed before any of the bonds of the Indianapolis and St. Louis Railroad Company were issued and sold; that it was the duty of the Indianapolis and St. Louis Railroad Company to pay all of its operating expenses, including the rental of the petitioner's road, out of its earnings before it paid any interest on said bonds; but that the said Indianapolis and St. Louis Railroad Company, instead of paying its operating expenses as thus defined, diverted and appropriated its earnings to improvements of its property in better equipment and new construction, and to the payment of interest upon its bonds, and neglected and refused to pay the rental accruing to the petitioner for which it had obtained a decree, as above stated. And the petition alleges that during the time the Indianapolis and St. Louis Railroad Company has been in possession of the petitioner's road, the amount of such misappropriation and diversion of funds, that should have been applied to the payment of operating expenses, amounts to the sum of $1,000,000.

The petition further shows that on May 1, 1878, the Indianapolis and St. Louis Railroad Company made default in the payment to petitioner of the rental then due under the terms of said contract, and so continued to make default from and including April 1, 1878, up to and including October 26, 1878, during which time it was in possession and use of the leased road, receiving the profits and income thereof, and paid over no part of the gross earnings of said road to the petitioner whatever, but appropriated the whole of the same to its own use, 30 per cent whereof during said time amounted to the sum of $164,052.82, which, it is alleged, was appropriated by the Indianapolis and St. Louis Railroad Company to improvements, betterments, and new construction upon its own line of railroad, in the purchase of rolling stock and equipment, and in the payment of interest upon its bonds.

It is further alleged in the petition that when the Indianapolis and St. Louis Railroad Company took possession of the leased road in 1867 it received from the petitioner supplies of the value of $91,860.05, which, by the terms of the lease, the lessee contracted and agreed to return or account for to the lessor at the termination of the lease; that said supplies have long since been consumed by the lessee; that by the terms of the decree and sale in the principal cause the lease has been assigned and transferred to the Indianapolis and St. Louis Railroad Company, and it is claimed that said amount is a charge upon the proceeds of the

sale of the leased road in the possession of the court for distribution.

The petition therefore prays for a decree awarding priority in payment in its favor out of the proceeds of the sale of the two sums of $664,874.70 and $91,860.05.

To this petition answers were filed by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and by the Pennsylvania Railroad Company, in which the allegations of the petition in regard to the diversion of the earnings of the St. Louis, Alton and Terre Haute Railroad Company to the purposes of the Indianapolis and St. Louis Railroad are denied, as well as the general equity set up by the petitioner.

On June 27, 1884, the cause having been fully heard upon the petition, and the answers and proofs, a final decree was rendered, awarding to the petitioner an amount found due to it for rental accrued while the road was in the possession of the receiver appointed under the foreclosure proceedings, and directing payment thereof; but so far as the petition sought to establish a claim for rental prior to the date when the receiver took possession of the property, as against the proceeds arising from its sale, and so far as it sought to recover the value of the supplies turned over to the Indianapolis and St. Louis Railroad Company in 1867, at the time of the execution of the lease, the petition was dismissed. It is from that decree that this appeal is prosecuted.

Messrs. **John M. Butler** and *Joseph E. McDonald*, for appellant:

The decree of July 26, 1882, in so far as it affected the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Pennsylvania Railroad Company, has been reversed by this court.

Pennsylvania R. R. Co. v. *St. Louis, A. & T. H. R. R. Co.* 118 U. S. 290, 314 (30:88,93).

The St. Louis, Alton, and Terre Haute Railroad Company is entitled to payment of the amount equitably due for the use of its railroad and franchises by the Indianapolis and St. Louis Railroad Company, as upon *quantum meruit*, regardless of the lease of September 11, 1867.

Thomas v. *Brownville, Ft. K. & P. R. R. Co.* 109 U. S. 522, 526 (27:1018,1019); *Gardner* v. *Butler*, 30 N. J. Eq. 710; *Wardell* v. *Union Pac. R. R. Co.* 4 Dill. 339; *S. C.* 103 U. S. 656 (26:511).

The St. Louis, Alton and Terre Haute Railroad Company is entitled to payment, out of the proceeds of the sale of the railroad and franchises of the Indianapolis and St. Louis Railroad Company, of the full amount of $664,874.70 decreed due to it by the decree of July 26, 1882, in preference to payment upon said second and third mortgage bonds.

Fosdick v. *Schall*, 99 U. S. 235 (25:339); *Union Pac. R. R. Co.* v. *U. S.* Id. 420, 422, 423 (25:282,283); *Union Trust Co.* v. *Walker*, 107 U. S. 596 (27:490); *Union Trust Co.* v. *Souther*, Id. 594, 595 (27:489); *Sage* v. *Central R. R. Co.* 99 U. S. 336, 345 (25: 394, 397); *Burnham* v. *Bowen*, 111 U. S. 776, 780, 781 (28: 596, 598); *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 311, 312 (27:126,127); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 457, 458 (29:971).

Rents definitely ascertained, and specifically reserved by lease, never become the property of the lessee, but vest directly in the lessor, and are simply held in trust by the lessee for the lessor.

Moulton v. *Robinson*, 27 N. H. 551; *Hatch* v. *Hart*, 40 N. H. 98; *Daniels* v. *Brown*, 34 N. H. 454; *Hart* v. *State*, 29 Ind. 200; *Lindley* v. *Kelley*, 42 Ind. 294; *Parker* v. *Garrison*, 61 Ill. 254; 1 Washb. Real Prop. § 10, title "*Estates for Years.*"

Messrs. **Stevenson Burke** and **John T. Dye**, for appellees:

The indebtedness to the petitioner is not entitled to preference over the claims of the bondholders. The case of *Fosdick* v. *Schall*, 99 U. S. 235 (25:339) is in point and decisive of the contention in this case.

All that can be said of it is that it is an indebtedness arising upon contract for which there was really no consideration received by the lessee. The case of *Huidekoper* v. *Hinckley Locomotive Works*, 99 U. S. 258 (25:344) is also in point.

If the petitioner's claim is to be paid in preference to the bonds, it requires that the court shall take the amount of the petitioner's indebtedness out of the small fund arising from the sale of the mortgaged premises, and hand that money over to the petitioner.

Miltenberger v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286 (27:117); *Union Trust Co.* v. *Souther*, 107 U. S. 591 (27:488).

There is nothing in the case of the *Union Trust Company* v. *Illinois Midland Railway Co.* 117 U. S. 434 (29: 963) which in any way conflicts with the principles enunciated in the case of *Fosdick* v. *Schall*, *supra*, nor which in any respect supports the claim of the petitioner in this action.

There is nothing in the case of *Burnham* v. *Bowen*, 111 U. S. 776 (28:596) which supports the case of the petitioner.

A corporation may be bound to refund to a person from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract.

White v. *Franklin Bank*, 22 Pick. 181; *Morville* v. *Am. Tract Society*, 123 Mass. 129, 137; *Re Cork & Y. R. Co.* L. R. 4 Ch. App. Cas. 748.

But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in or to guarantee the profits of the enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it.

East Anglian R. Co. v. *Eastern Counties R. Co.* 11 C. B. 775; *Macgregor* v. *Dover & D. R. Co.* 18 Q. B. 618; *Ashbury R. Carriage & I. Co.* v. *Riche*, L. R. 7 H. L. 668; *Thomas* v. *West Jersey R. R. Co.* 101 U. S. 71 (25:950); *Downing* v. *Mt. Washington Road Co.* 40 N. H. 230; *Franklin Co.* v. *Lewiston Sav. Inst.* 68 Me. 43; *Davis* v. *Old Colony R. R. Co.* 131 Mass. 258.

Every person who enters into a contract with

a corporation is bound at his peril to take notice of the legal limits of its capacity.

There was a clear distinction, as was pointed out by *Justice* Campbell in *Zabriskie* v. *Cleveland, C. & C. R. R. Co.* 64 U. S. 23 How. 381–398 (16:488–497), by *Mr. Justice* Hoar in the *Monument Nat. Bank* v. *Globe Works*, 101 Mass. 57, 58, and by *Lord* Hatherly in *Ashbury R. Carriage & I. Co.* v. *Riche*, L. R. 7 H. L. 668–684, between the exercise by a corporation of a power not conferred upon it,—of which all persons dealing with it are bound to take notice,—and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance when such abuse or failure is not known to the other contracting party.

Davis v. *Old Colony R. R. Co.* 131 Mass. 258.

Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment.

Thomas v. *West Jersey R. R. Co.* 101 U. S. 86 (25:953); *Pennsylvania R. R. Co.* v. *St. Louis, A. & T. H. R. R. Co.* 118 U. S. 317 (30:94).

None of the cases cited to show that the court will sustain an action on a *quantum meruit*, where the contract is void, are cases where the contract was held void because it was not in the power of the corporation to make it.

The contract in the case of *Thomas* v. *Brownville, Ft. K. & P. R. R. Co.* 109 U. S. 522–526 (27:1018,1019) was void because of fraud, and not because the work which was performed under it was beyond the scope of the corporate authority. The same criticism applies to the cases:

Gardner v. *Butler*, 30 N. Y. Eq. 724, and *Wardell* v. *Union Pac. R. R. Co.* 4 Dill. 339; *S. C.* 103 U. S. 656 (26:511).

Mr. Justice **Matthews** delivered the opinion of the court:

At the time of the execution of the lease in 1867 of the St. Louis, Alton and Terre Haute Railroad to the Indianapolis and St. Louis Railroad Company, the railroad of the latter company was not in existence. It was subsequently constructed in order to form the connection which would give to the parties in interest the desired through line from Indianapolis to St. Louis. The capital stock of the Indianapolis and St. Louis Railroad Company was owned substantially by the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company in equal parts. A portion of the funds necessary to construct and equip the road was represented by bonds secured by mortgages. Of these there were three: the first mortgage was for $2,000,000, the second for $1,000,000, and the third for $500,000. The first mortgage bonds, prior to the foreclosure and sale, had been sold in the market, and were outstanding. The sale was made subject to the continued incumbrance of that mortgage, and of the bonds secured thereby. The holders of these bonds have, therefore, no interest in this controversy.

The second and third mortgage bonds were originally taken to account by the two companies interested in the construction of the road, but, prior to the foreclosure and sale, had become substantially the property of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, that Company having acquired the entire interest of the Pennsylvania Railroad Company. As the owner of these bonds, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company claims to be entitled to the whole amount of the proceeds of the sale of the road under the foreclosure, and is the only party in interest adverse to the petitioner.

The default in the payment of interest on the second and third mortgages dates from January 1, 1878. The decree of foreclosure finds the amount of interest in arrears on May 2, 1882, on the second mortgage bonds, to be $291,745.97, and the aggregate sum due on account of said mortgage, principal and interest to be $1,197,745.97, with interest from May 2, 1882. The amount found due by the same decree, on account of the bonds secured by the third mortgage, including interest from January 1, 1878, is $699,164.76. The whole amount found due by the decree, including both sums, is $1,896,910.73, which is more than the amount of the proceeds of the sale of the road, which were $1,896,000.

Upon the bill of Hinman B. Hurlbut, as trustee for the foreclosure and sale of the Indianapolis and St. Louis railroad property, a receiver was appointed, and it was ordered that the St. Louis, Alton and Terre Haute Railroad Company should be entitled to require the payment of 30 per cent of the gross earnings of its railroad to said lessor, according to the order of the court theretofore made and still in force in the suit of the St. Louis, Alton and Terre Haute Railroad Company against the Indianapolis and St. Louis Railroad Company, with the terms of which order the receiver was directed to comply. The order appointing the receiver also expressly reserved to the court the right and power to make such orders and decrees touching the payment of the debts of the Indianapolis and St. Louis Railroad Company incurred in the management and operation of its railroad prior to the appointment of the receiver as might be equitable and just. The decree of foreclosure and sale also contained a clause, reserving to the court the right by subsequent order or orders to distribute the proceeds of the sale of the railroad and property connected therewith, and to make such further order and decree in regard to the distribution of the proceeds of sale as might to the court seem equitable and just; and a reference was made to the master to hear evidence in support of all claims or indebtedness in behalf of any creditor of the defendant Company, whether secured or not.

The Indianapolis and St. Louis Railroad Company, from the date of the lease in 1867, continued to pay to the St. Louis, Alton and Terre Haute Railroad Company the rental reserved by the terms of the lease, viz., 30 per cent of the gross earnings of the leased road in each year until April 1, 1878. Prior to that time there had been no default in respect to the payment of the full amount of the rental as it accrued; the lessee ceased paying rent from that date.

On October 25, 1878, the St. Louis, Alton and Terre Haute Railroad Company filed its bill in equity in the Circuit Court of the United States

for Indiana against the Indianapolis and St. Louis Railroad Company, to which also the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pennsylvania Railroad Company were made parties defendant. The object of that bill was specifically to enforce the performance of the covenants contained in the lease on the part of the lessee and of the other defendants as guarantors. It was in that suit that the order was made November 30, 1878, requiring the Indianapolis and St. Louis Railroad Company to pay into court, on account of the rental due the lessor, monthly, on the 15th day of each month, 30 per centum of the gross earnings of the preceding month of the leased road, calculating the gross earnings which had accrued since October 26, 1878.

The final decree of the circuit court in that cause declared that the lease and operating contract of September 11, 1867, was a valid obligation upon all the parties thereto, and established the amount of the indebtedness of the Indianapolis and St. Louis Railroad Company on account of the minimum rent reserved by said lease to July 1, 1882, at the sum of $541,358.23 principal, and $123,516.47 interest, making in all the sum of $664,874.70. It also found that 30 per cent of the gross earnings of the leased line collected and received by the Indianapolis and St. Louis Railroad Company, and withheld by it from April 1, 1878, until October 26, 1878, amounted to $164,052.82, which was part of said aggregate amount found due. The decree further declared the liability of the Pennsylvania Railroad Company and of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company as guarantors for their proportion of the said sum, and awarded payment accordingly.

From this decree appeals were taken and prosecuted to this court by the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the judgment in which was rendered at October Term, 1885, and is reported in 118 U. S. 290 [30:83]. It was there decided that the lease of 1867 was void for want of power on the part of the Indianapolis and St. Louis Railroad Company to enter into it, and that the guaranty of performance executed by the other defendant companies by reason thereof was also void. The decree of the circuit court was accordingly reversed, and the cause remanded with directions to dismiss the bill as to the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company; but that part of the decree which required the Indianapolis and St. Louis Railroad Company to pay the amount found due as rent was left standing, as no appeal from it had been prosecuted by the Indianapolis and St. Louis Railroad Company. Pending that litigation, the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, now under consideration, was filed in the foreclosure suit, in which Hurlbut, as trustee, was complainant.

The propositions on which counsel for the appellant bases its right to the relief prayed for in the intervening petition, and which was denied by the decree, are stated by it as follows:

First. That the petitioner is in equity entitled to just and fair compensation for the use of its railroad, equipment and franchises as upon *quantum meruit*, even if the lease is entirely disregarded.

Second. That the minimum rent of $450,000 per annum, in monthly payments of $37,500, is no more than just, fair, and equitable compensation for the use of the leased line upon *quantum meruit*.

Third. That the petitioner is entitled to payment of the $664,874.70 decreed due it by the decree of July 20, 1882, with interest thereon, out of the proceeds of the sale of the railroad and property of the Indianapolis and St. Louis Railroad Company in preference to payment of the mortgage bonds:

1. Because it is an unpaid *operating expense of the Indianapolis and St. Louis Railroad Company*, there having been gross earnings abundant to pay all operating expenses, including rent of the leased line.

2. Because it is a debt justly due to the petitioner *as a connecting line*.

3. Because gross earnings lawfully applicable *only* to operating expenses, until every operating expense has been fully paid, have been diverted to the benefit of the bondholders of the petitioner in payment of bond interest, and in adding increased value to the mortgaged property by additions and improvements, to an amount sufficient to have paid the debt now due to the petitioner many times.

Fourth. That the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, in resisting payment of the debt due the petitioner in preference to the payment of the second and third mortgage bonds, does not stand before a court of equity in the position of simply an ordinary bondholder; and that the peculiar relations existing between the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Indianapolis and St. Louis Railroad Company, as disclosed by this litigation, greatly strengthen the equity in favor of the petitioner in its claim for preference in payment over the mortgage bonds.

Fifth. That the petitioner is entitled to payment of $164,052.82, with interest thereon from October 26, 1882, out of the proceeds of sale, because that amount is 30 per cent of the gross earnings earned on the track of the leased line from April 1, 1878, to October 26, 1878, and *is trust money reserved by the lease* belonging to the petitioner, collected, withheld, and wrongfully appropriated to its own use and benefit by the Indianapolis and St. Louis Railroad Company.

It may be admitted that the petitioner is entitled in equity to a just and fair compensation for the use of its railroad by the Indianapolis and St. Louis Railroad Company, without regard to the lease, as between it and the lessee, and also that the minimum rent of $450,000 per annum, in monthly payments of $37,500 is no more than that just and fair compensation that the lessor company would be entitled to receive for the use of its road upon a *quantum meruit*. As between the petitioner and the Indianapolis and St. Louis Railroad Company, the amount of the indebtedness on that account is conclusively established by the decree of July 26, 1882, which, as between these parties, stands unreversed and unsatisfied.

A different question, however, arises as between the petitioner and the Cleveland, Co-

lumbus, Cincinnati and Indianapolis Railway Company, as the owner of the mortgage bonds, for the satisfaction of which the Indianapolis and St. Louis Railroad has been sold. It remains, as between these parties, for the petitioner to establish that the debt to it of the Indianapolis and St. Louis Railroad Company, on account of this use and occupation, is a prior lien and charge upon the proceeds of the sale of the Indianapolis and St. Louis Railroad, entitled to preference over that of the second and third mortgages. Among the reasons urged in support of this preference are these,—because the arrearage is an unpaid operating expense of the Indianapolis and St. Louis Railroad Company; because it is a debt due to the petitioner as a connecting line; and because it consists of a portion of the gross earnings earned on the track of the leased line received by the Indianapolis and St. Louis Railroad Company, and held by it as trust money in equity belonging to the petitioner. This last reason, as formally presented, is limited to $164,052.82, being 30 per cent of the gross earnings earned on the track of the leased line from April 1, 1878, to October 26, 1878, but is applicable as well to all other amounts received by the lessee of the gross earnings of the leased line which have not been accounted for.

But none of these reasons, standing by themselves, are sufficient. It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on mortgage bonds. But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus;* and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens.

There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are to be found in *Fosdick* v. *Schall,* 99 U. S. 235 [25: 339]; *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286 [27: 117]; *Union Trust Co.* v. *Souther,* 107 U. S. 591 [27; 488]; *Burnham* v. *Bowen,* 111 U. S. 776 [28: 596]; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 [29: 963]; *Dow* v. *Memphis & L. R. R. Co.* 124 U. S. 652 [*ante,* 565]; *Sage* v. *Memphis & L. R. R. Co.* 125 U. S. 361 [*ante,* 694]; and *Union Trust Co.* v. *Morrison,* 125 U. S. 591 [*ante,* 825]. The rule governing in all these cases was stated by *Chief Justice* Waite in *Burnham* v. *Bowen,* 111 U. S. 776, 783 [28: 596, 598] as follows: "That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all.

Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis and St. Louis Railroad Company, as a part of its current operating expenses, before any net income could arise applicable to the payment of the interest on the mortgage bonds, it must still be shown, to entitle the petitioner to the relief prayed for, that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment to the use and benefit of the mortgage bondholders. Counsel for the petitioner undertake to do this, and insist that upon the proofs in this case it satisfactorily appears that such a diversion and misappropriation have taken place to its injury and to the advantage and benefit of the bondholders claiming the fund in court for distribution.

This diversion and misappropriation are alleged to have occurred in two ways: (1) by the payment of the interest on the mortgage bonds out of earnings which should have been paid to the petitioner on account of rent due to it as an operating expense; and (2) by the application of earnings to permanent improvements and betterments of the Indianapolis and St. Louis Railroad property, which have increased the value of that property as a mortgage security; an increased value which, it may be very fairly presumed, is represented in the proceeds of its sale.

The fact in issue, it is claimed, is shown by an exhibit, which in tabular form contains a statement of the earnings, expenses, rental, and interest on bonds of the Indianapolis and St. Louis Railroad Company, including the leased line as one of its divisions, from the date of the commencement of operations under the lease in 1867 to May 23, 1882. That statement shows: gross earnings, $26,868,252.31; operating expenses, including taxes, $19,417,078.26; leaving as net earnings, $7,451,174.05. During the same period the amount of rental paid for the leased lines was $6,464,869.19, and during the same period interest paid on bonds, $2,234,896.62, showing as the result of the operations for the entire period a deficit of $1,248,091.76. It thus appears that the payments made on account of the various items mentioned exceed by that sum the entire gross earnings received by the lessee from its own and the leased line. But inasmuch as during this period $2,234,896.62 out of the gross earnings were paid on account of interest on bonds, being $986,804.86 more than the entire apparent deficit, the inference is drawn that the deficit has arisen in consequence of the payment of interest on bonds, more than sufficient, if they had been so appropriated, to have paid the entire rental, including the arrearage now due. This, it is claimed, establishes the fact to be proved, that gross earnings, which should have been applied to the payment of rent, have been diverted by the lessee to the payment of interest on bonds.

This statement, however, is deceptive. From the beginning of operations under the lease in 1867 until April 1, 1878, the Indianapolis and

St. Louis Railroad Company paid in full, as it accrued, the whole amount of the rental called for by the lease. During that period, the lessee, being in no default at any time on account of rent, had a legal right to appropriate any surplus of its gross earnings to the payment of interest on bonds, or for the improvement and additional equipment of its road. It was not bound to accumulate, out of the surplus of gross earnings, prior to 1878, a fund to meet possible contingencies in respect to rent that might arise after that date. The petitioner, therefore, has no right to complain of any appropriation of the earnings of the leased line during the period in which it received the full amount due to it.

If now we turn to a statement of a similar account, beginning in 1878, when the default in the payment of interest began, to the close of the period, May 28, 1882, we are furnished with the following figures: gross earnings, $7,443,894.43; operating expenses, including taxes, $6,253,819.53; leaving net earnings, $1,190,074.90. During the same period there was paid on account of rent of the leased line to the petitioner $1,450,336.67, making a deficit of $260,261.77, without reference to anything paid during that period on account of interest on bonds. That is to say, during the period in which the arrearage on account of rent accrued, there was paid out on account of rent $260,261.77 in excess of the entire earnings of the whole line, after deducting the ordinary expenses of operation. During the same period there was paid on account of interest on bonds the sum of $490,105, making the entire deficit during that period $750,366.77. But it is admitted that during the same period the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pennsylvania Railroad Company made advances in cash to the Indianapolis and St. Louis Railroad Company to the amount of $510,306.24, a sum greater than the whole amount of the interest paid during the same period on bonds. Even if we should treat the payment, on account of interest on bonds during that period, of $490,105 as taken from the earnings, which should have been applied to the payment of the rental, it is to be considered that the payment was made on account of the interest accruing during that period on the first mortgage bonds alone. No interest whatever was paid from January 1, 1878, on account of the interest accruing on the second and third mortgage bonds. It cannot be said that the application of earnings to the payment of the interest on the first mortgage bonds is chargeable to the holders of the second and third mortgage bonds; the latter alone are interested in the fund for distribution. That fund, in the sense of the rule sought to be applied, cannot be said to have been benefited by the payment to other bondholders from the gross earnings applicable to the payment of the rent. The equity of the petitioner, if in fact it exists, is against the holders of the first mortgage bonds, who have actually received the money to which it claims to be equitably entitled.

It is further insisted, however, on behalf of the petitioner, that there has been a diversion of earnings to its detriment by payments made for additions and improvements to the mortgaged property during the years 1878, 1879, 1880, and 1881, amounting to $256,501.05; but if we exclude from the account the payments made during that period on account of interest on the first mortgage bonds, as should be done, the amount of these betterments of the mortgage security is much more than made up by the cash advances during that period made by the Cleveland, Columbus, Cincinnati, and Indianapolis Railway Company and the Pennsylvania Railroad Company, which, as we have stated, were $510,306.24.

A special equity is urged as to the unpaid rent of the leased line for the seven months from April 1, to November 1, 1878, during which nothing whatever was paid on that account, amounting, as found by the decree of July 26, 1882, to $164,052.82, on the ground that the gross earnings of the leased line during that period were received by the Indianapolis and St. Louis Railroad Company clothed with a trust, and were diverted from their legitimate application to the benefit of the bondholders. As we have already stated, no equity can arise upon alleged breach of trust unless the second and third mortgage bondholders participated in it, or have been benefited by it. The alleged diversion of this amount is covered by the statements that have been already adverted to. It consists in payments on account of interest on the first mortgage bonds, which must be excluded from the account for reasons already given, and payments made on account of new construction, additions, new equipment, and improvements, more than covered by the cash advances made by the owners of the second and third mortgage bonds. An effort is made in the argument to swell the amount chargeable to permanent improvements by pointing out that from January 1, 1881, to May 28, 1882, more than all of the gross earnings of the entire line were charged up to the operating expense account, without counting anything for rent of the leased line as an operating expense. The witness who tabulated the schedules in which these statements appear stated that, during the months covered by these charges for excessive operating expenses, large improvements were being made to the property, but no details were brought out on the examination, and the witness qualified his statement by saying that he did not mean to be understood that the improvements were more than such as were necessary to the proper repair and restoration of the property. We cannot assume by way of conjecture or mere inference that the items referred to were not properly charged as operating expenses. On this branch of the case we conclude that the petitioner has failed to establish any diversion and misappropriation of the earnings applicable to the payment of rent of the leased line to entitle him in equity to charge the fund in court for the payment of the arrearage in preference to second and third mortgage bondholders.

Independently of the equity growing out of the alleged diversion and misappropriation of earnings properly applicable to the payment of rent, it is claimed on behalf of the petitioner that it has an equitable right to a priority of payment out of the fund in court growing out of the peculiar relations existing between it and the Cleveland, Columbus, Cincinnati and

Indianapolis Railway Company and the Indianapolis and St. Louis Railroad Company, as disclosed in the transactions out of which this litigation has grown. It is alleged, in substance, that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company is the real debtor for this arrearage of rent; that it with the Pennsylvania Railroad Company were in fact the owners of the Indianapolis and St. Louis Railroad, which was built with their money, and for the promotion of their interests, in order, by means of the lease of the petitioner's road, to create a through line from Indianapolis to St. Louis for business between the East and the West, the establishment and operation of which have contributed largely to swell the business upon their own previously existing lines. Having thus induced the petitioner to enter into the arrangement for their benefit, and having secured and actually enjoyed its advantages and profits, the argument now is that good faith, by an equitable estoppel, forbids the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company from now asserting a claim which will deprive the petitioner of the compensation agreed to be paid for the use of its road. But this is the very equity which the petitioner sought to enforce by its bill filed October 25, 1878, in which it sought to obtain a decree against its lessee and the guarantors in the lease for the specific performance of the covenant to pay the reserved rent. In that bill reliance was placed, it is true, upon the express covenants which were held finally to be void; but every equitable ground upon the existing facts was invoked in support of the validity of the covenants. The facts supposed to constitute the equity now insisted on were urged then as sufficient to support the obligation based upon the terms of the operating contract and lease. If this equity was not sufficient then to sustain an express promise to pay the rent, it certainly is not strong enough now to justify a decree for its payment standing by itself. To enforce the present claim of the petitioner on this ground would be simply to reinstate as valid the covenants of the lease and guaranty which between the same parties have already been finally decided to be void.

It has already been stated that no default occurred in the payment of the rent by the Indianapolis and St. Louis Railroad Company until April 1, 1878. After that default occurred, no step was taken by the petitioner by any legal proceeding to forfeit the lease and repossess itself of its road. Nothing was done until the filing of its bill, October 25, 1878, to compel the specific performance of the covenants of the lease and operating contract, when the order was made requiring payment to it, pending the proceeding, of 30 per cent of the gross earnings of its road; and an analysis of the tabular statements, already referred to as in evidence, shows that the arrearage of rent, for which payment is now sought, can be recovered only upon the basis of the minimum rental fixed by the lease by the enforcement of the covenants of guaranty declared to be void.

The minimum fixed by the lease for the rental of the leased line from June 1, 1867, to May 23, 1882, at $450,000 per annum, is $6,750,000; 30 per cent of the gross earnings of the leased road for the same period is $6,031,465.61, being less than the guaranteed rent by $718,534.39. In point of fact, the condition of the petitioner, upon the facts as they now stand, without payment of any arrearage of rent, is demonstrably better than it would have been if no lease had been made, and the road had been operated by its own proprietors independently but as part of a connected through line. This is shown by the fact that the lessor received as rent during the whole period of the lease $6,464,869.19, while the total net earnings of the leased property during the same period are shown to have been only $5,290,783,02. Presumably these net earnings are as large as they would have been if the road had been operated by its own proprietor. The volume of its business, and the corresponding amount of its gross receipts, were certainly swelled beyond what they would have been if the Indianapolis and St. Louis Railroad had not been built, or had not been operated in connection with it. It follows, therefore, upon the basis of the figures shown in the proofs, that the lessor has actually received, since the lease was made, in excess of the entire net earnings of the leased property, $1,174,086.17. Indeed, it is further shown, that during the period commencing with 1878, when the default began, the net earnings of the entire line, including the Indianapolis and St. Louis Railroad, as well as the leased road, amounted to $1,190,074.90, and that during the same period the lessor received on account of rent $1,450,836.67, being in excess of the net earnings of the two roads.

Upon these facts, we are unable to discover any equitable ground for the relief prayed for by the petitioner.

The decree of the Circuit Court is therefore affirmed.

NELSON LYON, *Appt.*,
v.
THE PERIN AND GAFF MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 698–702.)

Res judicata—*adjudication, when a bar—on the merits—decree of dismissal.*

1. In order to render a matter *res judicata*, there must be a concurrence of the four conditions, viz: identity in the thing sued for; identity of the cause of action; identity of persons and parties to the action; and identity of the quality in the persons for or against whom the claim is made.

2. Where all these conditions exist in a case, and the decree therein is absolute in its terms and is an adjudication of the merits of the controversy, it constitutes a bar to any further litigation of the same subject between the same parties.

3. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.

4. A decree, made upon bill, answer and replication, which decrees that the equities are with the defendant, that the bill of complaint be dismissed, and that defendant recover its costs, if set up as a plea in bar to a new bill for same cause, is conclusive, if the dismissal was upon hearing, and is not, in direct terms, "without prejudice."

[No. 201.]

Argued April 2, 1888. Decided April 16, 1888.

APPEAL from a decree of the Circuit Court of the United States for the District of Indiana, in favor of defendant, dismissing plaintiff's bill in an action for an alleged infringement of reissued letters patent. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **William H. King**, for appellant:

A former verdict or dismissal on a bill filed for an injunction to restrain the use of a patent is not a bar to a subsequent suit, unless a judgment was rendered on such verdict against the plaintiff, or the dismissal was on the merits.

Allen v. *Blunt*, 2 Robb, Pat. Cas. 288; *S. C.* 3 Story, 742; 1 Greenl. Ev. Redf. ed. 563.

A former adjudication is an estoppel only as to the matters in issue, or points in controversy, upon the determination of which the judgment was rendered.

Cromwell v. *Sac County*, 94 U. S. 351 (24:195); *Buerk* v. *Imhaeuser*, 10 Off. Gaz. 907; *De Florez* v. *Raynolds*, 16 Blatchf. 408.

A decree is not final if it does not make the question of the novelty of the claim *res judicata*.

Rumford Chemical Works v. *Hecker*, 2 Bann. & Ard. 351.

A decree of a circuit court taken *pro confesso* will not preclude full inquiry and investigation by another court.

Everet v. *Thatcher*, 3 Bann. & Ard. 435.

A suit which is dismissed for want of prosecution is no bar to a subsequent suit for the same cause of action.

American Diamond Rock Boring Co. v. *Sheldon*, 4 Bann. & Ard. 551.

The record shows no ground upon which it was dismissed, except the want of appearance of the plaintiff; and a dismissal for that cause is not conclusive in favor of the defendant, even upon another suit for the same relief.

Mitf. Ch. Pl. 238; *Carrington* v. *Holly*, 1 Dick. 280; *Rosse* v. *Rust*, 4 Johns. Ch. 299; *Badger* v. *Badger*, 1 Cliff. 237, 245; *Porter* v. *Vaughn*, 26 Vt. 624.

Record must show conclusive judgment.

Hartley v. *Gregory*, 9 Neb. 279.

If, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.

Russell v. *Place*, 94 U. S. 606 (24:214); *Bank of U. S.* v. *Beverley*, 42 U. S. 1 How. 134 (11:75).

In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties, or their privies; and the point of controversy must be the same in both cases and must be determined on its merits.

Hughes v. *U. S.* 71 U. S. 4 Wall. 232 (18:303); *Walden* v. *Bodley*, 39 U. S. 14 Pet. 156 (10:398).

After a nonsuit a new action may be brought.

Oscanyan v. *Winchester Repeating Arms Co.* 103 U. S. 261 (26:539).

(No counsel appeared for appellee.)

Mr. Justice **Lamar** delivered the opinion of the court:

This is a suit in equity brought in the Circuit Court of the United States for the District of Indiana by Nelson Lyon against the Perin and Gaff Manufacturing Company, praying an injunction and damages for an alleged infringement of reissued letters patent No. 9198, dated May 11, 1880, owned by complainant, for an improvement in "metallic stiffeners for boot and shoe heels."

The bill of complaint, after the usual recitals necessary in a suit of this character, among other things, sets forth that before the commencement of this action, to wit, in September, 1881, complainant having been informed and believing that the defendant was manufacturing an instrument which infringed said reissued letters patent, filed his bill in equity against the said defendant in the United States Circuit Court for the Southern District of Ohio to restrain said defendant from further infringement; that the Company appeared therein and answered, setting forth, among other things, the defense that said reissued letters patent was invalid for want of novelty in the invention, and was not granted in accordance with law, denying also that the instrument used infringed the said reissued letters patent, and denying that complainant was entitled to any of the relief thereiñ prayed, to which answer complainant filed his replication: that the statutory time for taking testimony having expired, and an extension thereof not having been granted, and the complainant not having been able to get the proof of the infringement in time, no evidence of the facts, matters, or things alleged in his complaint was offered or taken, and upon the call of the case before the court, counsel for complainant not appearing, a decree was entered, dismissing the bill; and that none of the issues were tried, and no decision rendered on the merits thereof, the suit having been dismissed merely for want of prosecution.

The defendant interposed a plea that the prior adjudication and decree of the suit mentioned in said plea (which is the same suit set forth in said bill of complaint) is a bar to the present suit. The court below found the plea to be good and sufficient; thereupon complainant filed his replication. The cause being at issue was referred to a master in chancery to take testimony, and to return the same into court with his conclusion of law thereon. Testimony was taken, and the master made and filed his report, in and by which said master concluded, as a matter of law, that the decree mentioned in said plea stands as an absolute adjudication of the rights of the parties upon the merits, and reported and found that the averments of the plea were sustained by the evidence.

Exceptions to said master's report having been overruled by the court and the report confirmed, a decree was entered that the defendant's plea was well taken in law and sustained by the proofs, and the bill was dismissed. An appeal from this decree brings the case here.

The only material question for consideration is as to the effect of the decree of the Circuit Court of the United States for the Southern District of Ohio, rendered May 4, 1882, which is correctly found to be still in full force, as a bar to the prosecution of this suit.

It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz: (1) *Identity in the thing sued for;* (2) *identity of the cause of action;* (3) *identity of persons and parties to the*

action; and (4) *identity of the quality in the persons* for or against whom the claim is made. 2 Bouv. L. D. 467. All these elements or conditions exist in this case, as shown by the master's report, which was to the effect that the averments of said plea were sustained by the evidence; that there was no controversy as to the identity of the cause of action, or of the identity of the parties in the two suits; that the bill was sworn to by the complainant, and the answer was sworn to by the defendant, and the cause submitted in due course; and that the decree rendered in the suit pending in the court of Ohio was, as it professed to be, an absolute adjudication of the rights of the parties upon the merits, without any qualifying clause, and was conclusive of the rights attempted to be litigated in this case.

The dispute, however, seems to be as to the *nature* of the former judgment—that is, whether it is a final judgment or decree. It is contended on the part of appellant that such judgment was merely one of *nol pros*—a decree entered by default—and is, therefore, not a bar to the prosecution of this suit. To sustain this view of the case he has recourse to a statement by the clerk of the Circuit Court of the United States for the Southern District of Ohio (wherein the decree was rendered), under his hand and seal, dated nearly two years after said decree was rendered, to the effect that no proof or testimony was filed in said cause in his office either for the complainant or the defendant; that at the time of the granting of said decree, May 4, 1882, the complainant did not appear, nor was he represented by counsel; and that said decree dismissing the complainant's bill was granted on default of the complainant.

The decree itself is in the words and figures following, to wit:

"The United States of America, } *ss:*
Western Division of the Southern District of Ohio, }

"At a stated term of the Circuit Court of the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the City of Cincinnati, Ohio, in said district, on the first Tuesday of April, being the fourth day of that month, in the year of our Lord one thousand eight hundred and eighty-two, and of the independence of the United States of America the one hundred and sixth.

"Present: The Hon. John Baxter, Circuit Judge, and Hon. Philip B. Swing, District Judge.

"On Thursday, the fourth day of May, 1882, among the proceedings had were the following, to wit:

"Nelson Lyon
vs.
The Perin and Gaff Manufacturing Co. } 3180. In Equity.

"This cause coming on for hearing, and being submitted to the court upon bill, answer, and replication, and having been duly considered, the court finds, adjudges, and decrees *that the equities are with the defendant;* that the bill of complaint be dismissed, and that defendant recover its costs, to be taxed."

This is the record to which the court must look, and not to the statement of the clerk of the court made two years afterwards. This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in *Durant* v. *Essex Company*, 74 U. S. 7 Wall. 107, 109 [19: 154, 156]: "A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits."

To the same effect see *Bigelow* v. *Winsor*, 1 Gray, 299, 301, where it is said: "Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or nonsuit in an action at law, may be allowed to do so; but we believe the uniform practice in such case is to enter 'dismissed without prejudice.'"

Likewise Cooper, Eq. Pl., 270, as follows: "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not, in direct terms, 'without prejudice.'" See also Story's Eq. Pl., § 793, and authorities there cited.

The authorities to sustain this view of the case might be multiplied, but those cited are sufficient, and demonstrate the uniformity of the rule. It is clear to this court that the decree below dismissing the bill is in harmony with the law, and it is therefore *affirmed.*

ROBERT K. DOW ET AL., *Plffs. in Err.*,
v.
JOHN W. BEIDELMAN.

(See S. C. Reporter's ed. 680–692.)

Railroad companies—legislative right to regulate fare—effect of law as to freight and fare—Memphis and Little Rock Railroad Co.—classification, when proper—constitutionality of law.

1. Railroad companies are subject to legislative control, as to their rates of fare and freight, unless protected by their charters.

2. In the absence of any legislative regulation upon the subject, the courts must decide for the company, as they do for private persons, when controversies arise, what is reasonable.

3. Where property has been clothed with a public interest, the Legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change.

4. The Memphis and Little Rock Railroad Company, as reorganized by the purchasers in 1877, at the sale under mortgage foreclosure, if a lawful corporation of Arkansas, was not the same corporation as that chartered by the Legislature in 1853, but was a new corporation, subject to the Constitution and laws in force when it came into existence.

5. The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads, according to the length of their lines.

If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

6. There being no proof in this case of the amount invested by the reorganized corporation or its trustees, this court has no means, if it had the power, to determine that the rate of three cents a mile, fixed as the fare of passengers by the Legislature, is unreasonable; and it does not appear that there has been any such confiscation as amounts to a taking of property without due process of law, because the income of the road, at that rate of fare, will pay only one and one half per cent on the original cost of the road.

7. If the classification made by the Legislature operates uniformly, this court cannot decide whether it was the best that could have been made.

[No. 1001.]

Submitted Nov. 21, 1887. Decided April 16, 1888.

IN ERROR to the Supreme Court of the State of Arkansas, to review a judgment of that court affirming a judgment of the State Circuit Court for the statutory penalty for the taking of illegal fare by the agent of a railroad company for the carriage of a passenger. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. **U. M. Rose,** for plaintiffs in error:

The Act of Arkansas, entitled "An Act to Regulate the Rates of Charges for the Carriage of Passengers by Railroad," approved April 4, 1887, was repugnant to the Fourteenth Amendment to the United States Constitution which provides that "No State shall deprive any person of life, liberty or property without due process of law."

Santa Clara County v. *Southern Pac. R. R. Co.* 118 U. S. 394 (30: 118); *Railroad Commission Cases*, 116 U. S. 331 (29: 644); *Ex Parte Koehler*, 23 Fed. Rep. 529; Cooley, Const. Lim. 578; *Miller* v. *New York & E. R. R. Co.* 21 Barb. 519; 2 Morawetz, Corp. § 1075 *c;* Black, Const. Prohibitions, § 26; *Holyoke Water-power Co.* v. *Lyman*, 82 U. S. 15 Wall. 500 (21: 138).

The court erred in holding that said Act was not repugnant to that clause of the Fourteenth Amendment of the United States Constitution which declares that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

U. S. v. *Cruikshank*, 92 U. S. 555 (23: 592); *Missouri* v. *Lewis*, 101 U. S. 31 (25: 992); *Barbier* v. *Connolly*, 113 U. S. 31 (28: 924); *Yick Wo* v. *Hopkins*, 118 U. S. 368 (30: 225); *New Brunswick* v. *Fitzgerald*, 8 Cent. Rep. 310, 48 N. J. L. 457; *State* v. *Wood*, 5 Cent. Rep. 345, 49 N. J. L. 85; *McCarthy* v. *Commonwealth*, 1 Cent. Rep. 111, 110 Pa. 243; *Morrison* v. *Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *State* v. *Winsor*, 2 Cent. Rep. 259, 48 N. J. L. 95; *State* v. *Bloomfield*, 1 Cent Rep. 442, 47 N. J. L. 442; *Van Riper* v. *Parsons*, 40 N. J. L. 1; *Passaic County* v. *Stevenson*, 46 N. J. L. 173; *Gibbs* v. *Morgan*, 39 N. J. Eq. 126; *Ernest* v. *Morgan*, Id. 391; *Woodard* v. *Brien*, 14 Lea, 520; *Smith* v. *Warden*, 80 Ky. 608; *State* v. *Herrmann*, 75 Mo. 341; *Commonwealth* v. *Patton*, 88 Pa. 258; *Devine* v. *Cook County*, 84 Ill. 590; *Dougherty County* v. *Boyt*, 71 Ga. 484; *Scranton School District's Appeal*, 1 Cent. Rep. 626; *S. C.* 4 Cent. Rep. 311, 113 Pa. 176; *People* v. *Haselwood*, 3 West. Rep. 538, 116 Ill. 319; *Anderson* v. *Trenton*, 42 N. J. L. 486; *Zeigler* v. *Gaddis*, 44 N. J. L. 363.

Mr. **John H. Rogers,** for defendant in error:

It was decided by the Supreme Court of Arkansas in *Searcy* v. *Yarnell*, 47 Ark. 269, that private individuals cannot rightfully operate a railroad in this State, this prerogative of sovereignty being accorded to corporations only.

Chief Justice Marshall, in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 (4: 579) said: "The power to tax involves the power to destroy." The Chief Justice, in *Railroad Commission Cases*, 116 U. S. 331 (29: 644) said that "The power to regulate is not the power to destroy."

The right to regulate railroad fares is no longer an open question. It was settled by the *Railroad Commission Cases*, 116 U. S. 307 (29: 636); *Stone* v. *Wisconsin*, 94 U. S. 181 (24: 102); *Munn* v. *Illinois*, Id. 113 (24: 77); *Chicago, B. & Q. R. R. Co.* v. *Iowa*, Id. 155 (24: 94).

To classify railroads by length for the purpose of rates has been generally adopted in the Western States.

See 1 Rev. Stat. Mo. 1879, p. 146; Howell, Anno. Stat. Mich. 1882, p. 840, § 3323, sub. secs. 7, 9; Laws Pa. 1876, No. 87, p. 116; Hittell, Code & Stat. Cal. § 5489; Com. Laws Kan. 1879, p. 225, § 57; Acts Wis. 1874, 600, § 4.

Opposing counsel have cited a number of cases from Pennsylvania and New Jersey to show that such a classification is unconstitutional. We call attention to the following cases *contra* from the same States:

Wheeler v. *Philadelphia*, 77 Pa. 338; *Kilgore* v. *Magee*, 85 Pa. 401; *Commonwealth* v. *Patton*, 88 Pa. 258; *Morrison* v. *Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *Davis* v. *Clark*, 106 Pa. 377; *Van Riper* v. *Parsons*, 40 N. J. L. 1; *State Board of Assessors* v. *Central R. R. Co.* 48 N. J. L. 310. See also *Cincinnati, W. & Z. R. R. Co.* v. *Clinton County*, 1 Ohio St. 85; Cooley, Const. Lim. 5th ed. 154, note.

If the classification be such that the Act complained of operates uniformly on each class, this is all the Constitution requires.

Chicago, B. & Q. R. R. Co. v. *Iowa*, 94 U. S. 155 (24: 94); *Little Rock & Ft. S. R. R. Co.* v. *Hanniford*, 5 S. W. Rep. 294.

Mr. Justice **Gray** delivered the opinion of the court:

The general rule of law that governs this case has been clearly stated and developed in opinions of this court, delivered by the late Chief Justice.

In *Munn* v. *Illinois*, 94 U. S. 113 [24:77], decided at October Term, 1876, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the Legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," the Chief Justice said: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." Pp. 133, 134 [86, 87].

In *Chicago, Burlington & Quincy Railroad*

Co. v. *Iowa*, 94 U. S. 155 [24: 94] decided at the same time, a corporation having a perpetual lease of the railroad of another organized under the general Corporation Law of Iowa of 1851, chapter 43, with the same powers as private individuals to make contracts, as well as the power to establish by-laws and make all rules and regulations deemed expedient for the management of its affairs, in accordance with law, was held to be bound by the subsequent Statute of Iowa of 1874, chapter 68, entitled "An Act to Establish Reasonable Maximum Rates of Charges for Transportation of Freight and Passengers on the Different Railroads of This State," by which those railroads were classified according to the gross amount of their earnings per mile for the preceding year; and the compensation per mile, which those of each class might receive for the transportation of a passenger with ordinary baggage, was limited to three cents, three cents and a half, and four cents, respectively. Iowa Laws 1874, p. 61. The Chief Justice said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest and, under the decision in *Munn* v. *Illinois*, 94 U. S. 113 [24:77], subject to legislative control as to their rates of fare and freight; unless protected by their charters." "This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the Legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business." 94 U. S. 161, 162 [24: 95].

The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the Chief Justice, in answering "the claim that the courts must decide what is reasonable, and not the Legislature," said: "Where property has been clothed with a public interest, the Legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change." *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 178 [24: 97, 98]; *Chicago, M. & St. P. R. R. Co.* v. *Ackley*, Id. 179 [24: 99]; *Winona & St. P. R. R. Co.* v. *Blake*, Id. 180 [24: 99]; *Stone* v. *Wisconsin*, Id. 181 [24: 102].

Upon like grounds, in *Ruggles* v. *Illinois*, 108 U. S. 526 [27: 812], and *Illinois Central Railroad Company* v. *Illinois*, Id. 541 [27:818], decided at October Term, 1882, the Statute of Illinois of April 15, 1871 (Illinois Laws of 1871, p. 640), which classified the railroads in the State according to their gross annual earnings per mile, and put different limits on the compensation of the different classes per mile for carrying a passenger and his baggage, was adjudged, in opinions delivered by the Chief Justice, to be constitutional and valid, in restricting to the limit of three cents a mile existing corporations, whose charters gave them power to make all by-laws, rules and regulations not repugnant to law, and gave their directors power to establish such rates of toll as they should by their by-laws determine. And two justices who did not assent to those opinions concurred in the judgments, because it was not shown that the rate prescribed by the Legislature was unreasonable.

In *Stone* v. *Farmers Loan & Trust Company*, 116 U. S. 307 [29: 636], decided at October Term, 1885, the obligation of a contract, created by a charter granting similar powers to a railroad corporation and its directors, was held not to be impaired by a Statute of Mississippi, establishing a board of railroad commissioners, charged with the duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State; and the Chief Justice said: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." P. 325 [642]. He added, however: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law." P. 331 [644]. The opinions of the two dissenting justices were grounded upon the provisions of the charter, and upon its not having been expressly made subject to alteration or repeal by the Legislature. The cases, decided at the same time, of *Stone* v. *Illinois Cent. R. R. Co.* 116 U. S. 347 [29:650] and *Stone* v. *New Orleans & Northeastern Railroad Company*, Id. 352 [29:651] were substantially similar.

As applied to freights and fares for transportation not extending beyond the limits of the State by which the railroad company is incorporated, the authority of the Legislature is not affected by the later decision in *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557 [30:244].

The case at bar is quite clear of any of the questions upon which the members of the court have heretofore differed in opinion.

If the Memphis and Little Rock Railroad Company, as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the Legislature in 1853, but was a new corporation, subject to the provisions of the Constitution and laws in force when it first came into existence, that is to say, in 1877. *Memphis & L. R. R. R. Co.* v. *Railroad Comrs.* 112 U. S. 609 [28:837].

The Constitution of Arkansas of 1874 contains the following provisions:

'Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or that may be hereafter created, whenever, in their opinion, it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators." Art. 12, sec. 6.

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroad, canal and turnpike companies, for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures." Art. 17, sec. 10.

The Legislature of Arkansas, by the Statute of April 4, 1887, fixed the maximum fare that any corporation, trustees, or persons, operating a line of railroad, might charge and collect for carrying a passenger within the State, at eight cents a mile on a line fifteen miles long or less, five cents a mile on a line more than fifteen and less than seventy-five miles long, and three cents a mile on a line more than seventy-five miles long. The line of the road of the plaintiffs in error is more than seventy-five miles long, and they charged more than three cents a mile, and were therefore held to be subject to the penalty imposed by the statute for any violation of its provisions.

The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case, by reason of the admitted fact, that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than 1 ½ per cent on the original cost of the road, and only a little more than 2 per cent on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the Legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.

It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws.

The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

A similar question was presented and decided in *Chicago, Burlington & Quincy Railroad Co.* v. *Iowa*, above cited. It was there objected that a statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, was in conflict with art. 1, sec. 4, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." In answering that objection, the Chief Justice said: "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires." "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done." 94 U. S. 163. 164 [24:95, 96].

Judgment affirmed.

JAMES DOOLAN ET AL., *Plffs. in Err.*,

v.

WILLIAM B. CARR.

(See S. C. Reporter's ed. 618-642.)

Jurisdiction of circuit court—patent for land—evidence to show it void—Mexican claim, not included in railroad grants—written evidence—oral evidence.

1. Where the controversy in an action turns upon the validity of a patent from the United States, under which plaintiff claims title, in ejectment, which is denied by defendant, the circuit court has jurisdiction of the case, although no citizenship of either party is alleged.

2. In an action at law it is competent to prove, by extrinsic evidence, that a patent of the United States is void for want of power in the officers to issue it, and the facts which show that want of power.

3. Land covered by a Mexican claim is not "public land," within the meaning of the Acts of Congress making grants to railroads, but was reserved from the granting clause of those statutes.

4. To the extent of such claims, when the grant was for land with specific boundaries, or known by a particular name, and also to the extent of the quantity named within outboundaries containing a greater area, Mexican claims are excluded from the grant to the railroad company.

5. Written evidence of the grant by the Mexican Government, of its confirmation by the land commission, of the affirmance of the award of that

commission by the District Court of the United States, and by this court, and of the record of two surveys made by the Surveyor of the United States showing the location and confirmation of the Mexican grant, and their dates, is admissible in an action of ejectment, to show title under that grant.

6. Oral evidence, also, is admissible to identify the land in controversy as coming within the Mexican grant, and the surveys of the land office.

[No. 34.]

Argued Oct. 24, 25, 1887. Decided Nov. 21, 1887.

IN ERROR to the Circuit Court of the United States for the District of California, to review a judgment in favor of plaintiff in an action to recover possession of land in California. *Reversed.*

The case is fully stated in the opinion.

Mr. **Michael Mullany,** for plaintiffs in error:

The United States Circuit Court has no jurisdiction.

Little York Gold W. & W. Co. v. *Keyes*, 96 U. S. 199 (24: 656); *Romie* v. *Casanova*, 91 U. S. 380 (23: 374); *Hoadley* v. *San Francisco*, 94 U. S. 4 (24: 34); *Dowell* v. *Griswold*, 5 Sawy. 40, 41; *Trafton* v. *Nougues*, 4 Sawy. 179; *Provident Sav. L. Assur. Soc.* v. *Ford*, 114 U. S. 635 (29: 261); *Theurkauf* v. *Ireland*, 27 Fed. Rep. 769.

The proof offered by defendants ought to have been admitted.

Newhall v. *Sanger*, 92 U. S. 761 (23:769); *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 642 (28:1126); *Rosecrans* v. *Douglass*, 52 Cal. 214; *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 733 (23:634); *Patterson* v. *Winn*, 24 U. S. 11 Wheat. 380 (6:500); *Moore* v. *Robbins*, 96 U. S. 530 (24:848); *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 509 (10:269); *Easton* v. *Salisbury*, 62 U. S. 21 How. 432 (16:183); *Kissell* v. *St. Louis Public Schools*, 59 U. S. 18 How. 27 (15:328); *Reichert* v. *Felps*, 73 U. S. 6 Wall. 160 (18:849); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87 (3:665); *Carr* v. *Quigley*, 57 Cal. 394; *Connecticut Mut. L. Ins. Co.* v. *Shaefer*, 94 U. S. 458 (24:252); *U. S.* v. *Minor*, 114 U. S. 240 (29:112).

Messrs. A. T. Britton, A. B. Browne and **Walter H. Smith,** for defendant in error:

The plaintiffs in error did not appeal from the decision of the register. His decision thereupon became final.

Rev. Stat. §§ 441, 453, 2478; *Favrey* v. *Lonsdale*, 4 Copp, Land Cas. 12; *Weber* v. *Western Pac. R. R. Co.* 6 Copp, Land Cas. 19.

The deed of the Central Pacific Company to the plaintiff was executed by the president and secretary of the company, and was under its corporate seal. Upon such a state of facts the law presumes that the officers did not exceed their authority.

Ang. & Ames, Corp. § 224; *Berks & D. Turnpike Road Co.* v. *Myers*, 6 Serg. & R. 12; *Antipœda Baptist Church* v. *Mulford*, 8 N. J. L. 188; *Adams* v. *His Creditors*, 14 La. 455; *Darnell* v. *Dickens*, 4 Yerg. 7; *Burrill* v. *Nahant Bank*, 2 Met. 166; *Commercial Bank* v. *Kortright*, 22 Wend. 348; *Lovett* v. *Steam Saw Mill Asso.* 6 Paige, 54; *Johnson* v. *Bush*, 3 Barb. Ch. 207; *Reed* v. *Bradley*, 17 Ill. 321.

The question of reservation was a question of fact, or a mixed question of law and fact, for the Land Department to decide, and its decision is conclusive upon all parties.

Johnson v. *Towsley*, 80 U. S. 13 Wall. 72 (20:485); *French* v. *Fyan*, 93 U. S. 169 (23:812); *Ehrhardt* v. *Hogaboom*, 115 U. S. 67 (29:346); *U. S.* v. *Schurz*, 102 U. S. 400 (26:178); *Quimby* v. *Conlan*, 104 U. S. 425 (26:802); *Shepley* v. *Cowan*, 91 U. S. 330-340 (23:424-428); *Moore* v. *Robbins*, 96 U. S. 530 (24: 848); *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 640 (26:876).

Mr. Justice **Miller** delivered the opinion of the court:

William B. Carr, the defendant in error, brought his action of ejectment in the Circuit Court of the United States for the District of California against James Doolan and James McCue, to recover possession of 320 acres of land, described as "the east half of section 27, township 2, range 1 east of the Mount Diablo base and meridian, of the public land surveys of the United States of America, in the State of California," and he had judgment for the land.

No citizenship of either party is alleged, and this is urged as a ground of reversal in this court, to which the case has been brought by a writ of error. It, however, appears very clearly that the controversy turns upon the validity of the patent from the United States under which plaintiff claims title, and which was denied by the defendants. The Circuit Court for the District of California, therefore, had jurisdiction of the case as one arising under the Constitution and laws of the United States within the meaning of the Act of March 3, 1875, 18 U. S. Stat. at L. 470.

On the trial before the jury the plaintiff introduced in evidence a patent from the United States to the Central Pacific Railroad Company for the land in question, among many other tracts, dated February 28, 1874. This patent purported to be issued under "the Act of Congress approved July 1, 1862, as amended by the Act of July 2, 1864, to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes, and the Act of March 3, 1865," and in accordance with the laws of the State of California, by which the Central Pacific Railroad Company and the Western Pacific Railroad Company were consolidated. Although the introduction of this patent was objected to by the defendants, it appears upon its face to be valid, and it was therefore properly admitted as evidence. The plaintiff also introduced a deed of conveyance from the Central Pacific Railroad Company to himself, and, after further evidence as to the use and occupation of the land, its value, and that the amount in controversy was over $10,000, rested.

The defendants, thereupon, in order to show that the patent to the railroad company was issued without authority of law, and therefore void, offered evidence to show "that on, to wit, April 10, A. D. 1839, the Mexican Government granted to José Noriéga and Robert Livermore a certain tract of land known by the name 'Las Pocitas,' and which embraced all the land within the following boundaries, viz.: Bounded on the north by the Lomas de las Cuévas, on the east by the Siérra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores

Pacheco, containing in all two square leagues provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land.

"That the Departmental Assembly of the Mexican nation confirmed said grant to said Noriêga and Livermore on, to wit, May 22, 1840.

"That on, to wit, February 27, 1852, said Noriêga and Livermore petitioned to the board of land commissioners appointed under the provisions of the Act of Congress, approved March 3, 1851, entitled 'An Act to Ascertain and Settle the Private Land Claims in the State of California', to have said grant confirmed, and on, to wit, the 14th day of February, A. D. 1854, the said board of land commissioners confirmed the same to said Noriêga and Livermore, their heirs and assigns, and the decree of confirmation so made to said Mexican grant by said board of land commissioners described the boundaries thereof to be: On the north by the Lomas de las Cuêvas, on the east by the Siêrra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, provided that within the same no greater quantity than two square leagues were found to be contained; and if a less quantity should be found therein, then that less quantity was confirmed and all of said described tract of land.

"That the United States District Court for the Northern District of California, on appeal to it from said decree of the board of land commissioners, duly confirmed said Mexican grant on, to wit, February 18, A. D. 1859, to the same extent and by the same description, and under the same conditions as said board of land commissioners had done, and the Supreme Court of the United States, at the December Term, A. D. 1860, affirmed the said decree of said United States District Court and every part thereof.

"That during the year 1865 an official survey of the lands so confirmed to said Noriêga and Livermore was made by or under the directions of the Surveyor-General of the United States for the State of California, and which was duly approved by said surveyor-general in the year A.D. 1866, and which survey included the half section of land described in the complaint herein; that said survey was set aside by the Secretary of the Interior in the year A. D. 1868, and a new survey ordered to be made of said Mexican grant within the boundaries set forth in said decrees, which should contain but two square leagues of land, or thereabouts.

"That in March, 1869, the United States Surveyor-General for California caused the said Mexican grant to be surveyed and designated in accordance with the claims thereof and within the boundaries set forth in said decrees of confirmation, the amount so segregated consisting of about two square leagues, in accordance with the said order of the Secretary of the Interior, and said survey was approved by said surveyor-general on, to wit, May 11, 1870; and the said survey was approved by the Commissioner of the General Land Office on, to wit, March 1, 1871; and said survey was finally approved by the Secretary of the Interior on, to wit, June 6, 1871, and on said last named date the surplus (or sobrante) of the land embraced within the boundaries contained in said grant and in said decrees became freed and discharged from the claims and reservation of said Mexican grant, and became public land of the United States and a part of the public domain thereof.

"That the entire half section of land described in the complaint herein is located and embraced within the boundaries stated and tract described in and confirmed by the said decree of the board of land commissioners of the United States District Court and of the Supreme Court of the United States, but it was not included within the tract so surveyed in March, 1869, and finally approved on June 6, A. D. 1871, as aforesaid, as the final survey of said Mexican grant; and said half section of land described in the complaint herein was held and claimed as a part and parcel of said Mexican grant, and was reserved as such continually from the 10th day of April, A.D. 1839, down to the 6th day of June, A. D. 1871, and on said last named day it became for the first time public land of the United States.

"That the line of the road of said Western Pacific Railroad Company of California was definitely fixed under the provisions of said Act of Congress on, to wit, the 30th day of January, 1865, under and within the intent and meaning of the provisions of the Act of Congress of July 1, 1862, entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean,' and the Act amendatory thereof and supplemental thereto; and that, on the 31st day of January, 1865, the lands within the limits designated by said Acts of Congress as being granted to said railroad company were withdrawn from preemption, private entry, and sale under the provisions of said Acts, and that no part of the lands described in the complaint has been taken or used for any depot, shop, switch, turn-out or roadbed of said railroad or of said railroad company; that said railroad was completed prior to the year 1870.

The plaintiff objected to the proof thus offered to be made by the defendants and to other proof not material to the point now under consideration, on the ground "that the United States patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that the said United States patent and the recitals therein contained are conclusive evidence in this action that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent, and, taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's right to recover."

The court sustained the objection, and refused to allow said proof, or any part of it, to be made, to which the defendants excepted. The court then charged the jury that "the patent title to this land to the Central Pacific Railroad Company is conclusive in this case. It cannot be attacked in a collateral manner. If it can be attacked at all it is only by a direct proceeding for the purpose of vacating the patent; and, without further remark upon this, one way or the other, it may be sufficient to

say that I charge you the law is that, so far as this case is concerned, the patent from the government to the railroad company, the first patent introduced here, is conclusive of the rights of the parties in this case."

To this charge the defendants excepted, and the case before us turns upon the correctness of the ruling of the court on the proposition that in this action at law none of the evidence offered by the defendants could be received to impeach the validity of the patent, and that such an issue as that attempted to be raised by the defendants could only be made by a suit in equity to set it aside.

There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87 [3: 665]; *New Orleans* v. *U. S.* 35 U. S. 10 Pet. 730 [9: 599]; *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 509 [10: 269]; *Stoddard* v. *Chambers*, 43 U. S. 2 How. 317 [11: 282]; *Easton* v. *Salisbury*, 62 U. S. 21 How. 428 [16: 182]; *Reichert* v. *Felps*, 73 U. S. 6 Wall. 160 [18: 849]; *Best* v. *Polk*, 85 U. S. 18 Wall. 117 [21: 807]; *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 733 [23: 634]; *Newhall* v. *Sanger*, Id. 761 [23: 769]; *Sherman* v. *Buick*, 93 U. S. 209 [23: 849]; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636 [26: 875]; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447 [27: 226]; *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 642 [28: 1126]; *Reynolds* v. *Iron Silver Mining Co.* 116 U. S. 687 [29: 774].

The case of *Polk* v. *Wendal* is, perhaps, the earliest one in this court where the subject received full consideration. That was an action of ejectment in the Circuit Court of the United States for the Western District of Tennessee. On the trial, the plaintiff, who was also the plaintiff in error, introduced and relied upon a patent from the State of North Carolina, of the date of April 17, 1800, which included the land in controversy. The defendant then offered in evidence a patent issued by the same State, dated August 28, 1795, which also included the land in dispute. The reading of this prior patent was objected to, but, the objections being overruled, the patent was read in evidence. Testimony was then offered to impeach it, and it is upon this branch of the subject that the opinion of the court, delivered by *Chief Justice* Marshall, is pertinent. After considering the many guards which the statutes provide to secure the regularity of grants and the incipient rights of individuals, as well as to protect the State from imposition, he expresses the view, in language the substance of which has been often since repeated, that, in general, a court of equity appears to be a tribunal better adapted to the object of examining into objections to a patent which affect its validity than a court of law. He then says: "In general, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."

In that case, the court held that it could be shown, as a defense to the patent, that the entries on which it was granted were never made, and that the warrants were forgeries; in which case no right accrued under the Act of 1777, and, no purchase of the land having been made from the State, the grant was void by the express words of the law, and that in rejecting the testimony on this point the circuit court erred. The judgment was, therefore, reversed.

The case of *Wilcox* v. *Jackson*, [*supra*] was an action of ejectment brought against Wilcox, the commanding officer at Fort Dearborn, to recover possession of land held by him in that character. This land was entered under a preemption claim by one Beaubean, who paid the purchase money and procured the register's receipt therefor. He afterwards sold and conveyed his interest to the lessor of the plaintiff. The question was whether the register's certificate, which seems to have been treated as sufficient evidence of title if it was valid, could be impeached by testimony that the land was not subject to entry. In the opinion of the supreme court on this subject the language used in *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 340 [7: 170], is quoted with approval:

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The court then proceeds: "Now to apply this: Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant preemptions in land in which the law declares that they shall not be granted, then they are acting upon a sub-

ject matter clearly not within their jurisdiction, as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum."

In *Stoddard* v. *Chambers*, [*supra*], which was an action of ejectment, an attempt was made to show that the defendant's patent was void. This court said in that case:

"The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be no question that all land claimed under a French or Spanish title, which claim has been filed with the recorder of land titles—as the plaintiff's claim had been—were reserved from sale by the Acts of Congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the Act of July 9, 1832, and was continued until the final confirmation of the plaintiff's title by the Act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears that when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiff's survey, was not 'a part of the public land authorized to be sold.' On the above facts the important question arises whether the defendant's title is not void. That this is a question as well examinable at law as in chancery will not be controverted. That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is whether the defendant has any title as against the plaintiff's. And there seems to be no difficulty in answering the question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. * * * No title can be held valid which has been acquired against law, and such is the character of the defendant's title, so far as it trenches on the plaintiff's. * * * The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual. * * * The patent of the defendant, having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiff's title."

These principles were recognized in and governed the decision of the court in *Easton* v. *Salisbury*, [*supra*].

In *Reichert* v. *Felps* [*supra*], which was an action of ejectment, the plaintiff claimed under two patents, of the dates of 1838 and 1853, which the court says "exhibit conclusive evidence of title if the land had not been previously granted, reserved, or appropriated." This was permitted to be proved by the patent of Governor St. Clair, dated February 12, 1799, duly registered in 1804, with a survey made in 1798. This was held to be conclusive evidence that the land was so reserved, and defeated the patents of 1838 and 1853.

In *Best* v. *Polk* [*supra*], the plaintiff, in support of his title in an action of ejectment, produced a patent from the United States, dated March 13, 1847, which seemed in all respects to be regular, granting the section of land described to James Brown in fee, who conveyed to Polk. The defendant Best, being in possession, attempted to defeat this patent by showing that the land in question was reserved under the Treaties of 1832 and 1834 with the Chickasaw Nation of Indians, which authorized members of the tribe who desired to do so, and heads of families, to locate lands, which when so located were to be reserved from sale or other disposition by the United States. The defendant undertook to show that the land on which he was settled, which was the subject of controversy, had been properly located by an Indian, and was therefore not liable to sale at the time that Brown purchased it of the land officers. The court below rejected the evidence because of certain deficiencies in the certificate made by one Edmondson, a register of the land office at Pontotoc, who certified that the land in question was located as a reserve by a Chickasaw Indian, under the treaty, in July, 1839. This court reversed the judgment rendered in favor of plaintiff in the court below, holding that the certificate was sufficient, and that it showed that under the treaty, and by the action of the Indian in settling upon it, and procuring a certificate of that fact from the proper officer, the land had become reserved in the language of the treaty, and that the patent under which the plaintiff claimed was therefore void. Citing also *Polk* v. *Wendal* [*supra*], and *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 436 [10:235].

In the case of *Reynolds* v. *Iron Silver Mining Co.* 116 U. S. 687 [29: 764], decided last year, which was an action to recover possession of part of a vein or lode of mineral deposit, plaintiff relied on a patent for a placer mine and the contested vein was within the lines of its superficial area extended perpendicularly. The statute on which this patent was issued declared that it should not confer any right to veins known to exist within it at the time the grant was made. Defendants offered evidence to show that the vein in controversy was known to the patentee to exist at the time of his application for the patent.

The circuit court charged the jury that because the defendants had shown no right whatever to the vein, but were in possession as naked trespassers, they could not, in defense of that possession, show this defect in plaintiff's title. But this court (the Chief Justice dissenting) held that this ruling was erroneous, and that, as in all other actions of ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of defendants.'

With the principles so well established by these decisions, of the right in an action at law to prove by competent extrinsic evidence that a patent of the United States is void for want of power in the officers to issue it, and the facts which show that want of power, we come to the case of *Newhall* v. *Sanger* [*supra*], which establishes the proposition that land covered by a Mexican claim was not public land within the meaning of the Act of Congress making the grant to the railroads, but was reserved from the granting clause of those statutes.

In *Leavenworth, L. & G. R. R. Co.* v. *U. S.* [*supra*] decided at the same time with *Newhall* v. *Sanger*, the opinions in both cases being delivered by *Mr. Justice* Davis, the question of the right to show this want of authority was also very fully discussed. That was a case in which

the railroad company had brought suit in equity to establish its title to tracts of land lying within the Osage country, in Kansas, which had been certified to the Governor of that State as part of the grant made by Congress to aid in the construction of certain railroads. This was done by the supposed authority of the Act of March 3, 1863, 12 U. S. Stat. at L. 772, granting every alternate section of land in the State of Kansas, designated by odd numbers, for ten sections in width, on each side of said road, and of each of its branches.

It also contained the usual reservation, that in case it should appear when the line or route of said railroad and branches was definitely fixed, that the United States had sold any of the land granted, or that the right of preemption or homestead settlement had attached to the same, then the right was given to select other lands; and it provided that any and all lands theretofore reserved to the United States by the Acts of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, "be, and the same are hereby, reserved to the United States from the operation of the Act."

The route of the road in that case was located through lands which had belonged to the Osage Indians, and to which their title was not extinguished until September 29, 1865. This court held that, notwithstanding the generality of the granting clause, it was not intended by that statute to grant anything but *public* lands of the United States at the date of the grant, and that the reservation clause was sufficient to except these lands, then in the possession of the Indians, out of the grant, even if the general language could be construed to include them. The court says: "A special exception of this land was not necessary in these grants, because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved it for any purpose, excluded it from disposal as the public lands are usually disposed of."

In the case of *Newhall* v. *Sanger*, the object of the suit was to determine the ownership of a quarter section of land in California. The patent under which the appellee claimed was issued in 1870, under the Act of 1862 granting lands to railroad companies for the purpose of constructing a railroad to the Pacific Ocean. 12 U. S. Stat. at L. 492. One of the companies was the Western Pacific Railroad Company, to which was granted every alternate section of *public land*, designated by odd numbers, within ten miles on each side of its road, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or preemption claim may not have attached at the time the line of the road was definitely fixed. The Act also declared, as in other cases, that it should not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler. The appellant asserted title under a patent of the United States of later date, which recited that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the company. It was conceded that the land in controversy fell within the limits of the railroad grant as enlarged by the amendatory Act of 1864, 13 Stat. at L. 358, the same Act now under consideration, "and the question arises," said the court, "whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public within the meaning of the Acts of Congress under which the patent whereon the appellee's title rests was issued to the railroad company."

It will be seen that this is the precise question presented in the case under consideration, and the court, referring to the preceding case of *Leavenworth, L. & G. R. R. Co.* v. *U. S.*, and reciting the fact that in that case they confined a grant of every alternate section of "*land*" to such whereto the complete title was absolutely vested in the United States, proceeds: "The Acts which govern this case are more explicit, and leave less room for construction. The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from preemption, private entry, and sale apply." The court then goes on to show that the status of lands included in a Spanish or Mexican claim, pending before tribunals charged with the duty of adjudicating it, was such that the right of private property could not be impaired by a change of sovereignty, and that such lands were not included in the phrase "public lands" of these specific railroad grants, and that until such claims were finally decided to be invalid they were not restored to the body of public lands subject to be granted.

Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger outboundaries, and they were frequently described by the name of a place or ranch. To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within outboundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican Government, which was yet undetermined, and to which therefore the phrase "public lands" could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located.

It is objected that the testimony offered in the present case, and rejected by the court below, to prove the facts concerning the Mexican grant which would defeat the patent to the railroad company, is parol, and that even conceding the right to assail the patent in an action at law founded on the title conveyed by it, this cannot be done by parol testimony. But without deciding in this case how far such testimony can be received in an action at law for

that purpose, it is sufficient to say that the evidence rejected by the court below in the present case is entirely documentary and matter of record, being the written evidence of the grant by the Mexican Government, of its confirmation by the Land Commission of California, of the affirmance of the award of that commission by the District Court of the United States, and by this court, and of the record of the two surveys made by the Surveyor of the United States, the latter confirmed by the Commissioner of the General Land Office, showing the location and confirmation of the Mexican grant, and the dates at which all those transactions occurred. We do not doubt that this evidence was admissible for the purpose for which it was offered, and if any oral testimony were necessary to identify the land in controversy as coming within the Mexican grant, and the surveys of the land office, under the decisions of the courts, we do not think it would be inadmissible, although it is not clear that any such was necessary or was offered.

For the radical error of the court in rejecting this evidence and in the instructions given to the jury on the same point, *the judgment is reversed, and the case remanded to the Circuit Court for a new trial.*

Mr. Chief Justice **Waite,** dissenting:

I feel compelled to withold my assent to this judgment. The ground of my dissent is not that in a proper case the validity of a patent of the United States for the conveyance of lands may not be attacked in a suit at law by proving that it was issued without the requisite authority, but that this is not a proper case for the application of that rule. To show that I recognize the existence of the right to make such proof, if the person who offers it is in a position to do so, it is only necessary to refer to *Simmons* v. *Wagner*, 101 U. S. 260 [25: 910] where, as the organ of the court, I announced its decision, that one in possession under a certificate issued by a proper officer in the regular course of his official duty, showing that he had bought and paid for the land, might successfully defend an action of ejectment brought against him by the holder of a patent issued upon an entry by another party made long after his rights accrued; and this because, after the purchase under which he was in possession, the land was no longer a part of the public domain, and the officers of the United States had no authority in law to sell it a second time.

In my opinion, however, such proof can only be made by one who holds a right at law or in equity which is prior in time to that of the patentee, or by one who claims under the United States by a subsequent grant or some authorized recognition of title. Unless I have misinterpreted the cases on this subject, that has always been the doctrine of this court.

In *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87 [3: 665], the controversy was between two persons, one holding under a patent issued by the State of North Carolina, dated August 28, 1795, and the other under another patent for the same land, issued by the same State, dated April 17, 1800, and the question was whether, as against the second patent, the first was good. In *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 [10: 264], the defendant was an officer of the United States, in possession of a military post under the authority of the government, and the plaintiff was the holder of certificates of the register and receiver of the proper land office, showing that he had bought and paid for the land under a preemption entry. The officer in possession, holding under and for the United States, was allowed to prove that at the time of the entry and purchase the land had been reserved from the mass of public lands, and that its sale by the officers of the government was unauthorized and void. In *Stoddard* v. *Chambers*, 43 U. S. 2 How. 284 [11: 269], the controversy was between one claiming under a Spanish grant and a patentee under the location of a New Madrid certificate. The confirmation of the grant was not made until after the location, but as the right of the grantee was prior in time to that of the New Madrid claimant, he was permitted to show that the land was reserved from sale, and consequently the location of the certificate was unauthorized, and the patent thereunder invalid. In *Easton* v. *Salisbury*, 62 U. S. 21 How. 426 [16:181], the question arose upon substantially the same facts, and was decided in the same way. In *Reichert* v. *Felps*, 73 U. S. 6 Wall. 160 [18: 849], the holder of a French settler's claim, recognized in the grant by Virginia to the United States of the Northwest Territory, and confirmed or patented by Governor St. Clair, under the Act of June 20, 1788, was permitted to contest the validity of patents issued by the United States for the same land, one in 1838 and one in 1853, on the ground that the land had "been previously granted, reserved from sale, or appropriated," and therefore the patents were inoperative and void. In *Best* v. *Polk*, 85 U. S. 18 Wall. 112 [21: 805], the parties were the holder of a title under a treaty of the United States with the Chickasaw Nation of Indians, and a junior patentee. The holder of the elder title was permitted to show that when the claim was made under which the subsequent patent was issued the land had been "previously granted, reserved from sale, or appropriated," and consequently no title could be acquired under it. In *Newhall* v. *Sanger*, 92 U. S. 761 [23: 769], one side claimed under a patent issued upon the same railroad grant that is involved in the present suit, and the other under a subsequent patent which recited that "the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the [railroad] company." Such a junior patentee was allowed in that suit to contest the validity of the elder patent to the company. The case of *Leavenworth, L. & G. R. R. Co.* v. *U. S.* 92 U. S. 733 [23: 634], was a suit brought by the United States against the railroad company to quiet its title to lands claimed by the company under a land grant. That of *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 629 [28: 1123], so much relied on, presented the question as between the claimant under a railroad grant and the holder of a patent from the United States issued on a homestead entry made subsequently. *Sherman* v. *Buick*, 93 U. S. 209 [23: 849], was between the holder of a patent of the United States and the holder of a patent

from the State of California, claiming under a prior grant from the United States of the same land for school purposes. *The Smelting Company Cases*, 104 U. S. 636 [26: 875], and 106 U. S. 447 [27: 226], were between those claiming under a patent for a placer mining claim and certain occupants of lots in the town site of Leadville which had been reserved from sale prior to the location of the claim. In *Reynolds* v. *Iron Silver Mining Co.* 116 U. S. 687 [29: 774], the question was not one of admitting proof to invalidate a patent, but as to the legal effect of a patent for a placer mining claim, and it was held not to include veins or lodes within the boundaries of the claim as located on the surface and extended vertically downwards, if known to exist when the patent was issued. In *Wright* v. *Roseberry*, 121 U. S. 488 [30:1039], decided at the last term, one party held under a conveyance by the State of California of a tract of land which the State claimed under the grant by the United States of swamp and overflowed lands, and the other under a patent from the United States issued upon a preemption entry. Many more cases of a similar character might be cited, but it is needless to pursue them further. They establish beyond all question that if one holds under an older title, or if he is in a position under a junior claim to represent the title of the government, he may attack the validity of a patent in a suit at law on the ground that it was issued without proper authority.

On the other hand, it seems to me equally well settled, that if he who seeks to contest the patent is a volunteer, a mere intruder, he will not be heard. Thus, in *Hoofnagle* v. *Anderson*, 20 U. S. 7 Wheat. 212 [5:437], the contest was between the holders of two Virginia military land warrants, who had made their entries on the same tract of land. One entered and got his patent eighteen months before the other located his warrant. At the trial the holder of the junior warrant sought to show that the former grant was "obtained contrary to law, being founded on a warrant which was issued by fraud or mistake;" but *Chief Justice* Marshall, in delivering the opinion of the court, said: "The title of the respondent to the particular tract included in his patent was complete before that of the appellant's commenced. It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as the commencement of title, and have sustained a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made. But they have gone no farther. They have never sustained an entry made after the date of the patent. They have always rejected such claims. The reason is obvious. A patent appropriates the land it covers; and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and appropriate it to himself." This seems to me to be the true rule; and one way the government may adopt to annul a patent which has been issued without authority of law is to grant the land to another, and thus clothe the new grantee with its own power to test the validity of the former proceedings to divest it of title. Such a grantee will thus be made to represent the United States by authority, and he may sue for the land. With such a title, or something equivalent to it, the courts may properly, as has been done heretofore, allow him to assert his own title, that is the title of the government, against one which was apparently granted before. Such an attack on the title would be direct, not collateral, as authority to proceed had been given by the government for that purpose.

In *Cooper* v. *Roberts*, 59 U. S. 18 How. 173 [15:338], the suit was brought by one holding title under a patent of the State of Michigan conveying a tract of what was claimed to be school land, against one who had got into possession under a lease by the Secretary of War for mining purposes. The title of the State was adjudged to be good as against the United States and the defendant in possession. The defendant then objected to the plaintiff's right of recovery because "the officers of the State violated the statutes of Michigan in selling the lands, after they were known, or might have been known, to contain minerals." As to this, *Mr. Justice* Campbell, speaking for the court, p. 182 [341], said: "Without a nice inquiry into these statutes, to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known, or might have been known, to contain minerals, we are of opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached. Michigan has not complained of the sale, and retains, so far as this case shows, the price paid for it. Under these circumstances we must regard the patent as conclusive of the fact of a valid and regular sale on this issue."

So in *Field* v. *Seabury*, 60 U. S. 19 How. 323 [15:650], the same rule appears. There it was said that the question whether a grant from a sovereignty or by legislative authority was obtained by fraud was exclusively between the sovereignty making the grant and the grantee. It seems to me clear that the same rule applies to questions of illegality. The case of *Spencer* v. *Lapsley*, 61 U. S. 20 How. 264 [15: 902], is equally significant. There the question was as to the validity of a Mexican grant, and the court refused to investigate the fairness of the grant at the instance of one who had "entered without a color of title," and in so doing said, again speaking through *Mr. Justice* Campbell, "Neither the State of Coahuila and Texas, nor the Republic of Texas, nor the State of Texas, has taken measures to cancel this grant, nor have they conferred on the defendant any com-

mission to vindicate them from wrong. He is a volunteer. The doctrines of the court do not favor such a litigant."

The last case in this court to which I will refer in the present connection is *Ehrhardt* v. *Hogaboom*, 115 U. S. 67 [29:346]. There the suit was brought by one claiming title under a patent of the United States issued to a preemption settler, against one who contended the patent was void because the lands were, at the time of the preemption entry, swamp and overflowed lands which passed to the State of California under an Act of Congress passed in 1850. As a defense to the action the defendant offered to prove the character of the land, but we held this offer was properly denied because he was, as to the land in dispute, "a simple intruder, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States, * * * and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it."

In some of the state courts the same ruling has been made. Thus, in *Crommelin* v. *Minter*, 9 Ala. 594, before the Supreme Court of Alabama in 1846, it was decided that "a patent fraudulently obtained, or which has issued in violation of law, is void, and does not authorize a recovery against a party in possession under color of title. But a mere intruder cannot insist on the invalidity of the patent." And so in *Doll* v. *Meador*, 16 Cal. 295, it was held by the Supreme Court of California, in 1860, that "a patent not void upon its face cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title;" and the court, in delivering its opinion, was careful to say, "the point here is as to the *status* of the party who can raise any question as to its [the patent's] validity, when it is regular on its face."

I cannot but believe this is the true doctrine. If the government is satisfied with what has been done, all others must be; and it will be deemed in law to be satisfied, unless it proceeds itself to correct the error or authorizes some one else to do so.

It only remains to consider what position Doolan and McCue occupy in this litigation. The land was patented to the Central Pacific Railroad Company February 28, 1874, and the railroad company conveyed to Carr, the plaintiff below, June 10, 1874. No attempt has been made by the United States, so far as this record discloses, to annul the patent. On the 10th of November, 1882, Doolan and McCue each entered on 160 acres of the land under a claim of preemption settlement. Each of them then made and subscribed a declaratory statement of his intention to claim and preempt the land on which he had settled under the laws of the United States, and presented it to the register of the proper land office, but he refused to receive it on the ground of the existence of the patent to the railroad company. This is all the claim of title which they have; but the decisions are uniform to the effect that what had thus been done conferred on them no rights as against the United States. Certainly it gave them no right to represent the United States in a suit to avoid the patent which had been issued.

In *Frisbie* v. *Whitney*, 76 U. S. 9 Wall. 187 [19:668], it appeared that in March, 1862, this court decided that what had been supposed to be a valid Mexican grant of the Soscol Ranch was void for want of authority in the Mexican Government to make it. At the time of this decision Frisbie was in possession of the quarter section involved in the suit under the Mexican title. Whitney afterwards took forcible possession of the same quarter section and claimed to hold it as a settler under the preemption laws of the United States. He applied to the proper land officers to make his declaration under the statute, but they refused to receive it. On the 3d of March, 1863, Congress passed an Act, chap. 116, 12 Stat. at L. 806, by which the *bona fide* purchasers under the Mexican title were allowed to buy the lands from the United States. Frisbie availed himself of this statute and got his patent. Whitney then sued him for a conveyance of the legal title because of the alleged superior equity which he, Whitney, had acquired by his preemption settlement. This court however decided that a settlement on the public lands of the United States, no matter how long continued, conferred no right against the government, and, it was added, "the land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and has paid the requisite purchase money." For this reason the title of Frisbie was sustained and the bill dismissed. The *Yosemite Valley Case*, 82 U. S. 15 Wall. 77 [21: 82], is to the same effect.

It has also been held that a right of preemption can never be acquired by intrusion upon the actual possession of another. *Trenouth* v. *San Francisco*, 100 U. S. 251 [25:626]; *Atherton* v. *Fowler*, 96 U. S. 513 [24:732]. In the present case, Carr alleges that he was in possession when the entry was made by Doolan and McCue, and this is not denied except by saying that Carr was not ousted at any time while he was the owner of the land.

As these parties have received from the government no recognition of their preemption entries, therefore, and have not paid the purchase money, they stand before the law as mere volunteers and intruders on the possession of the patentees. They do not and cannot represent the title of the United States as against the patent, and are not entitled to be heard in opposition to it. As to them, in their present situation, the land was as much segregated from the public domain by the issue of the patent as it would have been if there were no dispute about the authority for its issue.

To show that Congress has been accustomed to treat such preemption settlers as mere intruders and entitled to no consideration by the government, it is only necessary to refer to the Act for the relief of purchasers of parts of the Soscol Ranch, just cited, and the Act passed March 3, 1887, chap. 376, 24 Stat. at L. 556, which directs the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, each of the land grants made by Congress to aid in the construction of railroads, and therefore unadjusted, and to demand from the several companies a relinquishment of their title to all lands that had been erroneously certified or patented. It there pro-

vides, § 4, that if any of the lands so erroneously certified or patented, with a few specified exceptions, have "been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the attorney-general shall cause suit or suits to be brought against such company for the said amount."

I cannot believe that one whose claim to rights under the laws of the United States is thus ignored by Congress in what was decided in *Frisbie* v. *Whitney*, *ubi supra*, to be valid legislation, can avail himself of a want of authority in the officers of the government to issue a patent which is valid on its face, to protect himself against eviction from the patented land on which he has entered as a trespasser and without any color of title.

J. P. and Z. T. ADDINGTON, *Plffs. in Err.*,

v.

GEORGE ADAMS ET AL.

(See S. C. "*Addington* v. *Burke*," Reporter's ed. 696.)

Dismissal on settlement.

It having been suggested that this suit has been compromised, and that it has been stipulated by the parties that it shall be dismissed, the court orders that, unless the plaintiffs in error show cause to the contrary within the time fixed by the court, the suit will be dismissed; and, no cause having been shown at the time appointed, the suit is dismissed.

[No. 8.]

Submitted Oct. 13, 1887. Decided Dec. 5, 1887.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas. *Dismissed.*

The facts are stated in the opinion.

Messrs. **C. L. Potter** and **Sawnie Robertson**, for plaintiffs in error.

Mr. **M. L. Crawford**, for defendants in error.

On October 17, 1887, *Mr. Chief Justice* **Waite** announced the following opinion and order of the court:

It having been suggested that this cause has been compromised and the debt paid, and that a stipulation has been entered into by the parties to the effect that the plaintiffs in error shall dismiss the suit,—

It is ordered that unless the plaintiffs in error show cause to the contrary on or before the fourth Monday in November, the writ be dismissed. The clerk will serve a copy of this order at once on the counsel for the plaintiffs in error of record, through the mail.

On December 5, 1887, the above order having been duly served, *Mr. Chief Justice* **Waite** announced the following order:

This cause is *dismissed* under the order made October 17, 1887, no cause having been shown to the contrary as then required.

The clerk will preserve as part of the record the evidence of service of the order of October 17.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY, *Plff. in Err.*,

v.

SOUTHERN TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 695, 696.)

Dismissal after settlement.

It having been shown to this court that there does not any longer exist any real controversy between the parties to this suit, about the matters originally involved, and that, by arrangement, the defendant in error is no longer a contestant in the cause, the court after notice to the parties and hearing, dismissed the case with costs.

[No. 107.]

Submitted Dec. 13, 1887. Argued March 20, 1888. Decided April 9, 1888.

IN ERROR to the Circuit Court of the United States for the Middle District of Alabama, to review a judgment in favor of the plaintiff, the Southern Telegraph Company, that it have and enjoy certain rights, ways and easements on making just compensation therefor to the plaintiff in error. *Writ of error dismissed.*

On January 9, 1888, *Mr. Chief Justice* **Waite** announced the following order, to wit:

It having been suggested to us that there is no longer any real controversy between the parties to this suit about the matters therein originally involved, and that the Western Union Telegraph Company is at this time practically both plaintiff and defendant, it is ordered that this writ of error be dismissed unless the plaintiff in error show cause to the contrary on or before the 17th day of February. The clerk will serve a copy of this order at once on the counsel of record for the plaintiff in error, through the mail.

The above order having been served as therein directed,—

On February 20, 1888, *Mr. Chief Justice* **Waite** announced the following further order, to wit:

The showing made in this case against the order to dismiss does not satisfy us that there exists any longer a real controversy in the suit. It is conceded that the Western Union Telegraph Company is now occupying the line under a contract with the Railroad Company which gives it an exclusive right in that behalf, and it is not denied that some arrangement has been made with the Southern Telegraph Com-

pany by which that Company no longer is a contestant in the cause. Time is given the Railroad Company until the 19th day of March next to make a further showing in the premises if it desires to do so.

Mr. **Gaylord B. Clark,** for plaintiff in error.

Messrs. W. A. Gunter, and *H. C. Semple* filed a brief for defendant in error.

On April 9, 1888, *Mr. Justice* **Miller** delivered the opinion of the court:

It was suggested by a letter from counsel employed on one side of this suit that his party had sold out the interest which it had to the other party, who was prosecuting it now and was *dominus litis* on both sides. A ruling was made some time ago, before the death of the late Chief Justice, in effect that there was sufficient evidence to that effect to require the case to be dismissed, unless the side now prosecuting it for decision would show satisfactory evidence that it was a *bona fide* suit. Two attempts have been made, and we are agreed in the opinion that they are both failures, and that the original order should now be carried out, dismissing the case on the grounds set forth in the opinion of the Chief Justice, delivered at the time.

Dismissed with costs.

QUIN BOHANAN, *Plff. in Err.,*
v.
STATE OF NEBRASKA.

(See S. C. Reporter's ed. 692.)

Review in criminal case where prisoner has escaped.

Where the plaintiff in error was convicted of murder in a state court, and the judgment on such conviction was affirmed by the highest court in the State, and, by a writ of error, the cause was removed to this court, and during the pendency of the writ the plaintiff in error escaped and is not within the control of the court below, the submission of the cause will be set aside; and, unless the plaintiff in error is brought within the jurisdiction and under the control of the court below within the time specified in the order of this court, the cause will be thereafter left off the docket, until directions to the contrary.

[No. 501.]

Submitted Oct. 11, 1887. Decided Oct. 17, 1887.

IN ERROR to the Supreme Court of the State of Nebraska, to review a judgment of that court affirming a judgment on a conviction for murder.

This case was before this court in April, 1886, on motion to dismiss for want of jurisdiction. The motion was denied; the court holding that "Bohanan set up specifically an immunity from a second trial for the same offense, by reason of article V of the Amendments of the Constitution of the United States. This was denied him by the judgment of the Supreme Court of the State, and we have jurisdiction to review that decision. Upon a motion to dismiss, we cannot consider the merits of the question on which our jurisdiction depends, and no motion has been made to affirm."

See 118 U. S. 231, 30 L. ed. 71.

Messrs. **Chas. O. Whedon, Chas. E. Magoon** and *O. P. Mason,* for plaintiff in error:

To hear or not to hear the claim of this man to his life lies within the discretion of the court; and the issue being not only one of life or death to this plaintiff in error, but of far-reaching power, unceasing interest and illimitable value, not only to the present citizens of the Republic but to the generations yet to be, we are persuaded that the court will direct its discretion in the way of the public interest, and hear and determine the questions of rights and immunities of American citizenship herein presented.

Smith v. *U. S.* 94 U. S. 97 (24:32).

Mr. **William Leese,** *Atty-Gen. of Nebraska,* for defendant in error:

It is a well settled rule that an escaped convict cannot successfully maintain an appeal; and this rule prevails in over one half of the States, as well as in this court.

McGowan v. *People,* 104 Ill. 100; *People* v. *Redinger,* 55 Cal. 290; *Commonwealth* v. *Andrews,* 97 Mass. 543; *People* v. *Genet,* 59 N. Y. 80; *Wilson* v. *Commonwealth,* 10 Busb. 526; 9 Crim. Law. Mag. 439; *Smith* v. *U. S.* 94 U. S. 97 (24:32); *Sargent* v. *State,* 96 Ind. 63.

Mr. Chief Justice **Waite** delivered the opinion of the court:

It appearing that during the pendency of this writ the plaintiff in error has escaped, and is not now within the control of the court below, either actually, by being in custody, or constructively, by being out on bail, it is ordered that the submission of the cause be set aside; and that, unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below, on or before the last day of this term, the cause be thereafter left off the docket until directions to the contrary. *Smith* v. *U. S.* 94 U. S. 97 [24: 32].

CITY OF SHREVEPORT, LOUISIANA,
Plff. in Err.,
v.
JOHN R. HOLMES.

SAME, *Plff. in Err.,* *v.* JOHN B. CROOKS.

SAME, *Plff. in Err.,* *v.* E. H. CARTER.

(See S. C. Reporter's ed. 694.)

Rehearing denied.

The judgments in these cases, having been affirmed by a divided court, petitions for rehearing of them are denied, no important constitutional question being involved.

[Nos. 1121, 1122, 1123.]

Submitted Oct. 17, 1887. Decided Nov. 14, 1887. Rehearing refused Jan. 9, 1888.

IN ERROR to the Circuit Court of the United States for the Western District of Louisiana.

On petitions for rehearing. *Denied.*

These actions were upon bonds of the City of Shreveport, and were originally commenced in the State Court of Louisiana, and were from thence removed to the Circuit Court of the

United States. In that court judgment was rendered against the City, from which judgment a writ of error was taken to this court, where the judgments were affirmed with costs and interest, by a divided court. The plaintiff in error petitioned for a rehearing.

Messrs. **N. C. Blanchard** and **T. Alexander,** for plaintiff in error and for petitioner.

Mr. **A. H. Leonard,** for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

These petitions are denied. The rehearing was granted in *Home Insurance Co.* v. *New York*, 119 U. S. 129 [30:350], after a decision by a divided court, because an important constitutional question was involved. The questions in these cases are not of that character.

WILLIAM L. ROYALL
v.
STATE OF VIRGINIA.

(See S. C. "*In Re Royall.*" Reporter's ed. 696, 697.)

Motion to give effect to judgment.

Where a state judgment has been reversed by this court and the cause remanded, this court will not grant a motion to give effect to its judgment where it does not appear that application has been made to the state court to carry the mandate of this court into effect.

[No. 1351 of October Term, 1886.]

Submitted Feb. 17, 1888. Decided Feb. 20, 1888.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

For a report of the case see Book 30, p. 883, Reporter's ed. Vol. 121, p. 102.

Motion to give effect to the judgment of this court. *Denied.*

The following is the petition on which this motion is made:

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner, William L. Royall, would respectfully show that in a prosecution against him in the Hustings Court of the City of Richmond, by the Commonwealth of Virginia, he was convicted and sentenced to pay a fine of fifty dollars. Your petitioner applied to the Supreme Court of Appeals of said State for a writ of error to reverse this judgment, but that court refused to award the same. Your petitioner then applied to this Honorable Court for a writ of error, which was awarded, and the judgment of the Supreme Court of Appeals of Virginia was reversed at the last term of this court, and this court's mandate was sent to said supreme court of appeals directing it to reverse the judgment of said Hustings Court.

Your petitioner placed the mandate of this court in the hands of Hon. L. L. Lewis, president of the Supreme Court of Appeals of the State of Virginia, in the month of June, 1887, and prayed that such proceedings might be taken as would cause the judgment of said Hustings Court to be reversed. Nevertheless, up to this day said Supreme Court of Appeals of the State of Virginia has taken no action in the matter, and the judgment and sentence of said Hustings Court of the City of Richmond against your petitioner remains in full force and unreversed. Your petitioner prays, therefore, that this Honorable Court will take such action in the premises as will cause said judgment to be reversed. The said Supreme Court of Appeals and the said Hustings Court are both in session at this time.

WM. L. ROYALL.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This motion is denied. It does not appear that the petitioner has ever applied to the Supreme Court of Appeals of Virginia to carry the mandate of this court into effect.

END OF VOL. 125.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1887.

Vol. 126.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1887,

AND REPORTED HEREIN,

VOL. 126,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Reg. 126 U. S.	Title.	Here in.	Off. Reg. 126 U. S.	Title.	Here in.
1	TELEPHONE CASES.	963	539–541	" "	991
	(Dolbear v. American Bell Tel. Co.		541–544	" "	992
			544–547	" "	993
	Molecular Tel. Co. v. American Bell Tel. Co.		547–550	" "	994
			550–553	" "	995
	American Bell Tel. Co. v. Molecular Tel. Co.		553–556	" "	996
			556–559	" "	997
	Clay Commercial Tel. Co. v. American Bell Tel. Co.		559–562	" "	998
			562–565	" "	999
	People's Telephone Co. v. American Bell Tel. Co.		565–568	" "	1000
			568–570	" "	1001
	Overland Telephone Co. v. American Bell Tel. Co.)		570–573	" "	1002
			573–576	" "	1003
531–532	" "	988	576–579	" "	1004
532–536	" "	989	579–582	" "	1005
536–539	" "	990	582–584	" "	1006

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1887.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

TELEPHONE CASES.

AMOS E. DOLBEAR ET AL., *Appts.*, *v.* AMERICAN BELL TELEPHONE COMPANY.

MOLECULAR TELEPHONE COMPANY ET AL., *Appts.*, *v.* SAME ET AL.

AMERICAN BELL TELEPHONE COMPANY ET AL., *Appts.*,
v.
MOLECULAR TELEPHONE COMPANY ET AL.

CLAY COMMERCIAL TELEPHONE COMPANY ET AL., *Appts.*,
v.
AMERICAN BELL TELEPHONE COMPANY ET AL.

PEOPLE'S TELEPHONE COMPANY ET AL., *Appts.*, *v.* SAME.

OVERLAND TELEPHONE COMPANY ET AL., *Appts.*, *v.* SAME.

Bell's telephone patent—scope of—process of transmitting speech—discovery and invention involved—right to a patent—case of O'Reilly v. Morse—useful art—perfection in—magnets and variable resistance method—Reis', McDonough's, Van der Weyde's, Varley's, and Drawbaugh's patents and discoveries considered—interpolation—incorporation—foreign patent—Bell's patent of 1887.

1. The 5th claim of the patent to Alexander Graham Bell of March 7, 1876, for "Improvement in Telegraphy," which is as follows:

"The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth:"

Embraces the art of transferring to or impressing upon an undulatory current of electricity the vibrations of air produced by the human voice in articulate speech, in such a way that the speech will be carried to and received by a listener at a distance on the line of the current.

2. Articulate speech is included in the description of the patent, for it is an "uttered sound" produced by the human voice; and the sound of articulate speech is one of the "vocal or other sounds" referred to in the claim.

3. Bell discovered that this process of transmitting speech could be accomplished by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of intensity could be made and speech actually transmitted. Thus his art was put in a condition for practical use.

4. In doing this, both discovery and invention were involved; discovery in finding the art, and invention in devising the means of making it useful.

5. For such discoveries and such inventions, the discoverer and inventor has the right to a patent, as discoverer, for the useful art, process or method of doing a thing he has found; and as inventor, for the means he has devised to make his discovery one of actual value.

6. The case of *O'Reilly* v. *Morse*, 15 How. 62, sustains Bell's claim. It was, in that case, held, that the use of magnetism as a motive power, without regard to the particular process with which it was connected in the patent, could not be claimed, but that its use in that connection could. Bell's claim is not one for the use of electricity distinct from the particular process with which it is connected in his patent.

7. The patent for the art does not necessarily involve a patent for the particular means employed for using it. An art or process which is useful is as much the subject of a patent as a machine, manufacture, or composition of matter.

8. The law does not require that a discoverer or inventor, in order to get a patent for a process, should have brought his art to the highest degree of perfection. It is enough if he describes his method with sufficient precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it in operation.

9. Bell's patent is not only for the particular apparatus he describes, but for the process that apparatus was designed to bring into use; the process can be operated "by the vibration or motion of bodies capable of inductive action, or by the vibra-

tion of the conducting wire itself in the neighborhood of such bodies," which is the magneto method; or "by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery," which is the variable resistance method. The patent is for both the magneto and variable resistance methods, and for the particular magneto apparatus described or its equivalent.

10. A patent for such a discovery is not to be confined to the mere means improvised to prove the reality of the conception.

11. Bell discovered that the intermittent current could not be made to reproduce the delicate forms of the air vibrations caused by the human voice in articulate speech, but that the true way was to operate on an unbroken current by increasing and diminishing its intensity, called a vibratory or undulatory current. This discovery was new.

12. Reis did not anticipate Bell's discovery. Reis discovered how to produce musical tones; but he did no more; he never succeeded in actually transmitting speech. He worked upon the principle previously suggested by Bourseul.

13. James W. McDonough, in what he asked for in his application for a patent filed April 10, 1876, was anticipated by Reis. Vander Weyde copied Reis. Bell taught him how to transmit speech.

14. Varley's English patents granted June 2, 1868, and October 8, 1870, did not include Bell's discovery.

15. Drawbaugh may have conceived the idea that speech could be transmitted to a distance by means of electricity, and was experimenting on the subject, but he did not discover the art of doing it before Bell did.

16. It is not established by the evidence in this case that Bell's application, as originally filed, did not contain his present fourth claim, or any description of the variable resistance method; nor that such claim and description were surreptitiously interpolated afterwards.

17. The Massachusetts Statutes duly authorized the organization of the American Bell Telephone Company as a corporation, and made the statutory certificate evidence of its corporate existence.

18. Section 4887 of the United States Revised Statutes does not make an American patent invalid which does not bear the same date as a foreign patent for the same invention, but only limits its term.

19. The fifth claim of Bell's patent of January 30, 1877, is not anticipated by the Schellen magnet. The patent is not for the magnet, but for the telephone of which it forms a part.

[Nos. 10, 361, 362, 709, 770, 771.]

Argued Jan. 24, 25, 26, 27, 28, 31, Feb. 1, 2, 3, 4, 7, 8, 1887. Decided March 19, 1888.

NO. 10, the *Dolbear Case*, is an appeal from the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

Reported below in 15 Fed. Rep. 448, and 17 Fed. Rep. 604.

Nos. 361 and 362, in the *Molecular Case*, are appeals from the Circuit Court of the United States for the Southern District of New York. *Affirmed* so far as it is in favor of the Bell Company and *reversed* so far as it is against that company on the 5th claim of the patent of Jan. 30, 1877, and a decree directed to that extent in its favor.

Reported below in 32 Fed. Rep. 214.

No. 709, the *Clay Commercial Case*, is an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. *Affirmed.*

No. 770, the *People's Company Case*, is an appeal from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

Reported below in 22 Fed. Rep. 309 and 25 Fed. Rep. 725. See also 31 Fed. Rep. 729 and 27 Fed. Rep. 663.

No. 771, the *Overland Company's Case*, is an appeal from the Circuit Court of the United States for the Southern District of New York. *Affirmed.*

A statement of the proceedings in each of these cases is hereinafter given.

These actions were brought by the American Bell Telephone Company and others for infringement of two Letters Patent, issued to Alexander Graham Bell, of which the plaintiffs were owners, known as the Bell Telephone Patent, the one being No. 174,465, dated March 7, 1876, issued on an application sworn to January 20, 1876, and filed February 14, 1876, for "Improvements in Telegraphy," the other being No. 186, 787, dated January 30, 1887, issued on an application filed January 15,1887, for "Improvements in Electric Telephony." The decree in the court below in each case was against the defendants except in the case of the Molecular Telephone Company in which a decree was entered for the complainants upon the 5th claim of said Letters Patent No. 174,465, and the sixth, seventh and eighth claims of said Letters Patent No. 186,787, and in favor of the defendants upon the fifth claim of the last named patent; both the defendants and the complainants appealed in that case from the portions of the decree decided against them severally. In each of the other cases, the defendants appealed.

The following are copies of the drawings and specifications of Bell's two patents upon which the suits were brought:

UNITED STATES PATENT OFFICE.

ALEXANDER GRAHAM BELL, OF SALEM, MASSACHUSETTS.

Improvement in Telegraphy.

Specification forming part of Letters Patent No. 174,465, dated March 7, 1876.

Application filed February 14, 1876.

To all whom it may concern:

Be it known that I, ALEXANDER GRAHAM BELL, of Salem, Massachusetts, have invented certain new and useful improvements in Telegraphy, of which the following is a specification:

In Letters Patent granted to me April 6, 1875, No. 161,739, I have described a method of, and apparatus for, transmitting two or more telegraphic signals simultaneously along a single wire by the employment of transmitting instruments, each of which occasions a succession of electrical impulses differing in rate from the others; and of receiving instruments, each tuned to a pitch at which it will be put in vibration to produce its fundamental note by one only of the transmitting instruments; and of vibratory circuit-breakers operating to convert the vibratory movement of the receiving instrument into a permanent make or break (as the case may be) of a local circuit, in which is placed a Morse sounder, register, or other telegraphic apparatus. I have also therein described a form of autograph telegraph based upon the action of the above-mentioned instruments.

In illustration of my method of multiple teleg-

raphy I have shown in the patent aforesaid, as one form of transmitting instrument, an electro-magnet having a steel-spring armature which is kept in vibration by the action of a local battery. This armature in vibrating makes and breaks the main circuit, producing an intermittent current upon the line-wire. I have found, however, that upon this plan the limit to the number of signals that can be sent simultaneously over the same wire is very speedily reached; for, when a number of transmitting instruments, having different rates of vibration, are simultaneously making and breaking the same circuit, the effect upon the main line is practically equivalent to one continuous current.

In a pending application for Letters Patent, filed in the United States Patent Office February 25, 1875, I have described two ways of producing the intermittent current—the one by actual make and break of contact, the other by alternately increasing and diminishing the intensity of the current without actually breaking the circuit. The current produced by the latter method I shall term, for distinction's sake, a pulsatory current.

My present invention consists in the employment of a vibratory or undulatory current of electricity in contradistinction to a merely intermittent or pulsatory current, and of a method of, and apparatus for, producing electrical undulations upon the line-wire.

The distinction between an undulatory and a pulsatory current will be understood by considering that electrical pulsations are caused by sudden or instantaneous changes of intensity, and that electrical undulations result from gradual changes of intensity exactly analogous to the changes in the density of air occasioned by simple pendulous vibrations. The electrical movement, like the aerial motion, can be represented by a sinusoidal curve or by the resultant of several sinusoidal curves.

Intermittent or pulsatory and undulatory currents may be of two kinds, accordingly as the successive impulses have all the same polarity or are alternately positive and negative.

The advantages I claim to derive from the use of an undulatory current in place of a merely intermittent one are, first, that a very much larger number of signals can be transmitted simultaneously on the same circuit; second, that a closed circuit and single main battery may be used; third, that communication in both directions is established without the necessity of special induction-coils; fourth, that cable despatches may be transmitted more rapidly than by means of an intermittent current or by the methods at present in use; for, as it is unnecessary to discharge the cable before a new signal can be made, the lagging of cable-signals is prevented; fifth, and that as the circuit is never broken a spark-arrester becomes unnecessary.

It has long been known that when a permanent magnet is caused to approach the pole of an electro-magnet a current of electricity is induced in the coils of the latter, and that when it is made to recede a current of opposite polarity to the first appears upon the wire. When, therefore, a permanent magnet is caused to vibrate in front of the pole of an electro-magnet an undulatory current of electricity is induced in the coils of the electro-magnet, the undulations of which correspond, in rapidity of succession, to the vibrations of the magnet, in polarity to the direction of its motion, and in intensity to the amplitude of its vibration.

That the difference between an undulatory and an intermittent current may be more clearly understood, I shall describe the condition of the electrical current when the attempt is made to transmit two musical notes simultaneously—first upon the one plan and then upon the other. Let the interval between the two sounds be a major third; then their rates of vibration are in the ratio of 4 to 5. Now, when the intermittent current is used the circuit is made and broken four times by one transmitting instrument in the same time that five makes and breaks are caused by the other. A and B, Figs. 1, 2, and 3, represent the intermittent currents produced, four impulses of B being made in the same time as five impulses of A. *c c c*, &c., show where and for how long time the circuit is made, and *d d d*, &c., indicate the duration of the breaks of the circuit. The line A and B shows the total effect upon the current when the transmitting instruments for A and B are caused simultaneously to make and break the same circuit. The resultant effect depends very much upon the duration of the make relatively to the break. In Fig. 1 the ratio is as 1 to 4; in Fig. 2, as 1 to 2; and in Fig. 3 the makes and breaks are of equal duration. The combined effect, A and B, Fig. 3, is very nearly equivalent to a continuous current.

When many transmitting instruments of different rates of vibration are simultaneously making and breaking the same circuit, the current upon the main line becomes for all practical purposes continuous.

Next, consider the effect when an undulatory current is employed. Electrical undulations, induced by the vibration of a body capable of inductive action, can be represented graphically, without error, by the same sinusoidal curve which expresses the vibration of the inducing body itself, and the effect of its vibration upon the air; for, as above stated, the rate of oscillation in the electrical current corresponds to the rate of vibration of the including body—that is, to the pitch of the sound produced. The intensity of the current varies with the amplitude of the vibration—that is, with the loudness of the sound; and the polarity of the current corresponds to the direction of the vibrating body—that is, to the condensations and rarefactions of air produced by the vibration. Hence, the sinusoidal curve A or B, Fig. 4, represents, graphically, the electrical undulations induced in a circuit by the vibration of a body capable of inductive action.

The horizontal line line *a d e f*, &c., represents the zero of current. The elevations *b b b*, &c., indicate impulses of positive electricity. The depressions *c c c*, &c., show impulses of negative electricity. The vertical distance *b d* or *c f* of any portion of the curve from the zero-line expresses the intensity of the positive or negative impulse at the part observed, and the horizontal distance *a a* indicates the duration of the electrical oscillation. The vibrations represented by the sinusoidal curves B and A, Fig. 4, are in the ratio aforesaid, of 4 to 5—that

is, four oscillations of B are made in the same time as five oscillations of A.

The combined effect of A and B, when induced simultaneously on the same circuit, is expressed by the curve A + B, Fig. 4, which is the algebraical sum of the sinusoidal curves A and B. This curve A + B also indicates the actual motion of the air when the two musical notes considered are sounded simultaneously. Thus, when electrical undulations of different rates are simultaneously induced in the same circuit, an effect is produced exactly analogous to that occasioned in the air by the vibration of the inducing bodies. Hence, the coexistence upon a telegraphic circuit of electrical vibrations of different pitch is manifested not by the obliteration of the vibratory character of the current, but by peculiarities in the shapes of the electrical undulations, or, in other words, by peculiarities in the shapes of the curves which represent those undulations.

There are many ways of producing undulatory currents of electricity, dependent for effect upon the vibrations or motions of bodies capable of inductive action. A few of the methods that may be employed I shall here specify. When a wire, through which a continuous current of electricity is passing, is caused to vibrate in the neighborhood of another wire, an undulatory current of electricity is induced in the latter. When a cylinder, upon which are arranged bar-magnets, is made to rotate in front of the pole of an electro-magnet, an undulatory current of electricity is induced in the coils of the electro-magnet.

Undulations are caused in a continuous voltaic current by the vibration or motion of bodies capable of inductive action; or by the vibration of the conducting wire itself, in the neighborhood of such bodies. Electrical undulations may also be caused by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery. The internal resistance of a battery is diminished by bringing the voltaic elements nearer together, and increased by placing them farther apart. The reciprocal vibration of the elements of a battery, therefore, occasions an undulatory action in the voltaic current. The external resistance may also be varied. For instance, let mercury or some other liquid form part of a voltaic circuit, then the more deeply the conducting wire is immersed in the mercury or other liquid, the less resistance does the liquid offer to the passage of the current. Hence, the vibration of the conducting wire in mercury or other liquid included in the circuit occasions undulations in the current. The vertical vibrations of the elements of a battery in the liquid in which they are immersed produces an undulatory action in the current by alternately increasing and diminishing the power of the battery.

In illustration of the method of creating electrical undulations, I shall show and describe one form of apparatus for producing the effect. I prefer to employ for this purpose an electro-magnet, A, Fig. 5, having a coil upon only one of its legs, *b*. A steel-spring armature, *c*, is firmly clamped by one extremity to the uncovered leg *d* of the magnet, and its free end is allowed to project above the pole of the covered leg. The armature *c* can be set in vibration in a variety of ways, one of which is by wind, and, in vibrating, it produces a musical note of a certain definite pitch.

When the instrument A is placed in a voltaic circuit, *g b e f g*, the armature *c* becomes magnetic, and the polarity of its free end is opposed to that of the magnet underneath. So long as the armature *c* remains at rest, no effect is produced upon the voltaic current, but the moment it is set in vibration to produce its musical note a powerful inductive action takes place, and electrical undulations traverse the circuit *g b e f g*. The vibratory current passing through the coil of the electro-magnet *f* causes vibration in its armature *h* when the armature *c h* of the two instruments A I are normally in unison with one another; but the armature *h* is unaffected by the passage of the undulatory current when the pitches of the two instruments are different.

A number of instruments may be placed upon a telegraphic circuit, as in Fig. 6. When the armature of any one of the instruments is set in vibration all the other instruments upon the circuit which are in unison with it respond, but those which have normally a different rate of vibration remain silent. Thus, if A, Fig. 6, is set in vibration, the armatures of A^1 and A^2 will vibrate also, but all the others on the circuit will remain still. So if B^1 is caused to emit its musical note the instruments B B^2 respond. They continue sounding so long as the mechanical vibration of B^1 is continued, but become silent with the cessation of its motion. The duration of the sound may be used to indicate the dot or dash of the Morse alphabet, and thus a telegraphic dispatch may be indicated by alternately interrupting and renewing the sound. When two or more instruments of different pitch are simultaneously caused to vibrate, all the instruments of corresponding pitches upon the circuit are set in vibration, each responding to that one only of the transmitting instruments with which it is in unison. Thus the signals of A, Fig. 6, are repeated by A^1 and A^2, but by no other instrument upon the circuit; the signals of B^2 by B and B^1; and the signals of C^1 by C and C^2—, whether A, B^2, and C^1 are successively or simultaneously caused to vibrate. Hence by these instruments two or more telegraphic signals or messages may be sent simultaneously over the same circuit without interfering with one another.

I desire here to remark that there are many other uses to which these instruments may be put, such as the simultaneous transmission of musical notes, differing in loudness as well as in pitch, and the telegraphic transmission of noises or sounds of any kind.

When the armature *c*, Fig. 5, is set in vibration the armature *h* responds not only in pitch but in loudness. Thus, when *c* vibrates with little amplitude, a very soft musical note proceeds from *h*; and when *c* vibrates forcibly the amplitude of the vibration of *h* is considerably increased, and the resulting sound becomes louder. So, if A and B, Fig. 6, are sounded simultaneously (A loudly and B softly), the instruments A^1 and A^2 repeat loudly the signals of A, and B^1 B^2 repeat softly those of B.

One of the ways in which the armature *c*,

Fig. 5, may be set in vibration has been stated above to be by wind. Another mode is shown in Fig. 7, whereby motion can be imparted to the armature by the human voice or by means of a musical instrument.

The armature *c*, Fig. 7, is fastened loosely by one extremity to the uncovered leg *d* of the electro-magnet *b*, and its other extremity is attached to the centre of a stretched membrane, *a*. A cone, A, is used to converge sound-vibrations upon the membrane. When a sound is uttered in the cone the membrane *a* is set in vibration, the armature *c* is forced to partake of the motion, and thus electrical undulations are created upon the circuit E *b e f g*. These undulations are similar in form to the air vibrations caused by the sound—that is, they are represented graphically by similar curves. The undulatory current passing through the electro-magnet *f* influences its armature *h* to copy the motion of the armature *c*. A similar sound to that uttered into A is then heard to proceed from L.

In this specification the three words "oscillation," "vibration," and "undulation," are used synonymously, and in contradistinction to the terms "intermittent" and "pulsatory." By the term "body capable of inductive action," I mean a body which, when in motion, produces dynamical electricity. I include in the category of bodies capable of inductive action brass, copper, and other metals, as well as iron and steel.

Having described my invention, what I claim, and desire to secure by Letters Patent, is as follows:

1. A system of telegraphy in which the receiver is set in vibration by the employment of undulatory currents of electricity, substantially as set forth.

2. The combination, substantially as set forth, of a permanent magnet or other body capable of inductive action, with a closed circuit, so that the vibration of the one shall occasion electrical undulations in the other, or in itself; and this I claim, whether the permanent magnet be set in vibration in the neighborhood of the conducting wire forming the circuit, or whether the conducting wire be set in vibration in the neighborhood of the permanent magnet, or whether the conducting wire and the permanent magnet both simultaneously be set in vibration in each other's neighborhood.

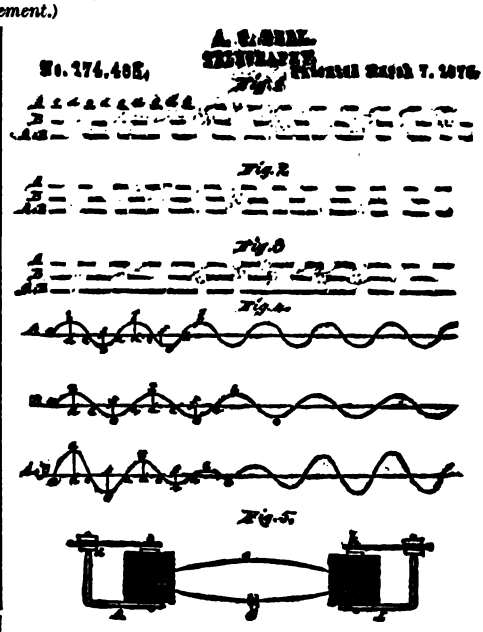
3. The method of producing undulations in a continuous voltaic current by the vibration or motion of bodies capable of inductive action, or by the vibration or motion of the conducting wire itself, in the neighborhood of such bodies, as set forth.

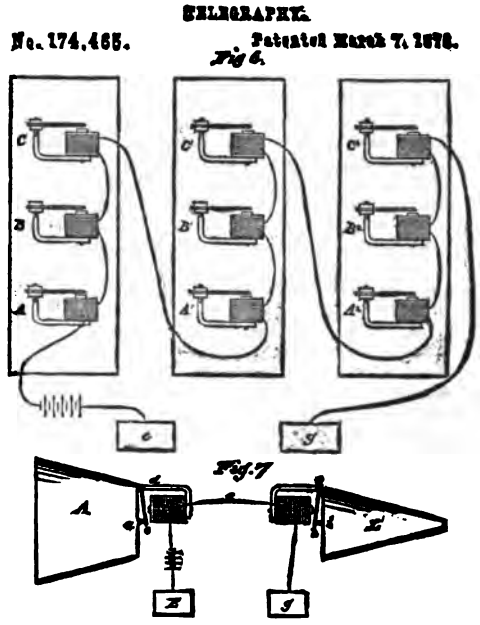
4. The method of producing undulations in a continuous voltaic circuit by gradually increasing and diminishing the resistance of the circuit, or by gradually increasing and diminishing the power of the battery, as set forth.

5. The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth.

In testimony whereof I have hereunto signed my name this 20th day of January, A. D. 1876.

Witnesses: ALEX. GRAHAM BELL.
THOMAS E. BARRY,
P. D. RICHARDS.





UNITED STATES PATENT OFFICE.

ALEXANDER GRAHAM BELL, OF BOSTON, MASSACHUSETTS.

Improvement in Electric Telegraphy.

Specification forming part of Letters Patent No. 186,787, dated January 30, 1877.

Application filed January 15, 1877.

To all whom it may concern:

Be it known that I, ALEXANDER GRAHAM BELL, of Boston, Massachusetts, have invented certain new and useful Improvements in Electric Telephony, of which the following is a specification:

In Letters Patent granted to me the 6th day of April, 1875, No. 161,789, and in an application for Letters Patent of the United States now pending, I have described a method of and apparatus for producing musical tones by the action of a rapidly-interrupted electrical current, whereby a number of telegraphic signals can be sent simultaneously along a single circuit.

In another application for Letters Patent now pending in the United States Patent Office I have described a method of and apparatus for inducing an intermittent current of electricity upon a line-wire, whereby musical tones can be produced and a number of telegraphic signals be sent simultaneously over the same circuit, in either or in both directions; and in Letters Patent granted to me March 7, 1876, No. 174,465, I have shown and described a method of an apparatus for producing musical tones by the action of undulatory currents of electricity, whereby a number of telegraphic signals can be sent simultaneously over the same circuit, in either or in both directions, and a single battery be used for the whole circuit.

In the applications and patents above referred to, signals are transmitted simultaneously along a single wire by the employment of transmitting instruments, each of which occasions a succession of electrical impulses differing in rate from the others, and are received without confusion by means of receiving instruments, each tuned to a pitch at which it will be put in vibration to produce its fundamental note by one only of the transmitting instruments. A separate instrument is therefore employed for every pitch, each instrument being capable of transmitting or receiving but a single note, and thus as many separate instruments are required as there are messages or musical notes to be transmitted.

My invention has for its object, first, the transmission simultaneously of two or more musical notes or telegraphic signals along a single wire in either or both directions, and with a single battery for the whole circuit without the use of as many instruments as there are musical notes or telegraphic signals to be transmitted; second, the electrical transmission by the same means of articulate speech and sound of every kind, whether musical or not; third, the electrical transmission of musical tones, articulate speech, or sounds of every kind, without the necessity of using a voltaic battery.

In my patent No. 174,465, dated March 7, 1876, I have shown as one form of transmitting instrument a stretched membrane, to which the armature of an electro-magnet is attached, whereby motion can be imparted to the armature by the human voice, or by means of a musical instrument, or by sounds produced in any way.

In accordance with my present invention I substitute for the membrane and armature shown in the transmitting and receiving instruments alluded to above a plate of iron or steel capable of being thrown into vibration by sounds made in its neighborhood.

The nature of my invention and the manner in which the same is or may be carried into effect will be understood by reference to the accompanying drawings, in which—

Figure 1 is a perspective view of one form of my electric telephone. Fig. 2 is a vertical section of the same, and Fig. 3 is a plan view of the apparatus. Fig. 4 is a diagram illustrating the arrangement upon circuit.

Similar letters in the drawings represent corresponding portions of the apparatus.

A in said drawings represents a plate of iron or steel, which is fastened at B and C to the cover or sounding box D. E represents a speaking tube, by which sounds may be conveyed to or from the plate A. F is a bar of soft iron. G is a coil of insulated copper wire, placed around the extremity of the end H of the bar F. I is an adjusting screw, whereby the distance of the end H from the plate A may be regulated.

The electric telephones J, K, L, and M are placed at different stations upon a line, and are arranged upon circuit with a battery, N, as shown in diagram, Fig. 4.

I have shown the apparatus in one of its simplest forms, it being well understood that the same may be varied in arrangement, combination, general construction, and form, as well as material of which the several parts are composed.

The operation and use of this instrument are as follows:

I would premise by saying that this instrument is and may be used both as a transmitter and as a receiver—that is to say, the sender of the message will use an instrument in every particular identical in construction and operation with that employed by the receiver, so that the same instrument can be used alternately as a receiver and a transmitter.

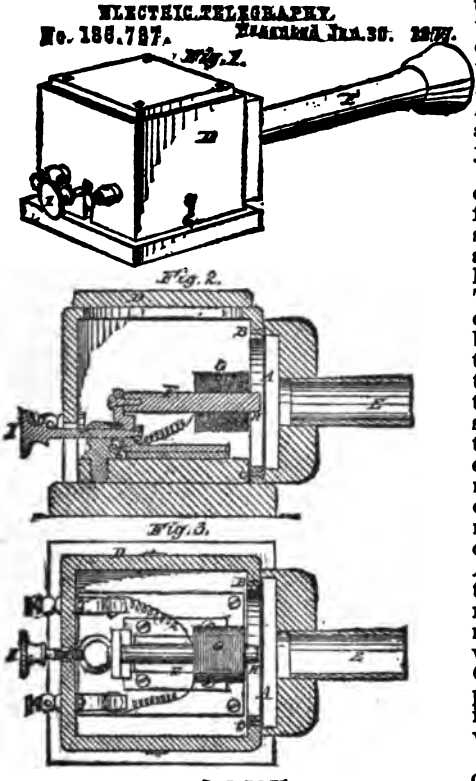
In order to transmit a telegraphic message by means of these instruments, it is only necessary for the operator at a telephone (say J) to make a musical sound in any way in the neighborhood of the plate A—for convenience of operation, through the speaking tube E — and to let the duration of the sound signify the dot or dash of the Morse alphabet, and for the operator who receives his message (say at M) to listen to his telephone, preferably through the speaking tube E. When two or more musical signals are being transmitted over the same circuit all the telephones reproduce the signals for all the messages; but as the signals for each message differ in pitch from those for the other messages, it is easy for an operator to fix his attention upon one message and ignore the other.

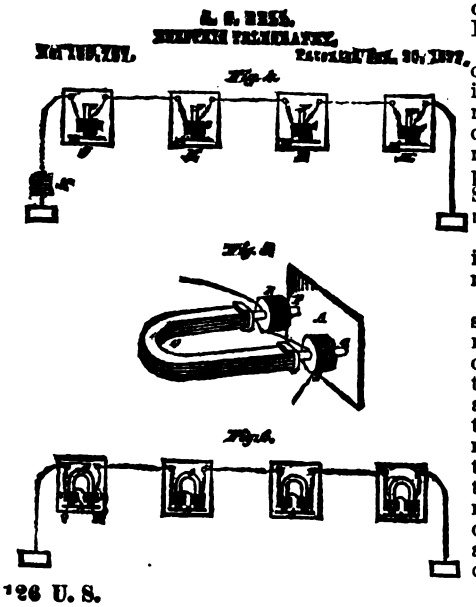
When a large number of despatches are being simultaneously transmitted it will be advisable for the operator to listen to his telephone through a resonator, which will re-enforce to his ear the signals which he desires to observe. In this way he is enabled to direct his attention to the signals for any given message without being distracted or disturbed by the signals for any other messages that may be passing over the line at the time.

The musical signals, if preferred, can be automatically received by means of a resonator, one end of which is closed by a membrane, which vibrates only when the note with which the resonator is in unison is emitted by the receiving telephone. The vibrations of the mem-

brane may be made to operate a circuit-breaker, which will actuate a Morse sounder or a telegraphic recording or registering apparatus.

One form of vibratory circuit-breaker which may be used for this purpose I have described in Letters Patent No. 178,399, June 6, 1876. Hence by this plan the simultaneous transmission of a number of telegraphic messages over a single circuit in the same or in both directions with a single main battery for the whole circuit and a single telephone at each station is rendered practicable. This is of great advantage in this, that for the conveyance of several messages, or signals, or sounds over a single wire simultaneously, it is no longer necessary to have separate instruments, correspondingly tuned for each given sound, which plan requires nice adjustment of the corresponding instruments, while the present improvement admits of a single instrument at each station, or if for convenience several are employed, they all are alike in construction, and need not be adjusted or tuned to particular pitches.





Whatever sound is made in the neighborhood of any telephone—say at J, Fig 4—is echoed in facsimile by the telephones of all the other stations upon the circuit; hence this plan is also adapted for the use of the transmitting intelligibly the exact sounds of articulate speech. To convey an articulate message it is only necessary for an operator to speak in the neighborhood of his telephone, preferably through the tube E, and for another operator at a distant station upon the same circuit to listen to the telephone at that station. If two persons speak simultaneously in the neighborhood of the same or different telephones, the utterances of the two speakers are reproduced simultaneously by all the other telephones on the same circuit; hence by this plan a number of vocal messages may be transmitted simultaneously on the same circuit, in either or both directions. All the effects noted above may be produced by the same instruments without a battery by rendering the central bar F H permanently magnetic. Another form of telephone for use without a battery is shown in Fig. 5, in which O is a compound permanent magnet, to the poles of which are affixed poll-pieces of soft iron, P Q, surrounded by helices of insulated wire, R S.

Fig. 6 illustrates the arrangement upon circuits of similar instruments to that shown in Fig. 5.

In lieu of the plate A in above figures, iron or steel reeds of definite pitch may be placed in front of the electro-magnet O, and, in connection with a series of such instruments of different pitches, an arrangement upon circuit may be employed similar to that shown in my patent No. 174,465, and illustrated in Fig. 6 of Sheet 2 in said patent. The battery, of course, may be omitted.

This invention is not limited to the use of iron or steel, but includes within its scope any material capable of inductive action.

The essential feature of the invention consists in the armature of the receiving instrument being vibrated by the varying attraction of the electro-magnet so as to vibrate the air in the vicinity thereof in the same manner as the air is vibrated at the other end by the production of the sound. It is, therefore, by no means necessary or essential that the transmitting instrument should be of the same construction as the receiving instrument. Any instrument receiving and transmitting the impression of agitated air may be used as the transmitter, although, for convenience and for reciprocal communication, I prefer to use like instru-

ments at either end of an electrical wire. I have heretofore described and exhibited such other means of transmitting sound, as will be seen by reference to the proceedings of the American Academy of Arts and Sciences, Volume XII.

For convenience, I prefer to apply to each instrument a call-bell. This may be arranged so as to ring, first, when the main circuit is opened; second, when the bar F comes into contact with the plate A. The first is done to call attention; the second indicates when it is necessary to readjust the magnet, for it is important that the distance of the magnet from the plate should be as little as possible; without, however, being in contact. I have also found that the electrical undulations produced upon the main line by the vibration of the plate A are intensified by placing the coil G at the end of the bar F nearest the plate A, and not extend it beyond the middle, or thereabout.

Having thus described my invention, what I claim, and desire to secure by Letters Patent, is:

1. The union upon, and by means of, an electric circuit of two or more instruments, constructed for operation substantially as herein shown and described, so that, if motion of any kind or form be produced in any way in the armature of any one of the said instruments the armatures of all the other instruments upon the same circuit will be moved in like manner and form, and if such motion be produced in the former by sound, like sound will be produced by the motion of the latter.

2. In a system of electric telegraphy or telephony, consisting of transmitting and receiving instruments united upon an electric circuit, the production, in the armature of each receiving instrument, of any given motion by subjecting said armature to an attraction varying in intensity, however such variation may be produced in the magnet; and hence I claim the production of any given sound or sounds from the armature of the receiving instrument by subjecting said armature to an attraction varying in intensity, in such manner as to throw the armature into that form of vibration that characterizes the given sound or sounds.

3. The combination, with an electro-magnet, of a plate of iron or steel, or other material capable of inductive action, which can be thrown into vibration by the movement of surrounding air or by the attraction of a magnet.

4. In combination with a plate and electro-magnet, as before claimed, the means herein described, or their mechanical equivalents, of adjusting the relative position of the two so that, without touching, they may be set as closely together as possible.

5. The formation in an electric telephone such as herein shown and described, of a magnet with a coil upon the end or ends of the magnet nearest the plate.

6. The combination, with an electric telephone such as described, of a sounding-box, substantially as herein shown and set forth.

7. In combination with an electric telephone as herein described, the employment of a speaking or hearing tube for conveying sounds to or from the telephone, substantially as set forth.

8. In a system of electric telephony, the combination of a permanent magnet with a plate of iron or steel, or other material capable of inductive action, with coils upon the end or ends of said magnet nearest the plate, substantially as set forth.

In testimony whereof I have hereunto signed my name this 18th day of January, A. D. 1877.

A. GRAHAM BELL.

Witnesses:
HENRY R. ELLIOTT,
EWELL A. DICK.

The above-mentioned letters patent were both duly assigned July, 1877, by Alexander Graham Bell to Gardiner C. Hubbard, trustee, and were further duly assigned July 20, 1878, by said Hubbard, trustee, to the Bell Telephone Company, a corporation created by the laws of Massachusetts, located at Boston; and were further duly assigned by the Bell Telephone Company to the American Bell Telephone Company, a corporation created by the laws of said State, the complainant in these actions.

The American Bell Telephone Company was incorporated by a law of Massachusetts, chapter 117, March 19, 1880, "for the purpose of manufacturing, owning, selling, using, and licensing others to use electric speaking telephones," etc., with authority to "become interested with other corporations" for like purposes; the certificate of the president, treasurer, and directors of said corporation, duly approved by the Commissioner of Corporations, was recorded in the office of the Secretary of State of Massachusetts; and the Secretary of the Commonwealth issued his certificate, in the form required by section 11, of chapter 224, of the Acts of 1870, that the persons named, their associates and successors, were legally organized and established and made an existing corporation, under the name of the American Bell Telephone Company. This section made such certificate conclusive evidence of the existence of the corporation organized under that chapter.

The Dolbear Case.

This case first came up for hearing on a motion for a preliminary injunction, which was elaborately argued before *Mr. Justice* Gray and *Judge* Lowell.

The question was, whether, assuming Mr. Bell to have been the inventor of the speaking telephone, his patent reached the somewhat peculiar apparatus of the defendant. The motion was argued in May, 1882, and January 24, 1883, the opinion, written by *Mr. Justice* Gray, was filed. The court sustained the plaintiff's claim and granted the injunction. The case then went to final hearing, and the defendants again contended that Mr. Bell was not the first inventor of the speaking telephone, but that it was invented and described in printed publications by Philip Reis ten years or more before Mr. Bell's time; and, as a consequence, that Mr. Bell had merely invented a special form of the speaking telephone, which they said was not used by the defendants. It was heard at final hearing before His Honor *Judge* Lowell, June 30, 1883. It was argued for the defendants by Messrs. Causten Browne, and J. E. Maynadier, and on August 25, 1883, *Judge* Lowell decided that the patent was valid and was of the scope contended for by the com-

plainants, that the defendants infringed it, and that Reis had not invented a speaking telephone.

This case is reported *sub nom. American Bell Telephone Co.* v. *Dolbear*. The opinion delivered by *Mr. Justice* Gray on granting the injunction *pendente lite* is in 15 Fed. Rep. 438; that of *Judge* Lowell on final hearing is in 17 Fed. Rep. 604.

The bill in this case charges infringement of Letters Patent No. 174,465, dated March 7, 1876, granted to Alexander Graham Bell. The answer denies the validity of the patent, and also denies infringement. The final decree was that the defendants have infringed the 5th claim of the Bell patent of 1876.

The *errors assigned* by the appellants in this case are:

"1. That the court below construed the method of the 5th claim to consist in causing electrical undulations similar in form to the sound waves.

"2. That the court below held the 5th claim so construed to be for a patentable subject.

"3. That the court below decided that the method and apparatus used by defendants infringed the 5th claim."

The appellants in this case contend:

"1. That the 5th claim, as construed by the Circuit Court of the District of Massachusetts, is not for an art, machine, manufacture or composition of matter, and is therefore void.

"2. That the 5th claim, as construed by the Circuit Court of the District of Massachusetts, is not for any invention or discovery, and is therefore void.

"3. That causing electrical undulations similar in form to the vibrations of air accompanying vocal or other sounds, is not a method or an art, but simply an object to be accomplished.

"4. That the only invention or discovery possible in regard to causing such electrical undulations, was as to some method of, or apparatus for, causing them, and for using them.

"5. That transmitting articulate sounds by undulatory vibrations of electricity is not an art or a process, and is not the subject of either invention or discovery, but is merely a result to be attained, or an object to be accomplished; and that the only invention or discovery possible in relation to such result or object is of some method of, or apparatus for, attaining such result or accomplishing such object.

"6. That neither the method nor the apparatus patented by said Letters Patent of 1876 has ever been used by the appellants, nor has any method or apparatus substantially like said patented method or apparatus ever been used by the appellants."

The appellees claim that Dolbear's apparatus differs from those of the other defendants only by the employment of a *condenser-receiver* instead of a *magneto receiver;* that Dolbear and all his experts employ Bell's method and in substance his apparatus; that they necessarily produce the electrical undulations of the form described and claimed in Bell's patent; that they employ the part of Bell's invention which is the most novel and characteristic, and this is what makes their instrument to be a speaking telephone; that they copy Mr. Bell in the great step of employing electrical undulations similar in form to the sound-waves; that the gist of Bell's invention patented lies in the employment of electrical undulations of the new form, which implies their creation by the voice, their conveyance and their reconversion into sound-waves; that Dolbear employs them and cannot speak without them; that his precise mode of creating them is the legal equivalent of Bell's; that his form of conductor was a well-known equivalent for Bell's precise form; that the only difference is that when the peculiar measured quantities reach the receiving station, Bell lets them announce themselves by virtue of one well-known property which attracts the announcing plate; and Dolbear lets them announce themselves by virtue of another well-known property which attracts the announcing plate.

The following are the drawings and specifications of the Dolbear Patent:

UNITED STATES PATENT OFFICE.

AMOS E. DOLBEAR, OF SOMERVILLE, MASSACHUSETTS.

Apparatus for Transmitting Sound by Electricity.

Specification forming part of Letters Patent No. 239,742, dated April 5, 1881.

Application filed October 11, 1880. (Model.)

To all whom it may concern:

Be it known that I, AMOS E. DOLBEAR, of Somerville, in the county of Middlesex and State of Massachusetts, have invented a new Apparatus for Transmitting Sound by Electricity, of which the following is a full, clear, concise, and exact description, reference being had to the accompanying drawings, making a part hereof, in which—

Figures 1 and 2 are two views of the best form of apparatus for practicing my invention. Fig. 3 is a cross-section, enlarged, of the receiver shown in Fig. 1. Fig. 4 is a plan of one of the plates. Fig. 5 is a diagram illustrating the system.

My invention consists, mainly, in a new mode of transmitting articulate and other sounds by an open circuit.

It also consists in new apparatus for this purpose.

My receiver is based upon the well-known principle that one terminal of an open circuit will attract the other terminal when both are charged; and my invention consists, mainly, in the arrangement of the enlarged terminal of the secondary coil of an induction-coil so that it will be vibrated toward and from the other terminal by variations in the electric state of the coil, and in such a manner as to reproduce sound-vibrations of all qualities, including articulate speech, when the primary circuit of the induction-coil contains a suitable transmitter.

Another feature of my invention relates to the system of connecting two or more receivers and two or more transmitters for practical use; and it consists in the combination of two induction-coils, two receivers, and two trans-

mitters in a novel manner, fully described below.

The best form of my receiver is that shown in elevation in Fig. 1, and in cross-section in Fig. 3.

In Fig. 3 the case of the receiver A is shown as made up of three pieces—a back piece, *r*, an ear-piece, *s*, and an annular connecting piece, *t*, for connecting the pieces *r* and *s* together.

a b are thin elastic plates, preferably of iron, forming terminals of the secondary coil of an induction-coil. These plates are securely fastened about the edges and brought very near to each other, but not in contact, a thin annulus, *d*, lying between them. This is best effected by forming a thin flange, *d*, on the interior of the connecting piece, *t*, and placing the terminals *a b* on opposite sides of this flange. The ear-piece *s* of the case holds the terminal *a* in place with the proper tension around the edge to insure mass vibrations of that terminal. The terminal *b* is held in place by the back piece, *r*, of the case. Each of the plates *a* and *b* is formed with a small tongue, a^3 (see Fig. 4), with which the binding screws are connected, as shown.

As the section-plane in Fig. 3 will pass through but one of the binding screws (that for the wire *a'*), the receiver is shown broken away at *x*, in order to show the binding screw for the wire *b'*. Both are shown in Fig. 1. One of the binding screws connects with plate *a*, the other with plate *b*. By the use of the tongues an even pressure around the whole edge of the plate is possible.

The adjustment of the instrument is effected by the screw A'; and this screw, by contact upon the back plate, *b*, prevents any vibrations of that plate which interfere with the proper vibrations of the front plate, *a*.

My system requires electricity of a very high electro-motive force, and this is best obtained by means of a secondary coil with a high resistance, the best results having been obtained from four or five thousand ohms of No. 36 copper wire.

Transmitters such as are in common use will answer with my receiver; but the best form of transmitter is that shown in the drawings (which is not here described, as it forms the subject of an application for a patent filed by me May 31, 1880).

The main advantages of my new system over all others known to me are, that it is not appreciably affected by ordinary induced currents on the line, it has no magnet to deteriorate, the adjustment is more simple and is not affected by barometric and hygrometric variations, and it lacks the fine-wire helix of the common receiver, which is very liable to get out of repair. It is very efficient also on very long lines.

[A. E. DOLBEAR.
Apparatus for Transmitting Sound by Electricity.
No. 239,742; Patented April 5, 1881.

A. E. DOLBEAR.
Apparatus for Transmitting Sound by Electricity.
No. 239,742 Patented April 5, 1881.

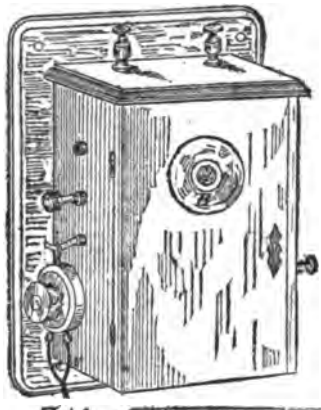


Fig. 1.

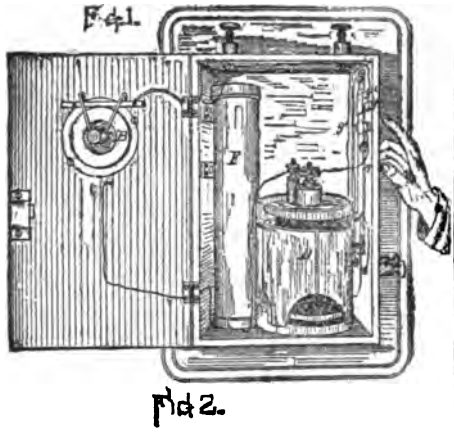


Fig. 2.

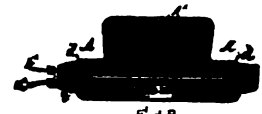


Fig. 3.

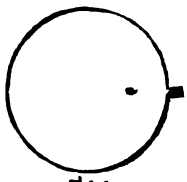


Fig. 4.

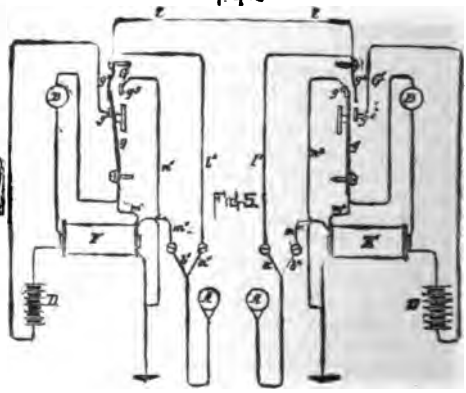


Fig. 5.

The best system for the practical use of my invention is illustrated in the diagram, Fig. 5, and the best form of apparatus is that shown in Figs. 1 and 2. In these figures, A represents the receivers, B the transmitters, D the batteries, F the induction-coils, and G switches.

The transmitter B and battery D are in the circuit with the primary coil of the induction-coil F, and this circuit is completed, when the transmitter is to be used, by throwing over the member *g* of switch G until it makes contact with the member *g'*, thereby completing the battery-circuit through the transmitter and primary coil. The electricity induced in the secondary coil affects the plates in the distant receiver by means of that branch of wire *m'* which extends from one end of the secondary coil to member *g* of switch G, members *g* and g^2 of switch G, the line-wire *l*, which is a continuation of member g^2 of switch G, wire l^2, which is a branch of line-wire *l*, receiver-wires *a' b'*, wire m^3, members *g* g^3 of switch G, wire n^3, to earth, thus cutting out the receiver at the sending-station (on the left of the diagram) and the secondary coil on the right of the diagram.

When the sending-station is at the right of the diagram, the switch G at the right will be arranged as is the switch G at the left, and the receiver at the left is electrified by means of wire *l'*, receiver-wires *a' b'* (at the left of the diagram), wire *m'*, members *g* g^3 of switch G (at the left of the diagram), wire *n'*, to earth.

The switch G is composed of two springs, *g* g^3, and two stops, *g' g²*, arranged as shown, so that when spring *g* is brought in contact with stop *g'* it will also be in contact with spring g^3, and when spring *g* is in contact with stop g^2 it will be out of contact with both spring g^3 and stop *g'*. One end of the secondary coil on the left of the diagram is connected with spring *g* on the left of diagram by means of one branch of wire *m'*, and with receiver-wire *b'* on the left of diagram by means of the other branch of wire *m'*, and one end of the secondary coil on the right of the diagram is connected with spring *g* on the right of diagram by means of one branch of wire m^2, and with receiver-wire *b'* on the right of the diagram by means of the other branch of wire m^2.

I am aware of the apparatus mentioned as used by Dr. Wright in "Ferguson's Electricity," published by William and Robert Chambers, of London and Edinburgh, in 1867, pages 258 and 259, in which two sheets of paper silvered on one side were placed back to back and connected with the two ends of an induction-coil, the primary circuit of which contained a Reis transmitter; and I disclaim that apparatus. My receiver differs from it in that the sounds transmitted are reproduced by the mass vibrations of one of the terminals, while in the Wright receiving apparatus the sound produced was mainly, if not altogether, due to molecular motion, and not to mass vibrations. Moreover, Wright's sheets of silvered paper were so arranged that each would damp any mass vibrations of the other; and in his apparatus any slight mass vibrations, even if not wholly damped, would be necessarily so irregular as to be worthless as a means of reproducing sounds. The fact, also, that the mass vibrations of each sheet damped those of the other sheet would make all the mass vibrations worthless for this purpose.

I am also aware of English Patents No. 4,934 of 1877 and No. 2,896 of 1878, and disclaim all therein shown.

What I claim as my invention is—

1. The receiver above described, consisting of the plates *a b*, mounted in case *r s t*, and separated by the annulus *d*, in combination with induction-coil F, substantially as described.

2. In combination, two induction-coils, the primary of each containing a battery, D, and transmitter B, and the secondary circuits, each containing receiver A, by means of switches G, consisting of members *g g' g² g³*, whereby the receiver at the sending-station and coil at the receiving-station are switched out of the line, substantially as described.

AMOS. E DOLBEAR.

UNITED STATES PATENT OFFICE.

AMOS E. DOLBEAR, OF SOMERVILLE, MASSACHUSETTS.

Mode of Transmitting Sound by Electricity.

SPECIFICATION forming part of Letters Patent No. 240,578, dated April 26, 1881.

[Application filed February 24, 1881. (Model.)

To all whom it may concern:

Be it known that I, AMOS E. DOLBEAR, of Somerville, in the county of Middlesex and State of Massachusetts, have invented a new Mode of Transmitting Sounds by Electricity, of which the following is a full, clear, concise, and exact description, reference being had to the accompanying drawings, making a part hereof.

My invention consists, mainly, in a new mode of transmitting articulate and other sounds by an open circuit.

It also consists in new apparatus for this purpose.

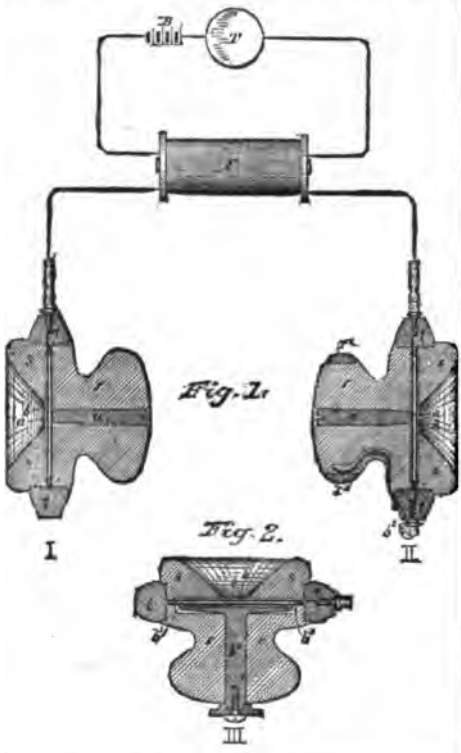
My receiver is based upon the discovery that one terminal of an open circuit will attract and be attracted by a neighboring body when the terminal is charged.

Figure 1 shows two modifications of my receiver, in section, connected in circuit with a transmitter and induction-coil. Fig. 2 shows another modification of my receiver.

Three forms of my receiver are shown in the drawings. In each the casing is formed of three pieces, *r* being the back-piece, *s* the ear-piece, and *t* the connecting-piece which connects *r* and *s* together. The plate *a* of receiver I is a thin elastic disc, preferably of iron, the vibrations of which reproduce the sound which causes the diaphragm of the transmitter T to vibrate, T representing a transmitter of suitable construction, the form preferred being that shown in my application for a patent filed May 31, 1880, the transmitter T and the battery B being in circuit with the primary coil, as will be clear without further description.

In receiver I the plate *a* is one terminal of the secondary coil F, and any change in the

A. E. DOLBEAR.
Mode of Transmitting Sound by Electricity.
No. 240,578. Patented April 26, 1881.



electrical state of coil F varies the potential of this plate *a* in receiver I and causes it to attract plate *b*, which is mounted close to, but not in contact with, plate *a*; but as plate *b* in receiver I is so mounted that it cannot vibrate, plate *a* will vibrate as its potential varies. In receiver I the plate *b* and back-piece *r* and adjusting screw *u* are all of metal.

It will be seen that neither the plate *b* nor back-piece *r* nor screw *u* of receiver I is connected to the coil F, but that only one terminal of coil F—viz., plate *a*—forms any part of the receiver I. The plate *b* may be made in one piece with back-piece *r*, but for purposes of adjustment is best made as shown.

The force of the attraction between the charged terminal *a* and any neighboring body is slight, unless the neighboring body be many times larger than the terminal and itself capable of being readily electrified, and for this reason, when the neighboring body is a plate, (as it is best made for purpose of adjustment) it should be electrically connected with a larger body. Consequently the back-piece *r* of the case of receiver I is made of metal, and is in metallic contact with plate *b*. The neighboring body, which is attracted by plate *a* in receiver I, (being, in fact, the plate *b*, piece *r* and screw *u*, which are all of metal and in metallic contact) acts as one body in this receiver I; but, as will be clear, the back-piece *r*, plate *b*, and screw *u* may be one single piece of metal, and some other provision be made for the necessary adjustment.

In receiver I I the terminal *a* is mounted upon back-piece *r*, so that it cannot vibrate, and must therefore be insulated. Consequently the back-piece *r* is made of hard rubber. The plate *b*, which is the neighboring body in receiver II, is connected by the wire b^3 with a metal band, r^2, upon back-piece *r*, in order to increase the attractive force due to the electrification of a greater mass than plate *b*, and without interfering with the proper vibration of plate *b*, which, in receiver II, vibrates as the potential of terminal *a* varies.

It will be clear that either of the plates *b* may be grounded, and thereby increase the electrification of these plates; but it is not necessary to ground either of them, and the audibility of the sounds reproduced is practically as great when the back-piece of the receiver is held in the hand as when the plates *b* are both grounded; and it makes no difference whatever whether both be grounded or only one. In other words, receiver I will reproduce articulate and other sounds, even if back-piece *r* be of hard rubber or other non-conductor and plate *b* be wholly disconnected from coil F, but the sounds reproduced are faint, although distinct and audible. The sounds will be louder if the piece *r* be of metal, as above described, or if the plate *b* or metallic piece *r* be grounded; but the difference is very slight, the sounds being practically as loud when the metal piece *r* is used as when the plate *b* is grounded. And so of receiver I I the sounds are distinct and audible when wire b^3 and metal band r^2 are omitted, but louder when metal band r^2 and wire b^3 are used, as shown, or when plate *b* of receiver I I is grounded. Moreover, the reproduction of sound by receiver I does not depend at all upon the grounding of any part of receiver I I, for receiver I will act with plate *b* of receiver I I not grounded precisely as it does when plate *b* of receiver I I is grounded, and receiver I I will act when plate *b* of receiver I is not grounded precisely as it acts when that plate of receiver I is grounded.

In my application filed October 31, 1880, I have described a receiver in which both the plates *a* and *b* are connected with the coil F, and I therefore disclaim in this application any receiver having both the plates connected with that coil, my present invention consisting in a receiver in which only one terminal of the coil is used, as above explained.

Instead of making plate *b* of metal and connecting it metallically with back-piece *r* or band r^2, it may be made of any non-conductor, and in this case the increased loudness is produced by electrifying plate *b* before it is put in place; or, as shown in receiver I I I, where *b* is a rubber plate, and b^3 is a disc of felt fast to the hard-rubber support b^4, which is turned by the thumb and finger to electrify rubber plate *b* by friction.

What I claim as my invention is—

In combination, a primary coil in circuit with battery B and transmitter T, and a secondary coil with its enlarged terminal *a* mounted in case *r s t*, and arranged near plate *b*, plate *b* being also mounted in case *r s t*, but not connected with the secondary coil, all substantially as described.

AMOS E. DOLBEAR.

The Molecular Case.

On July 17, 1883, the Bell Company brought a suit in equity in the United States Circuit Court for the Southern District of New York against the Molecular Telephone Company and others. The bill charges the infringement of Bell's Letters Patent above stated. The answer denies the validity of the letters; and the alleged infringement; and sets up several alleged prior inventors, but the chief stress was laid upon the work and publications of Philip Reis, either to destroy the Bell patent or to narrow it to a patent for a mere change of form. All the prior publications, set up in Spencer's Case, and all the prior publications set up in Dolbear's Case were also introduced in the Molecular Case, and a few more added; and substantially all the testimony taken in the Hopkins and Overland Cases and in Spencer's Case were introduced, and the same experts were recalled and further examined by the defendants. The case was argued before *Judge* Wallace, in March and April, 1885.

On final hearing upon the pleadings and proofs, a decree was entered for the complainants upon the fifth claim of said Letters Patent No. 174,465; and the sixth, seventh and eighth claims of said Letters Patent No. 186,787; and the defendants appealed.

Upon the fifth claim of said Letters Patent No. 186,787 the decree was for the defendants and complainants appealed.

The defenses set up in the answer, and relied upon by the defendants, are the invalidity of Letters Patent No. 174,465, because:

1. As a patent for a machine, the instrument or machine described and claimed is an inoperative device.

2. As a patent for a new art, there is in the patent no disclosure of what the art is, nor any description of the art process that would enable a skilled person to beneficially use it.

3. Because the claims of the patent include and appropriate mere forces of nature and things which are not subject matter of patent.

4. Because all the claims of the patent are anticipated or limited by the inventions and discoveries of Reis, Gray, Dolbear, Holcomb, Van der Weyde, McDonough, Varley and others. As to Letters Patent No. 186,787, the defendants' contention is:

1. That the claims are all anticipated by the inventions and discoveries of the persons named and others.

2. As to both said letters the defendants deny that they infringe any of the claims therein set forth.

Defendants say that proof of infringement was founded upon the mechanical construction of the defendant's instrument, given by Daniel M. Adee and the evidence of Prof. Charles R. Cross, that he had examined and tested the instruments marked Exhibit Defendant's Transmitter and Exhibit Defendant's Receiver, and found that from their construction and method of operation they are adapted, when suitably connected with a battery, to transmit articulate speech; and that when so connected and so operated they use "the *method* invented by Bell and described in his specification No. 174,465, for transmitting vocal or other sounds telegraphically, by causing electrical undulations similar in form to the vibrations of the air accompanying any sound."

The following are the *errors assigned*:

"First. The court below erred in holding that the 5th claim of Patent 174,465 was valid.

"Second. The court below erred in holding that defendants infringed the 5th claim of Patent 174,465.

"Third. The court below erred in holding that the 6th, 7th and 8th claims respectively of Patent 186,787 were valid." Separate errors were assigned as to the holding valid of each of said claims.

"Fourth. The court below erred in holding that the defendants infringed the 6th, 7th, and 8th claims of Patent 186,787." Separate errors were assigned in respect to the infringement of each of said claims, 6th, 7th, and 8th, Patent 186,787. For the final decree in this case see 23 Blatchf. 253.

In the Molecular Case, the validity of the fifth claim under the second patent, for a combination of a peculiarly shaped magnet and diaphragm, was questioned, but no oral argument was made upon it by either side, the claim having been sustained in the previous cases. *Judge* Wallace, in his opinion in the Molecular Case, adverting to the fact that this question had not been argued, said that he read the claim as a claim for a *form of magnet* which clearly was not new, but did not read it as a claim for a combination of that old magnet with a diaphragm in a speaking telephone. The same question came up, upon substantially the same evidence, in the Overland Case and People's Telephone and Telegraph Cases, and the complainants there argued the question and pointed out that the claim was not for a new magnet, but was for a novel combination constituting an important improvement in speaking telephones. *Judge* Wallace then sustained the claim, and decreed its validity.

Following are the Molecular Co. patents:

(No. 52.) Defendants' Exhibit, Lockwood & Bartlett's Patent for Transmitter for Telephones.

J. A. Welch, Special Examiner, May 14, 1884.

UNITED STATES PATENT OFFICE.

ROBERT M. LOCKWOOD AND SAMUEL H. BARTLETT, OF NEW YORK, N. Y., ASSIGNORS OF ONE HALF OF THEIR RIGHT TO CHARLES F. LIVERMORE, OF THE SAME PLACE.

Transmitter for Telephones.

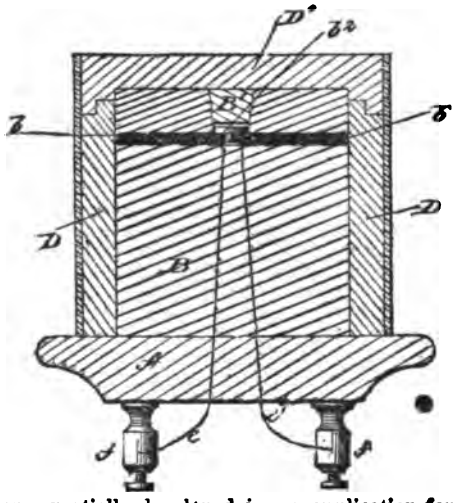
Specification forming part of Letters Patent No. 228,884, dated June 15, 1880.

Application filed March 9, 1880. (No model.)

To all whom it may concern:

Be it known that we, ROBERT M. LOCKWOOD and SAMUEL H. BARTLETT, both of the City County and State of New York, have invented certain new and useful improvements in transmitters for telephones or Vocal Telegraphs, of which the following is a full, clear and exact description, reference being had to the accompanying drawing, which represents our improved transmitter in section.

In the telephones as heretofore constructed the transmitting instrument, or that which received the sound-waves and transmits them to the electrically-charged conductors, has been organized upon the theory of mechanical vibration due to the action of the sound-waves, and from this has arisen the device of a thin flexible metallic diaphragm, the vibrations of which were transmitted by the electric current to the receiver; and all telephones in what may be termed successful operation in one form or another, so far as we are acquainted with them, employ this so-called "mechanical vibration." We propose to dispense with this mechanical vibration, and as a substitute therefor we employ what we term "molecular" disturbance or vibration, the construction of our apparatus being such as to prevent, as far as practicable, anything in the nature of mechanical vibration. This feature



was partially developed in an application for letters patent filed by us Nov. 3, 1879, but in that the carbon plates, while supported by the non-resonant material, were left uncovered at their inner adjacent ends, and sound chambers were formed in the non-resonant block on opposite sides, thereof, one of which communicated with the external atmosphere rendering the plates and the connecting button liable to be more or less affected or mechanically disturbed by the direct action of the sound-waves. In the present instance we embed the carbon or conducting plates solidly throughout their entire length in and cover or surround said plates and the button with the non-resonant material, as hereinafter explained.

In the accompanying drawing, A represents a base plate of wood, upon which is secured a block or cylinder, B, of cork or other suitable non-resonant material. Near the upper end of this block two bars or plates of carbon, *b b*, or other suitable conductors of electricity, are secured by being solidly embedded in the cork, as shown. These bars are arranged transversely of the block, extending from near its centre to or nearly to its outer face, on opposite sides as shown. Between the inner adjacent ends of these bars is placed a headed pin of carbon or other suitable conducting material similar to that of which the bars are composed, the head of said pin constituting what we term a "button," which connects the two plates and rests upon the adjacent ends of the bars by its own gravity. A cavity is formed in the block B directly over this button, to give access to it for removing or replacing it, and this cavity, when the button is in place, is closed by a plug B′, of similar material to that of which the body of the block is formed, and which rests in close proximity with and prevents accidental displacement of the button. The block B thus formed, with the carbon bars embedded within it, is by preference fitted snugly in a metal cylinder D, the open end of which rests against the base plate A, the other end being covered by a metal cup or cover D′, screwed upon or otherwise firmly secured thereto, and the metal case is in turn covered with leather, rubber, canton-flannel, or other soft non-resonant material, as shown, but the metal cylinder and its covering may be dispensed with.

Wires *e e*, are connected with the carbon plates *b b*, one to each, and extend thence out through the body B of the block in any convenient direction, and are connected at their outer ends to screw posts *f f* on the base plate A. The main-line wires connected with the battery are also connected with these screw posts in the same manner as in an ordinary telegraph instrument, and as will be seen, the wires *e e*, carbon plates *b b*, and button b^2 serve to connect said main-line wires and thereby complete the circuit.

The sound-waves in speaking, &c., are received upon the face or sides of the block of non-resonant material, or upon its covering described, and are communicated through said block and the carbon plates to the button *b*2, and through what we term a "molecular disturbance" the action or disturbance of the latter is communicated through the plates to the electrically charged wires *e e*, which complete the battery circuit, and thence over the main-line wires to the point connected therewith. We thus make use of the direct current from the battery in the transmission of the sound-waves, and are thus enabled to transmit them like distances and with the same precision as an ordinary telegraphic message is transmitted.

As will be seen, our construction of the transmitter is such as is calculated to, and we believe it does as far as practicable, obviate all so called "mechanical vibration" of the parts, for the carbon or conducting bars or plates being solidly cushioned or embedded in some firm non-resonant substance, (such as cork) the disturbance caused must be other than mechanical and constitutes what we call "molecular" disturbance.

The means for repeating or transmitting the vocal sounds over long lines or a series of circuits and for receiving the same are embraced in other applications filed herewith, and need not therefore be here described.

Having now described our invention we claim—

1. In a transmitter for telephones or vocal sound telegraphs, a block of non-resonant substance provided with strips or plates of carbon or other conducting material embedded in it, for

2. The block of non-resonant material having conductors embedded within it, and wires extending therefrom for connecting with the main line current, substantially as described.

3. The non-resonant block in which the carbon plates are embedded, in combination with the enclosing metallic case or cylinder, substantially as described.

4. The combination of the non-resonant block B, enclosing metal case D, and flexible cover thereto, substantially as described.

ROBT. M. LOCKWOOD.
SAMUEL H. BARTLETT.

(No. 53.) Defendants' Exhibit, Lockwood & Bartlett.

J. A. Welch, Sp. Exr., May 14, '84.

UNITED STATES PATENT OFFICE.

ROBERT M. LOCKWOOD AND SAMUEL H. BARTLETT, OF NEW YORK, N. Y., ASSIGNORS OF ONE HALF OF THEIR RIGHT TO CHARLES F. LIVERMORE, OF SAME PLACE.

Telephone Receiver.

Specification forming part of Letters Patent No. 228,825, dated June 15, 1880.

Application filed April 30, 1880. (No model.)

To all whom it may concern:

Be it known that we, Robert M. Lockwood and Samuel H. Bartlett, of the City, County and State of New York, have invented a new and useful Improvement in Telephone Receivers, of which the following is a full, clear, and exact description, reference being had to the accompanying drawings, making part of this specification, in which—

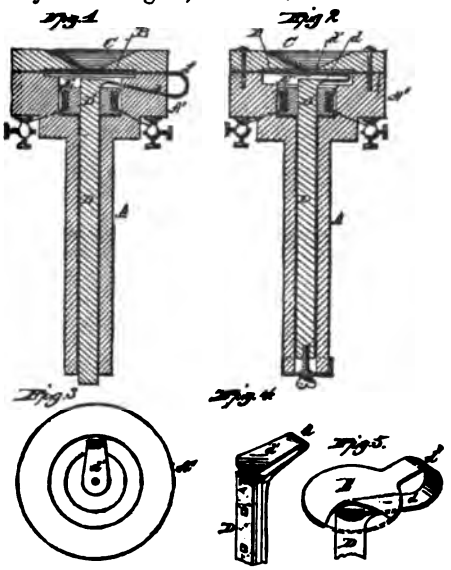
Figure 1 represents our improved telephone or vocal sound telegraph receiver. Fig. 2 is a similar view, showing a modification in the manner of connecting the diaphragm with the magnet. Fig. 3, G is an end view of the construction shown in Fig. 2, with the ear-piece and diaphragm removed and Figs. 4 and 5 are prospective views of the end of the magnet, having one the spring arm and the other the spring arm and diaphragm applied.

Similar letters of reference denote corresponding parts whenever used.

Our invention relates to a novel construction of the end of the magnet to which the diaphragm is connected, whereby, through disturbance or variations of magnetic power between parts of the same pole of the magnet, vocal sounds are transmitted to the diaphragm or sounding-board; and it consists in extending the pole in the form of a flat U-shaped spring, the outer free end of which overhanging the end of the magnet of which it is an extension is expanded into or has the diaphragm connected with it, as hereinafter explained.

In the accompanying drawings, A represents the body or handle of the receiver, made of wood or other suitable material, cylindrical in form, and enlarged at one end, A′, to accommodate the diaphragm B and ear-piece C secured thereto.

The body or handle A is perforated longitudinally to receive the magnet D, the perforation in the enlarged end A′ being enlarged into a socket for *a*, the reception of a spool or helix, E, surrounding the end D′ of the magnet as shown. The magnet at the end D′ is drawn out, reduced in size, and bent at a right angle to the body D of the magnet, or nearly so, extends to one side thereof in the form of a flat spring, *d*, recurved upon itself in U form until the outer arm or end, *d′*, overhangs the end D′ of the body of the magnet, as shown.



Where the end *d′* is expanded to form the diaphragm B, as shown, the spring portion passes out through an opening in the head A′, and is there recurved so as to bring the diaphragm over the end thereof, where it is held in place by the ear-piece C, which is secured to said head or end by screws or other suitable fastening devices; but as good practical results have been obtained by making the diaphragm of different materials from the magnet, such as wood, paper, parchment, brass, &c., constituting a sounding-board, the end *d′* of the spring arm may terminate at a point overhanging the end D′ of the body of the magnet, and the diaphragm or sounding-board may be bolted or otherwise firmly fastened to it, as shown in Fig. 2. Where the latter form of construction is employed the magnet should be made adjustable longitudinally by means of a thumb-screw or equivalent device, as shown, for adjusting the tension of the disc or sounding-board B as may be necessary to give it the utmost efficiency.

Under the arrangement described it will be seen that the spring arm *d d′* forms an extension of the pole D′ of the magnet, reduced in size, and its normal condition will be one of rest in relation thereto. Thus calling the current in the helix E one, the amount of magnetism in the magnet D at D′ will be one and that in the arm *d′* one, and the latter will be at rest. The body of the magnet lies within the helix, and is more easily and quickly affected by it, and constitutes, as it were, a reservoir from which the smaller arm *d d′* is supplied. Now, sup-

posing the current in the helix to be suddenly increased to two, the end D′ becomes two in advance of the end *d′*, and for the instant attracts the latter until it becomes also two, when it again instantly repels it; then its normal condition as a part of the same pole is restored, and it returns to its position of rest, until again attracted or repelled through another disturbance of the current in the helix. Thus for each disturbance in the current there will be three distinct movements of the arm *d′* or diaphragm B connected therewith. First, it will be drawn down or toward the end D′, then it will be repelled beyond its normal position, and finally, the equilibrium being restored, it moves back to rest. Thus it will be seen that the diaphragm is operated by differences or disturbances of degree of polarity or attraction and repulsion in the same pole.

In Fig. 4 the magnet is shown made up of a number of strips, an extension of one of which forms the spring arm. This form obviates the necessity of drawing out the body of the magnet and facilitates its construction.

We are aware that the pole or poles of a horseshoe magnet have been expanded to form a disc or diaphragm; but in such cases, so far as we are advised, the diaphragm has been brought into such relation to the opposite pole of the magnet as to be acted upon and controlled or held under restraint by said pole by intercharge of polarity. This we do not claim; but,

Having now described our invention, we claim—

1. The pole of the magnet extended in the form of a laterally-projecting recurved arm and connected with the diaphragm or sounding-board substantially as described.

2. The curved spring and diaphragm, made in one piece with and forming an extension of the pole of the magnet, substantially as described.

3. The diaphragm connected with the magnet through the spring-extension of one pole of the latter and arranged with relation to said pole substantially as shown and described.

In testimony whereof, we have hereunto set our hands this 29th day of April, A. D. 1880.

ROBERT M. LOCKWOOD.
SAMUEL H. BARTLETT.

Witnesses:
C. H. HANKINSON.
T. W. HARTFIELD.

The Clay Commercial Case.

April 24, 1884, the Bell Company brought a suit in equity in the United States Circuit Court for the Eastern District of Pennsylvania against the Clay Commercial Telephone Company and others for infringement of the above described Bell Patents Nos. 174,465 and 186,787. The defendants set up the same line of defense which had been set up in the Molecular Case and other previous cases.

The Clay Commercial Telephone Company answered denying that the said Bell was the original and first inventor of the alleged improvements described and claimed in the said letters patent, and that the same had not been known or used by others in this country, nor patented or described in any printed publication in this or any foreign country before his alleged invention or discovery, and that the same had not been in public use or on sale for more than two years prior to his said application for the said respective letters patent, but alleged the contrary thereof.

The material allegations in the answer were as follows:

That, inasmuch as the letters patent, No. 186,787, do not bear even date with the foreign letters patent and are not limited to expire therewith, the letters patent of January 30, 1877, No. 186,787, are null and void.

That it has no knowledge that the complainants are corporations duly established under the laws of the State of Massachusetts and of the State of Pennsylvania; that the alleged title as set forth in the bill does not authorize the complainants to bring or maintain the bill, or to assert the rights and claim the relief in manner and form therein and thereby asserted and claimed; that the bill is defective for want of proper and sufficient parties thereto; and it prays that the complainants may be required to make due proof of all and singular the grants, assignments, and licenses in said bill mentioned, and of their allegations in this behalf.

It denies that electric speaking telephones had never been publicly known or used before the grant to Bell of said patent, No. 174,465; or that they were first publicly made known and introduced into public use by Bell, under the said patents No. 174,465 and No. 186,787; or that Bell was the original and first inventor of said alleged inventions.

It denies that the transmission of articulate speech, telegraphically, according to the method alleged to have been invented by Bell, and patented to him by the two several patents aforesaid, constituted an entirely new industrial art; and alleges that, on the contrary, these allegations and claims are in direct conflict with the publicly well known and the printed and published history of telephony; that his alleged discoveries or inventions, without the aid and employment of the inventions and discoveries of others, were incapable of accomplishing such results as those claimed in said bill, and could not produce, and never did produce, a practically effective, satisfactorily working, or commercially successful telephone; that speaking telephones arranged and constructed in the manner mentioned and set forth in said patent of Bell, No. 174,465, have never been put in use, are of no commercial value, and are, for practical purposes, without utility and inefficient and worthless.

It denies that it has made, used, and furnished to others, electric speaking telephones constructed according to the method described and claimed in said patents to Bell, No. 174,465, and No. 186,787, respectively; and alleges that, on the contrary, the telephones made, used, and sold by it have been made and constructed under letters patent of the United States issued and granted in conformity with law to Henry Clay, as the first and original inventor of said patented improvements, and by him duly assigned to it: to wit, May 8, 1883, No. 277,112, for a new and useful improvement in telephones; July 3, 1883, No. 280,351, for switch-board for telephones; July 3, 1883, No. 280,451, for telephone call-bell; July 3, 1883, No. 280,580,

for transmitter for telephone; November 6, 1883, No. 288,017, for telephonic transmitter; that the alleged inventions or discoveries described or claimed in the said letters patent of Bell, or the substantial and material parts thereof claimed as new and original, had, prior to the alleged invention or discovery thereof by Bell, been mentioned, described, or claimed in divers letters patent granted and issued to divers persons, mentioning the persons, and mentioning among others Cromwell Fleetwood Varley; that the said respective letters patent of Bell are null and void.

This case was argued in June, 1885, before His Honor, *Judge* McKennan.

In April, 1886, the court made a decree whereby it was decided that the several letters patent granted to Alexander Graham Bell, No. 174,465 and No. 186,787, are good and valid in law; that the said Alexander Graham Bell was the original and first inventor of the inventions described in said several letters patent, and that the said defendants have infringed the fifth claim of said letters patent No. 174,465, and the third, fifth, sixth, seventh and eighth claims of said letters patent No. 186,787, and that the defendants be perpetually enjoined from making, selling or using the said improvements.

From this decree the said, the Clay Commercial Telephone Company and other defendants appeal to this court.

In its answer this company claims "; that the telephones made, used and sold by it have been made and constructed under and in pursuance of certain Letters Patent of the United States, issued and granted, upon due application, and in conformity with law, unto one Henry Clay, as the first and original inventor of said patented improvements respectively, and by him duly assigned to this respondent, which said Letters Patent are respectively of the dates, numbers, and titles, following: to wit, May 8, 1883, No. 277,112, for a new and useful improvement in Telephones; July 3, 1883, No. 280,351, for Switch-board for Telephones; July 3, 1883, No. 280,451, for Telephone Call-bell; July 3, 1883, No. 280,580, for Transmitter for Telephones; Nov. 6, 1883, No. 288,017, for Telephonic Transmitter. And that the devices and methods of operation set forth in these said several Letters Patent are not similar to, but are wholly different from, the devices described and claimed in the said Letters Patent of the said Bell, and are not violations or infringements of said Letters Patent, and do not embody or embrace the method, principle, operation, or construction therein or thereby set forth, described and claimed."

The People's (or Drawbaugh) Case.

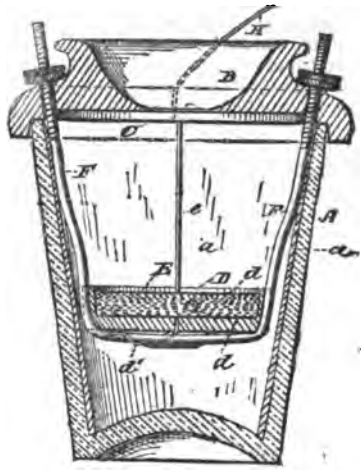
October 20, 1880, the American Bell Telephone Company sued, in equity, the People's Telephone Company, sometimes known as the Drawbaugh Company and others, for infringement of Bell's Patents No. 174,465 and No. 186,787 in the United States Circuit Court for the Southern District of New York.

The issues made by the pleadings are practically resolved into the single question, whether the patentee Bell, or Daniel Drawbaugh, of Milltown, in Cumberland County, Pennsylvania, was the first inventor of the electric speaking telephone.

The defendants in this case contended that, long before Bell had perfected his invention, and long before its mental conception by him, Drawbaugh had not only made the same invention, but had perfected improvements in organization and detail which Bell never reached, and which were only reached years afterwards by the work of many other inventors in the same field of improvement. Their history of the facts is stated with substantial accuracy in the answer to the bill of complaint.

Following are the exhibits referred to in the statement of the People's (or Drawbaugh) Case.

Instrument "F" reproduced Full Size—Tin Cup and Mustard Can.



REFERENCES.

A. Glass tumbler.
a. Plaster-paris lining to same.
B. Wooden mouthpiece.
C. Diaphragm; tin.
D. Carbon holding cup; wood.
d. Metallic plate at bottom of D.
d'. Wire from plate d to adjusting posts.
E. Upper metallic plate in cup D.
e. Bar from plate E to diaphragm.
F. Adjusting posts.
G. Carbon in cup D.
H. Conductor to diaphragm.

NOTE.—The conductor *H* is attached to the edge of the diaphragm; the opposite edge of the diaphragm is notched, to allow passage for a conducting wire (not on instrument) through the cap to the wire *d'*.

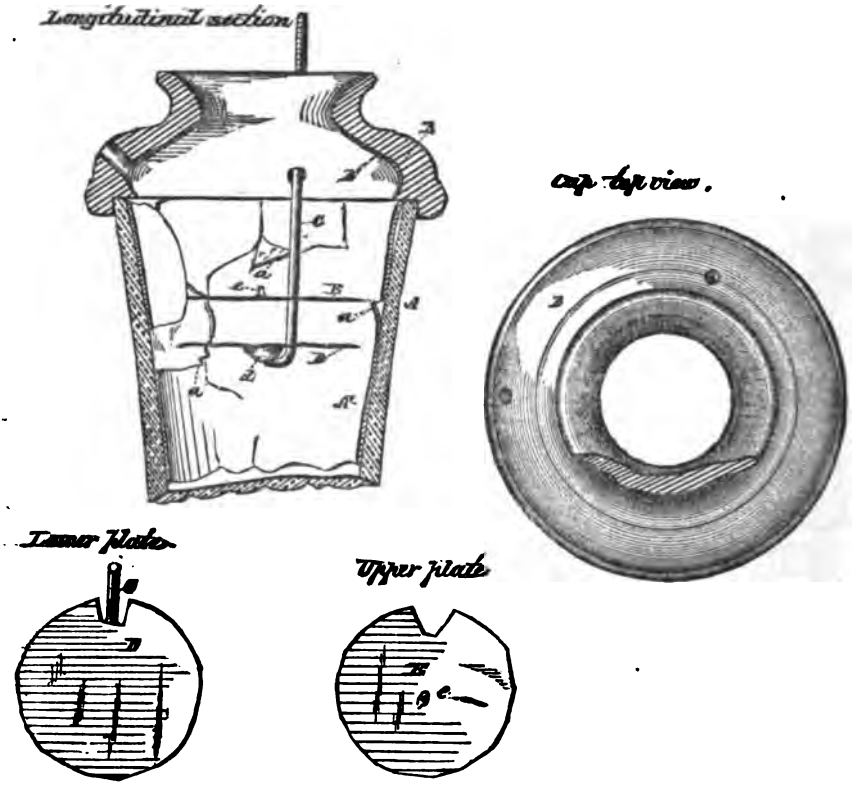
The answer, among other things, avers that Drawbaugh "was and is the original and first inventor and discoverer of the art of communicating articulate speech between distant places by voltaic and magneto electricity, and of the construction and operation of machines and instruments for carrying such art into practice; * * * that the said electric speaking telephones so constructed and successfully and practically used by him contained all the material and substantial parts and inventions patented" in the two patents granted to Bell; and also contained other important and valuable inventions in electric and magneto telegraphy; * * * "that some of the original machines and instruments invented, made, used and exhibited to many others long prior to the alleged inventions of Bell are still in existence, and capable of successful practical operation and use, and are identified by a large number of persons who

personally tested and used and know of their practical operation and use in the years 1870, 1871, 1872, 1878, 1874, and both subsequently and prior thereto; * * * that said Drawbaugh for more than ten years prior to 1880 was miserably poor, in debt, with a large and helpless family dependent upon his daily labor for support, and was from such cause alone utterly unable to patent his said invention or caveat it, or manufacture and introduce it upon the market; and that said Drawbaugh never abandoned nor acknowledged the claims of any other person thereto, but always persisted in his claim to it, and intended to patent it as soon as he could obtain the necessary pecuniary means therefor.

Drawbaugh, in his testimony, describes instruments which he says were made by him from to time, as experiments led him from one improvement to another. He testifies that he thinks he made his first telephone apparatus prior to November 1866, and is positive he had it before he moved his shop to the "Clover Mill" in 1867.

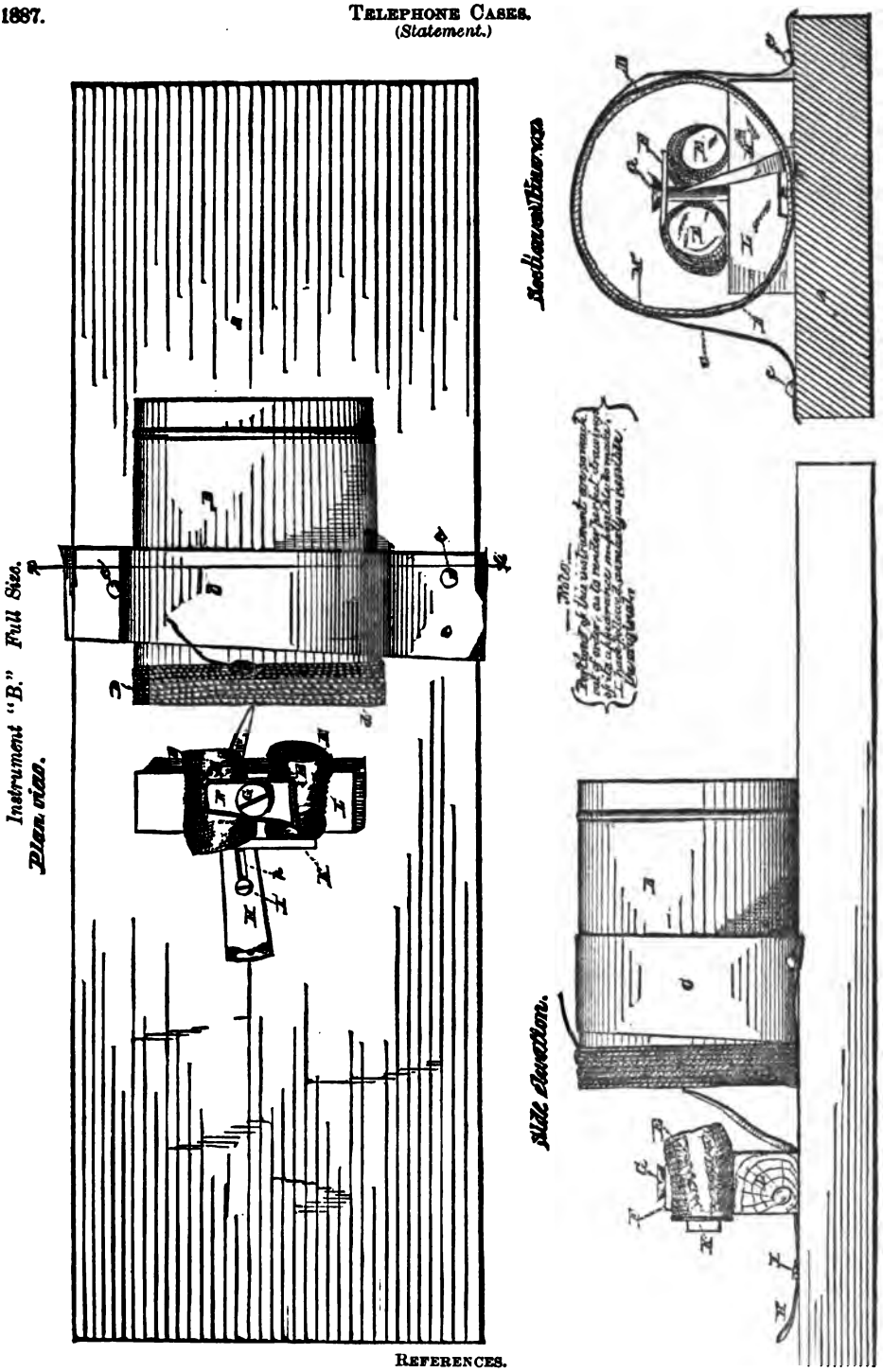
As he describes it, the body of the transmitter was a porcelain teacup, the diaphragm was of membrane, the electrodes interposed in the circuit were two copper discs, the upper one of which was connected to the diaphragm by a wire, so as to vary its pressure upon a low conductor of fine earth or pulverized charcoal interposed between the discs through the action of the sound-waves upon the diaphragm; and the receiver was a tin can without a top or bottom, having a membrane diaphragm stretched over one end, connected by a tense cord to an armature supported on a spring, and arranged close to the poles of an electro-magnet in the electric circuit. He testifies that subsequently he constructed apparatus upon the same general principle, with some change of detail; and he produces Exhibits F and B,—the former a transmitter and the latter a receiver—as the remnants of the original instruments. Exhibit F is a glass tumbler; and he states that at first he used a membrane diaphragm over it, and then one of thin metal; and that for the conductor he used pulverized carbon or carbon mixed with bronze powder, and used various tops or mouthpieces to speak into it. The Exhibit B, he says, was the receiver; and in this he had discarded the string and the spring of his earlier receiver. He says that experiment led him to improve the transmitter F by substituting a metal diaphragm in place of membrane, and he produces a sketch. A reproduction of this

Instrument "F." Full Size—Tumbler.



REFERENCES.

A. Glass tumbler; bottom broken off.
B. Wooden cap.
B'. Plaster-paris lining to cap.
A'. Plaster-paris lining to tumbler.
a. Breaks in lining A'.
C. Adjusting rod for lower plate.
D. Lower plate.
d. Solder joint.
E. Upper plate.
e. Wire to plate E.



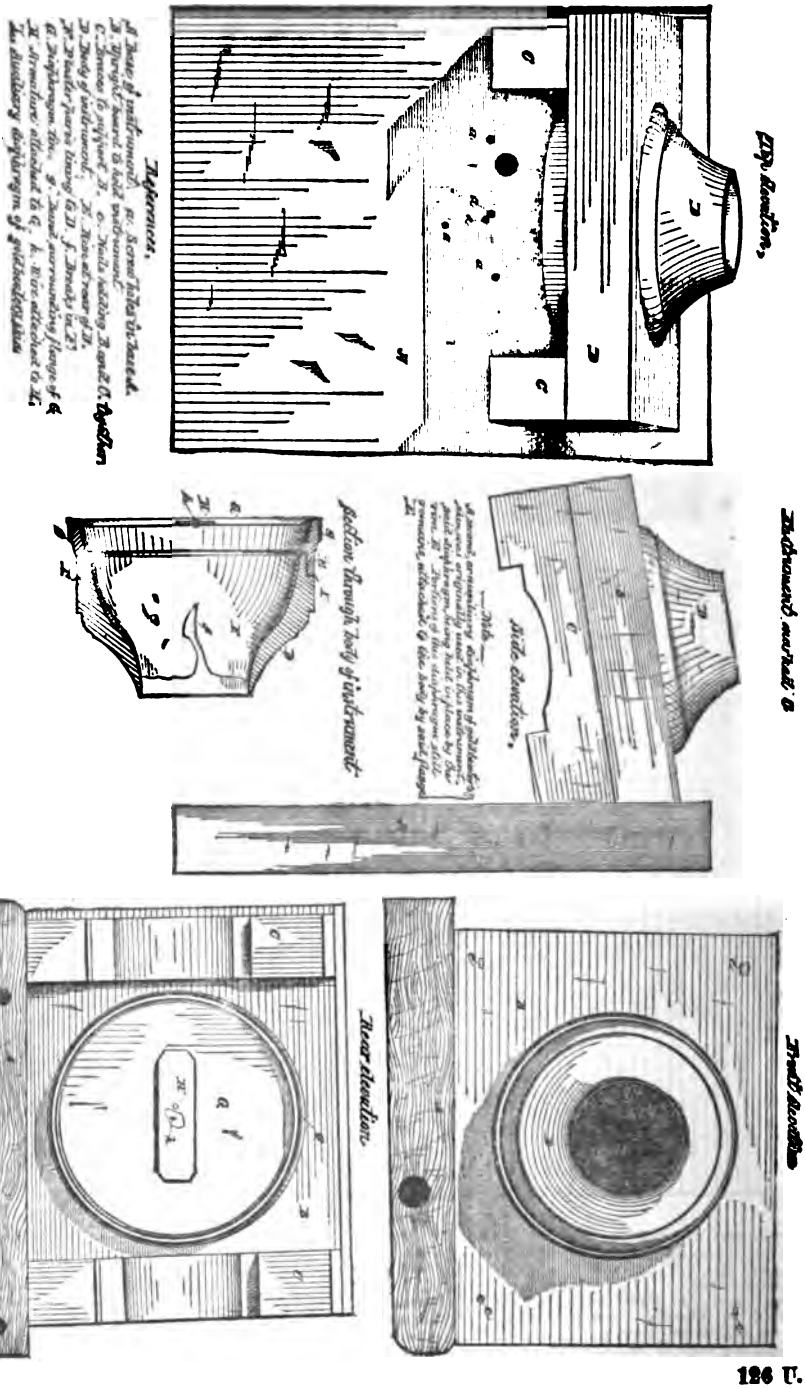
REFERENCES.

A. Base board, of pine.
B. Tin box, evidently a mustard box.
C. Strap of tin.
c. Nails or tacks.
D. Twine wrapped about box, to hold membrane composing diaphragm in place.
d. Projecting edge of membrane.
E. Electro-magnets.
F. Retaining plate of copper.
G. Screw securing same to base board.
H. Tension plate, to tighten diaphragm.
h. Slot in same.
I. Regulating screw in slot *h*.
K. Plate to which magnets are attached.
M. Plaster of paris lining to box from 1-16 to 3-32 of an inch in thickness; the lining is broken away at different points.
L. Wooden block upon which magnets rest.

instrument has been made by him for use in the proofs, which is designated as "Exhibit F reproduced." In this the mouthpiece is modified in size and in distance from the diaphragm.

He made, according to his testimony, a new receiver of more perfect construction, and produces the remnant of the original which is designated as "Exhibit C."

A reproduction of such an instrument as he describes is made and referred to in the proofs as "Exhibit Reproduced C." After Exhibit C, he produces Exhibits I, A, E, and D, as likewise original instruments, made respectively in the chronological order of their production as exhibits. He states that "I" was used by him as a companion instrument to "C". Exhibit A



discloses a modification of form and a higher degree of mechanical adaptation.

The last two, "D" and "E", are concededly perfect, practical instruments, and, according to the testimony of Mr. Benjamin, an expert witness for the defendants, would compete successfully for public patronage with any magneto telephone which had been introduced into use in 1882. It is asserted of these instruments by counsel that no higher development of the magneto telephone has been reached at the present time than is indicated by Exhibits E and D. Drawbaugh does not attempt to fix the time at which he made any of these instruments, or even the year. He testifies, however, that he made all of them prior to the time the Axle Company commenced business, which was in December, 1874, except E and D, which were made about that time.

The theory of the defendants is, that Exhibits F and B were used by Drawbaugh in 1867, 1868 and 1869, Exhibit C in 1869 and 1870, Exhibit I in 1870 and 1871, Exhibit A in 1873 and 1874; and that Exhibits E and D were made in January, or February, 1875.

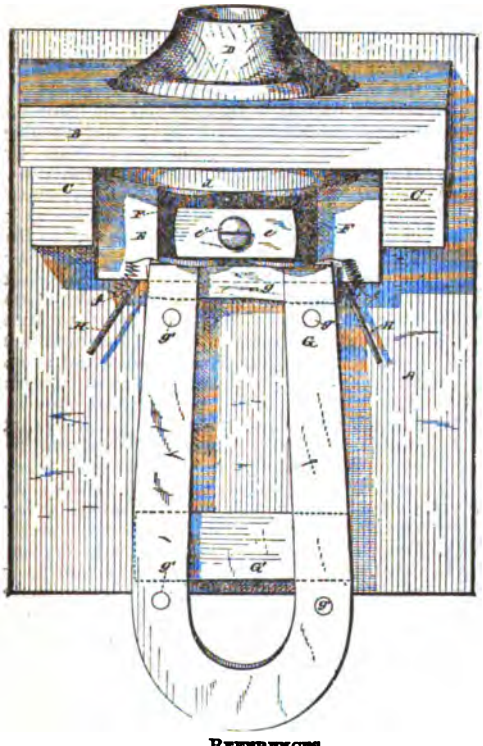
The defendants introduce the testimony of nearly two hundred witnesses tending to prove the priority of invention by Drawbaugh.

The general theory of the defense is substantiated by three classes of witnesses: those who heard of the existence of Drawbaugh's "talking machines" at various times; those who talked through the machines on various occasions, or heard others talk through them; and those who attempt to identify one or more of the exhibits as the instruments they saw used. More than fifty witnesses testify to having heard of the talking machines prior to February 14, 1879.

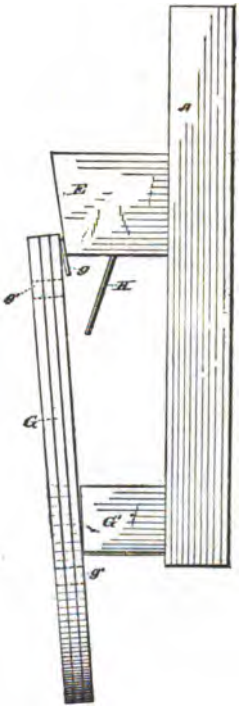
Sixty witnesses do not attempt to identify any particular instrument, but testify that they saw a talking machine or talked through it, or heard it talked through at Drawbaugh's shop on occasions subsequent to 1867, and most of them fix the occasion as prior to 1876.

The third class of witnesses is those who

Reproduction of instrument & Plan view



Side elevation of base board, magnet, and its supporting block



REFERENCES.

A. Base board.
B. Upright to hold body of instrument.
C. Supports of B.
D. Body of instrument.
d. Band on rim of D to hold diaphragm in place.
E. Block to support electro-magnets.
e. Plate to hold electro-magnets in place, brass.
e'. Screw to secure e and E to A.
F. Electro-magnets.
f. Wires to F.
G. Permanent magnet.
G'. Block to support G.
g. Paper to raise end of G.
g'. Rivets in G.
H. Studs in block E to receive wire.

NOTE.

This instrument is similar in all respects to original instrument marked *C*, having armature attached to diaphragm; therefore I have thought two views sufficient in this case.

identify more or less positively one or more of the several exhibits as the instruments used by them, or which they saw used by others prior to March 7, 1876. Exhibits F and B are identified by over forty witnesses.

The identification of Exhibits C, I and A is made by a smaller number of witnesses. Some of them think they saw "C" in 1870, and others at various dates after that and as late as March, 1876.

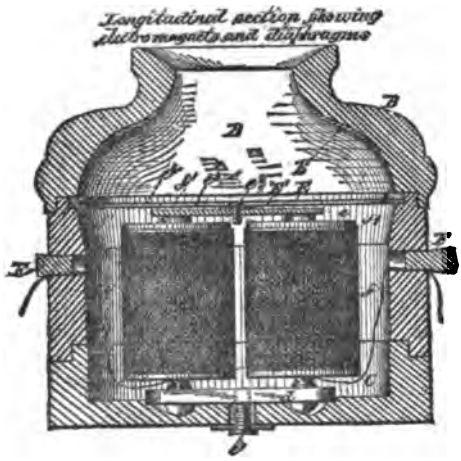
One of the witnesses thinks he saw "I" in 1871; the others locate the occasions in 1873, 1874 and 1875. Some of the witnesses think they saw "A" as early as 1872, one of them in 1870; but most of them saw it, they think, in 1875.

Some of the witnesses who identify one or more of the instruments exhibited to them by Drawbaugh as the Exhibits F, B or C saw or used them in 1875 or 1876.

That the talking machines referred to by the witnesses were electric instruments is clearly established. Drawbaugh testifies explicitly that they were always used with a closed circuit, and without breaking the current, some of them being battery telephones, and some magneto telephones. He always represented them as actuated by electricity, to those to whom he explained or described them, and claimed his invention would supersede the telegraph. His assertions show them to have been electrical instruments.

He stated to the witness Shank "it was the greatest invention ever known. If he had the means to go on with it, they could talk, or rather be a time to come as to talk, to the old country, same as we can talk here." To Zacharias, that "he could run it out for miles, and parties could talk in at one end and be heard at the other end, the same as persons in a room together." To Smith, that "parties between Harrisburg and Philadelphia could communicate as if they were speaking together; there would hardly be any limits;" it was an "instrument to convey the voice, to supply the place of the telegraph;" to Smyser, that it would work "from here to California;" to Fry, that one "can talk as far as the wire goes;" to Carl, that "he could hear a man talk from that place to New Cumberland or Harrisburg, and understand distinctly what he said;" to Sherwick, that it was "better and handier than the telegraph; that you could just talk through it in place of writing;" to Balsley, that "by attaching two wires you can hear it away off; the telegraph is nowhere with it;" to Kahney, that "he could talk the same for miles as he could for a short distance;" to Shettel, that, "if he had a wire from the shop in connection with the telegraph wires at White Hill, he could talk to Mechanicsburg by having a machine there or an instrument in the office; that it would be better than telegraphing, and that it would be worth a great deal of money;" to Reneker, that "he thought he could make it that he could talk through to Harrisburg; he thought they would take the place of telegraphing;" to Weber, that "it beats all the others of my inventions; he could carry sound, or rather talk, as far as Shiremanstown;" to Hawn, that "he would be able to operate that a man preaching in New York, that a congregation in Philadelphia would hear the same sermon;" to Kahney, that "he could just as easy speak ten miles as one, or any distance he would choose to;" to Rupp, who was there with Hamacher, that "it was worked by electricity, would take the place of the telegraph, and that he could make it so that he could talk to San Francisco;" to Musser, that "he was going to make a machine to talk from Harrisburg to Philadelphia, and it would be cheaper and quicker way than telegraphing;" to Smith, that "he believed they could talk for a hundred miles;" to Fettrow, that "I could speak ten, fifteen or twenty miles, or even to California, if there was a wire extended;" to Wisler, that "he could attach a wire to it and talk for ten miles, as far as he could have a circuit around;" to H. F. Drawbaugh, that "he could talk across the continent;" to Free, that "the talking machine could be used to talk at a long distance—from Philadelphia to California;" to Landis, "that it could be used a thousand miles; it would take the place of the telegraph;" to Lenig, that "he could talk hundreds of miles through that;" to Updegraff, that, "instead of using the old mode of telegraphing, he could talk directly through the wire; he thought he could talk as far as you could use the ordinary telegraph wire;" to Draper, that "he thought it was, or would be, one of the greatest inventions of the age, and would take the place of telegraphing;" to A. Evans, that "he could take this machine and talk clear out to Europe, cross the ocean;" to Eicholz, that "if he could only get some one to help him once, he would run it to Harrisburg, and convince them, and then he would run it from Harrisburg to Philadelphia."

Instrument "I." Full Size.



REFERENCES.

A. Body of instrument; black walnut.
B. Cap of instrument.
b. Plaster-paris lining to B.
C. Lower cap.
D. Electro-magnets.
d. Bar supporting magnets.
E. Upper diaphragm.
E'. Lower diaphragm.
e. Armature of magnets.
e1. Screw holding d in place.
e2. Screw holding E' to e.
e3. Paper ring between E and E'.
e4. Paper ring or gasket above E.
F. Plugs to hold wire.
f. Wires or conductors.

He stated to the witness Shank, that "it works by electricity;" to Smith, "it was by electricity;" to Nichols, that "the sound was conducted by electricity;" to C. Eberly, that the instruments were "to convey sound by electricity;" to Coudry, that "they were operated by electricity;" to Shoop, that "it operated by a battery;" to Shireman, that "they operated by magnetism;" to Hawn, that "they would be operated on by a battery;" to N. W. Kahney, that "the machine was operated by electricity, by a battery;" to Zimmerman, that "it was electricity that would pass it over the wires; that it would carry the sound right along;" to Hale, that "it was driven by a magnet;" to H. K. Drawbaugh, that "the sound could be carried to a distance on a wire by the use of electricity;" to Lenig, that "electricity was used in connection with it;" to Prof. Heiges, that "in connection with a talking machine both magnetism and electricity were applied;" to Goodyear, that "his talking machine was also done by electricity over wires;" to Woods, that "it was to be an electric machine used in place of telegraphing;" to Young that "it was an electric talking machine, which he had invented."

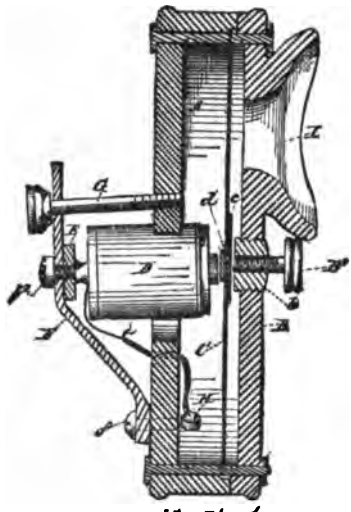
Thus Drawbaugh is corroborated by a cloud of witnesses whose testimony tends to substantiate his narrative.

Five hundred witnesses were examined by the parties on both sides.

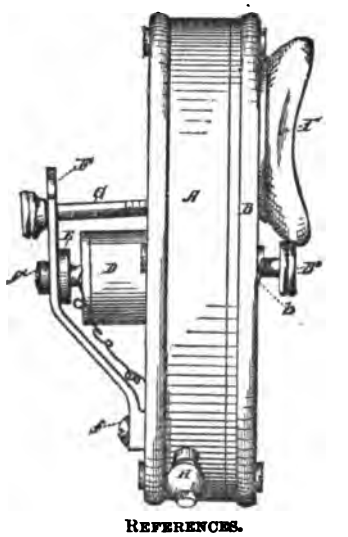
Judge Wallace, in the opinion of the court below, after a recital of the facts and testimony from which the foregoing is taken, says: "In cases where such a chaos of oral testimony exists, it is usually found that the judgment is

Instrument "A." ½ Size.

Longitudinal section on line x, y, z of front elevation



Side elevation

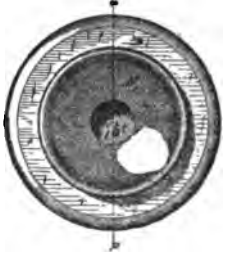


REFERENCES.

A. Case of black walnut.
B. Cover or cap to same.
B'. Adjusting screw for diaphragm; brass.
b. Screw block in cap through which B' passes.
C. Diaphragm; of thin black walnut.
c. Rubber cemented to C.
D. Electro-magnets.
d. Armature on diaphragm.
E. Plate connecting magnets.
F. Bracket to support magnets.
f. Screws securing same to case.
f2. Screw holding plate E to bracket.
G. Adjusting screw for bracket.
H. Screw cups.
I. Mouth or ear piece.
t. Conductors or wires.

Instrument "D."

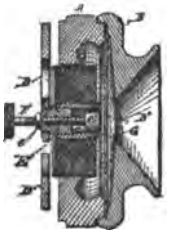
Front elevation



Side elevation

Rear elevation

Section on line x, x



REFERENCES.

A. Body of instrument.
B. Cap of instrument.
B'. Mouthpiece.
C. Electro-magnet.
c. Hollow core of C; iron.
c'. Adjustable plug in c.
D. Permanent magnet.
E. Screw plug to support D.
e. Jam nut on adjusting screw.
F. Adjusting screw for c'.
G. Diaphragm; tin.
O'. Conductors or wires.

convinced by a few leading facts and *indicia*, outlined so clearly that they cannot be obscured by prevarication or the aberrations of memory. Such facts and *indicia* are found here; and they are so persuasive and cogent that the testimony of a myriad of witnesses cannot prevail against them."

"The proofs on both sides lead to the general conclusion that Drawbaugh was not an original inventor of the speaking telephone, but had been an experimenter without obtaining practical results until the introduction of the instruments into Harrisburg."

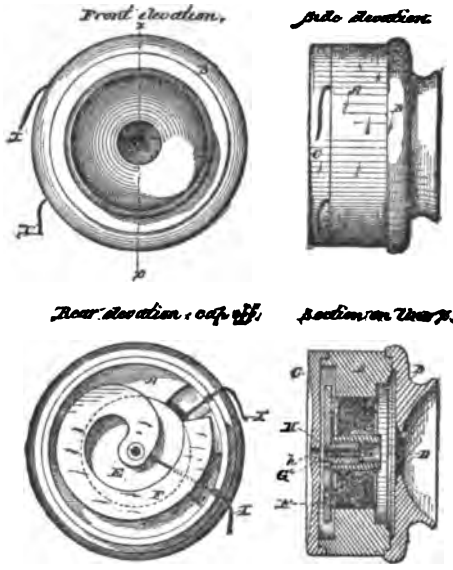
"Without regard to other features of the case it is sufficient to say that the defense is not established so as to remove a fair doubt of its truth, and such doubt is fatal."

The case was argued before His Honor *Judge* Wallace, by Hon. Geo. F. Edmunds and Lysander Hill, Esq., for the defendants. *Judge* Wallace decided in favor of the patent, filing an opinion Dec. 1, 1884.

All the Drawbaugh testimony had been stipulated into the Overland Cases then pending. After the Drawbaugh Company had by the argument and by *Judge* Wallace's opinion, learned the grounds of his decision, they arranged with the Overland Company to take more testimony in support of Drawbaugh in the Overland suit.

By stipulation, this was put in the original Drawbaugh Case, with an agreement that it should be considered by the court. It was presented for the consideration of the court, Dec. 2, 1885, and argued before *Judge* Wallace, who thereupon affirmed his former decision, filing his opinion Dec. 4, 1885. See the decree below 22 Blatchf. 531, and see also 22 Fed. Rep. 309 and 25 Fed. Rep. 725.

Instrument "E."



REFERENCES.

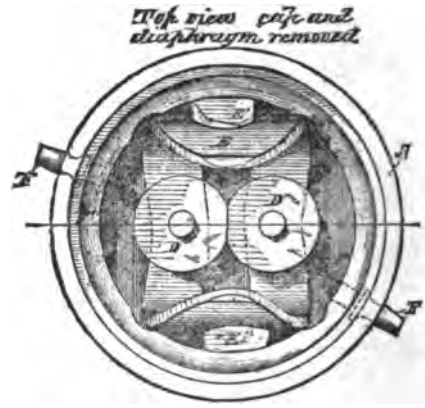
A. Body of instrument.
B. Cap of instrument.
C. Rear cap of instrument.
D. Diaphragm.
E. Electro-magnet.
F. Permanent magnet.
G. Hollow core of E; iron.
G'. Screw plug to support F.
H. Female screw in G'.
h. Aperture in C.
I. Wires.

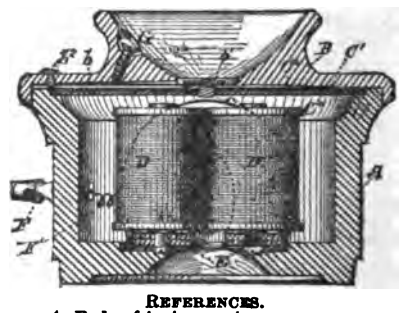
"The chronological order of Drawbaugh's machines, as established by the evidence, is as follows:

Teacup transmitter and receiver.	1866–1867
F and B. (Tumbler and tin can.)	1867–1869
C. (Breastwork instrument.)	1869–1870
I. (Cuspidor shape.) - - -	1870–1871
A. With mouthpiece at centre	1873
A. With mouthpiece at side of centre	1874
D and E. (Finished Magneto-Instruments) January and February,	1875
L. M. G. O. (Microphones.) From February, 1875, to August,	1876
H. (The copy of the Blake transmitter.) August, - - - -	1876
J. N. P - - - - - - - -	1868"

The following are representations of those instruments not already given so far as is necessary for the understanding of the case:

Instrument "L." ½ size.





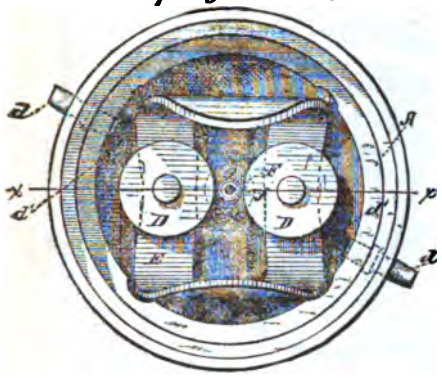
REFERENCES.

A. Body of instrument.
b. Pressure spring.
b². Rivet in same.
C'. Upper diaphragm.
C². Perforations in C'.
C³. Paper ring between C' and C⁴.
E. Permanent magnets.
F. Binding posts.
G. Adjusting screw to spring b.
B. Cap of same.
b'. Metal block on spring.
C. Compound diaphragm; two part.
C⁴. Lower diaphragm.
c. Rivet connecting C' and C⁴.
D. Electro-magnets.
E'. Wood wedges to hold E in place.
F'. Wires from D to F.
b². Rivet holding spring b to cap.

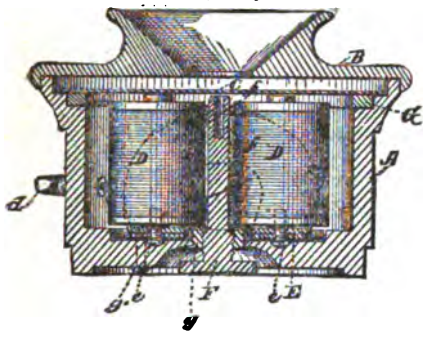
NOTE. The upper diaphragm is made of copper, perforated; the lower one is made of iron.

Instrument "M."

Top view, cap and diaphragm removed



Longitudinal section on line x, x. Top view



REFERENCES.

A. Body of instrument.
C. Diaphragm.
d. Binding posts.
E. Permanent magnet.
F. Adjusting screw or post.
G. Rubber ring.
g'. Screw to secure E to A.
B. Cap of instrument.
D. Electro-magnets.
d'. Wires.
e. Screws connecting E to D.
f. Recess for screw in end of F.
g. Nut in end of body A for adjusting post F.

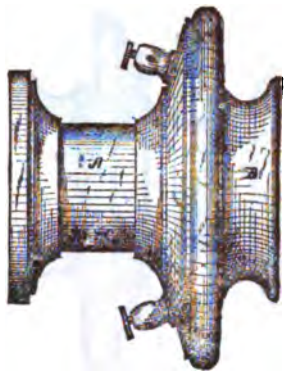
NOTE.

The magnet *E* is secured to the body of the instrument by screws, one of which is shown by dotted lines at *g'*.

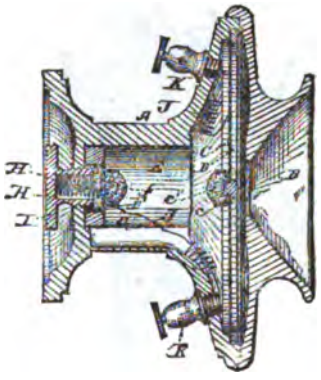
At one time the diaphragm of this instrument was made of tin, and was rigidly attached to the post *F* by a screw which entered the recess *f* in the post *F*.

Instrument "O." Full size.

Side elevation.



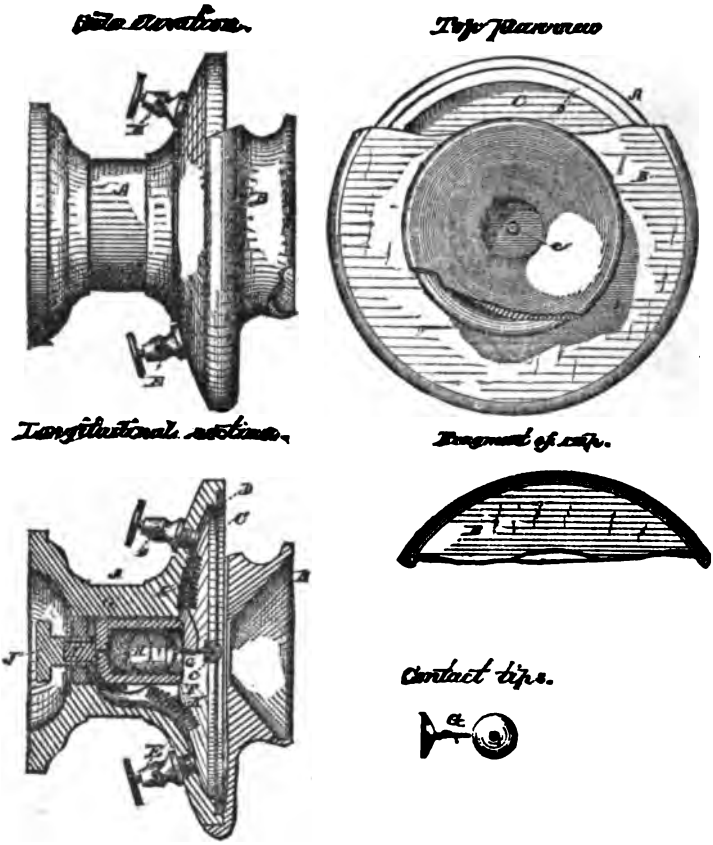
Longitudinal section.



REFERENCES.

A. Body of instrument.
B. Cap of same.
C. Diaphragm.
c. Carbon cup on diaphragm; brass.
c'. Carbon ball in cup c.
D. Cardboard ring.
E. Recess for carbon holder.
F. Lower carbon cup; brass.
f. Carbon ball in same.
G. Wood ring.
H. Recess in adjusting screw.
H'. Spiral spring in same.
I. Screw; adjusting.
J. Wires or conductors.
K. Screw cups.

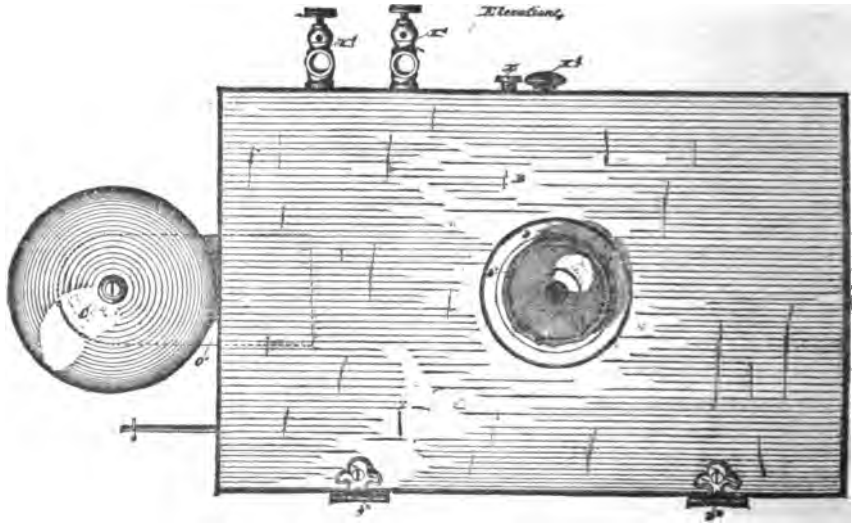
Instrument "G." Full size.

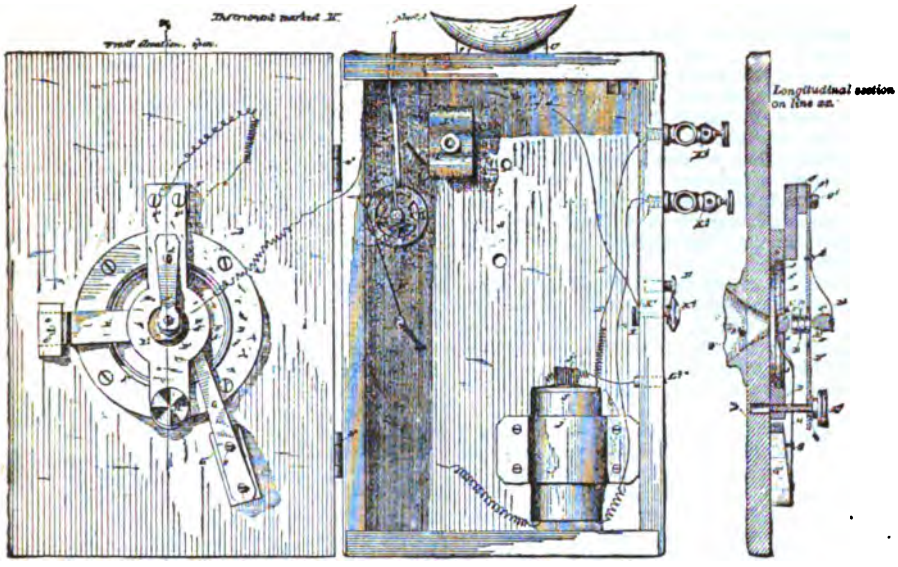


REFERENCES.

A. Body of instrument.
B. Cap of instrument.
C. Diaphragm.
c. Contact cup on diaphragm.
D. Paper ring.
E. Screw Cups.
F. Carbon holder; wood.
GG. Contact tips in holder.
H. Carbon ball.
I. Rubber spring to adjusting screw.
J. Adjusting screw.
K. Conductors.

Instrument "H." Sheet 1.





REFERENCES TO THE DRAWINGS OF INSTRUMENT "H."

A. Body of instrument.
B. Door of instrument.
b. Mouthpiece.
b'. Break in b.
b^2. Hinges to door.
C. Bell to instrument.
C'. Support to bell.
D. Casting for supporting diaphragm; iron.
D'. Plate to support contact spring.
D^2. Contact spring.
d. Screw securing D^2 to D'.
d'. Aperture through D'.
d^2. Carbon holding cup; brass.
d^3. Carbon block in d^2.
E. Plate or bracket to hold intermediate carbon cup; brass.
e. Block of wood on end of E.
e'. Screw securing e and E to B.
F. Diaphragm; corrugated iron.
f. Rubber ring.
f'. Wire to hold diaphragm in place.
G. Pressure spring for diaphragm.
G'. Block to which G is attached.
g. Adjusting screw to G.
g'. Wood insulator between D and D'.
g^2. Screw securing D' to D.
g^3. Rubber sleeve insulating D' from g^2.
H. Adjusting screw to D'.
h. Rubber sleeve insulating D' from H.
h'. Wire to diaphragm; conducting wire.
I. Carbon holding cup.
I'. Carbon ball in I.
I^2. Intermediate carbon holding tube; wood.
J. Induction coil.
j. Band holding J in place; brass.
j'. Wire core of J.
K. Signal plate. *K'. Contact spring.*
K^2. Key. *K^3. Binding posts.*
L. Screw to secure switch.
L'. Conductors.
L^2. Switch contacts.
L^3. Plate to hold electro-magnets for bell in place.
l. Bolt to plate L^3.
M. Armature connected with bell hammer.
m. Pivotal point of M.
m'. Spring to M.
N. Cord to increase power of spring m'.

The Overland Case.

These were a number of suits brought in 1883, in New York, in New Jersey, and in Pennsylvania, against the Overland Telephone Company and various of its branches. Motions for preliminary injunctions were made in them, and were very fiercely contested through many days of argument before *Judges* McKennan, Nixon and Butler, and were finally granted. The cases went to final hearing on testimony, entitled in all the suits. Some of the counsel and the principal experts for the defense in the Molecular Case were also counsel and experts in the Overland Cases. Substantially the same testimony was used by stipulation in both cases, some more being added in the Overland Cases after the Molecular Case was decided. When these cases were reached for hearing, the Molecular Case had been decided, and the Overland Cases were not argued, so far as the first patent was concerned. The court found that there was nothing to distinguish them from the Molecular Case, and a decree was rendered for the complainants.

From the decree in the New York Overland Case, an appeal was taken to this court.

The following is a statement of the defenses in the People's or Drawbaugh Case and in the Overland Case, taken from one of the briefs filed in their behalf:

"The defenses in these actions are, first, a denial of the validity of both of said patents, on the ground that Alexander Graham Bell was not the original and first inventor of any of the inventions claimed therein, constituting or applicable in connection with electric speaking telephones, but that Daniel Drawbaugh, of Eberly's Mills, otherwise known as Milltown, Cumberland County, Pennsylvania, was the original and first inventor of all such inventions and improvements described and claimed in said two patents, or in either of them.

Secondly, a denial that either of the said Bell patents is infringed by the defendants.

Thirdly, a denial that either of said Bell patents is valid in law.

Fourthly, a denial that Bell had achieved the invention of the electric speaking telephone at the date of his patent of March 7, 1876.

Fifthly, a denial that the matters described in said patent of March 7, 1876, were original with Bell; but that he derived many of them from Elisha Gray, a prior inventor of the electric speaking telephone.

Sixthly, a denial that the matters described in Bell's patent of January 30, 1877, were original with Bell; but that he derived many of them from said Gray.

Seventhly, a denial that Bell had any right to incorporate into either of his said patents any principles, inventions, methods, or devices, knowledge of which he derived from said Gray, and that his patents have any validity, in view of the fact that he so appropriated Gray's inventions."

Following is the Statement of Errors relied upon by the defendants in these two cases, the People's (Drawbaugh) and Overland Cases, as taken from the briefs of their counsel:

"1. The court below erred in holding the Bell patents in suit, or either of them, valid.

"2. It erred in holding said patents, or either of them, to have been infringed by the defendants, or any of them.

"3. It erred in holding that Daniel Drawbaugh was not the first and original inventor of the inventions here in suit.

"4. It erred in not holding Elisha Gray to have invented the electric speaking telephone, in its variable resistance method.

"5. It erred in not holding the Bell patent of March 7, 1876, here in suit, to be fraudulent and void, in view of the evidence as to fraudulent changes in the application therefor, and the fraudulent introduction of Gray's inventions into said application, while pending in the patent office.

"6. It erred in not holding the Bell patent of January 30, 1877, here in suit, to be fraudulent and void, in view of the evidence as to fraudulent introduction of Elisha Gray's said inventions into the same.

"7. It erred in not holding Bell to have surreptitiously and unjustly obtained both of said patents for that which was in fact invented by another (to wit, by Elisha Gray), who was using reasonable diligence in adapting and perfecting the same.

"8. It erred in not holding Bell to have surreptitiously and unjustly obtained both of said patents for that which was in fact invented by another (to wit, by Daniel Drawbaugh), who was using reasonable diligence in adapting and perfecting the same in his various improved instruments.

"9. It erred in not dismissing the appellees' bill for want of equity and right, in view of the frauds shown by the appellees' own evidence to have been perpetrated upon the Patent Office, Elisha Gray and the public in the procurement of the patents, and remaining in the patents, on which said bill is founded.

"10. It erred in construing said patent of March 7, 1876, here in suit, to cover anything more than a magneto-electric current generated by the vibration, by sound-waves, of a body of inductive material in the presence of a body susceptible of receiving induction therefrom; and it further erred in not holding such a patent for a current to be a patent for an 'effect,' 'mode of operation' or 'principle,' and therefore void.

"11. It erred in not holding said patent of March 7, 1876, to be limited to the described apparatus of its figure 7–there being, as the appellees contend, no 'art' then known, and there being no equivalents for this apparatus described in the specification.

"12. It erred in not holding said patent of January 30, 1877, to be invalid and void, by reason of its claiming matters described and shown, but not claimed in Bell's prior patent of March 7, 1876, the application not having been filed till after the former patent was issued, and said matters not having been reserved in said prior patent as matters to be afterwards applied for, but having been abandoned to the public by describing and showing without claiming them, in said prior patent.

"13. It erred in not limiting the scope of the claims of the patent of January 30, 1877, here in suit, to mere improvements in the form of the parts mentioned in said claims.

"14. It erred in holding that the specification of Bell's patent of March 7, 1876, describes the speaking telephone invention with the clearness, fullness and exactness which the statute requires in such cases; and that the patent is not invalid for want of a proper description and specification of said alleged invention.

"15. It erred in holding that Bell, in the sense of the patent law, completed or made any invention of an electric speaking telephone before a date later than March 7, 1876, and, therefore, in not holding the patent void, as being for an invention not made, at or prior to its date, by the patentee.

"16. It erred, throughout its opinion in the case against the People's Telephone Company, in treating of the evidence as to Drawbaugh's priority of invention, by ignoring, misconstruing, misstating, and misunderstanding the evidence; by assuming things of which there was no evidence, or which were contrary to the evidence; by misunderstanding and misapplying the law; and by attributing different degrees of probative force to the same kinds of evidence accordingly as it found the same on the one side or on the other side of the case."

There are certain questions common to all these cases. The meaning and construction of the Bell patent and understanding of what the speaking telephone is; the comparison of the invention set forth in the Bell patent with the previous state of the art, and particularly with what is known as the Reis telephone; the question of the meaning and scope of Mr. Bell's claims on which the issue of infringement turns, and some questions sought to be raised upon his history and work,—were subjects of discussion in all these cases.

The burden of the controversy turns on the first patent. Its language is criticised.

The attempt is made to narrow the legal effect of the claim, on the ground that it is broader than the law allows to any inventor.

It is contended that at the time of the Bell patent such electrical knowledge existed, and the state of the art was such, that it required no invention to make electric speaking telephones.

It is alleged that, before Mr. Bell, certain named persons had invented the electric speaking telephone.

Except in the case of one alleged prior inventor,—the Pennsylvania claimant, Drawbaugh,—the controversy chiefly turns upon a comparison of Mr. Bell's speaking telephone with the previous state of the art.

Extracts from the Answer of The Molecular Telephone Company.

10. This defendant, further answering said bill, denies that the said Bell Patent No. 174,465, dated March 7, 1876, is valid, and alleges that it is invalid and void for the following reasons, to wit:

(*a.*) Because the instrument or machine shown, described and claimed therein is not a patentable invention, but an inoperative, useless and worthless device.

(*b.*) Because the said Alexander Graham Bell was not the original and first inventor or discoverer of the thing patented in said Letters Patent or of any material or substantial part thereof, but that long prior to his said alleged invention and discovery in telegraphy the same or substantially the same thing or things had been invented, discovered and used in public by, and were known to the following named persons of and at the following named places, to wit:

Philip Reis, then of Friedrichsdorf, Germany, now dead, at Friedrichsdorf and Frankfort, Germany.

Elisha Gray, of Highland Park, Ill., at Oberlin and Cleveland, Ohio; Highland Park and Chicago, Ill.; Milwaukee, Wis., Washington, D. C., and New York City.

Thomas A. Edison, of Menlo Park, N. J., at Menlo Park, N. J., and New York City.

Daniel Drawbaugh, of and at Eberly's Mills, in the county of Cumberland and State of Pennsylvania.

Amos E. Dolbear, of Somerville, Mass., at Somerville, Mass., and elsewhere in the United States.

Alfred G. Holcomb, of Granby, Conn., at New York City, N. Y., and elsewhere in the United States.

Philip H. Van der Weyde, of Brooklyn, at New York City, N. Y., and elsewhere in the United States.

James W. McDonough, of Chicago, Ill., at said Chicago, at New York City and elsewhere.

W. F. Channing, of Providence, R. I., at Providence, R. I.

Benjamin F. Edwards, now deceased, formerly of Boston, Mass., at Boston, Mass., Washington, D. C., and New York City, N. Y.

James Hamblet, Jr., of Brooklyn, N. Y., at Boston, Mass., Washington, D. C., and New York City.

Edward Farran, of Keene, N. H. at Keene, N. H.

Antonio Mencci, of Clifton, Staten Island, N. Y., at Staten Island and New York City.

W. S. Voelker, of Morton, Delaware County, Pa., at Philadelphia, Pa., Morton, Delaware County, Pa., and other places in the United States.

Edward C. Pickering, of Cambridge, Mass., at Boston, and Cambridge, Mass.; and also by numerous other persons whose names and residences are now unknown to these defendants, but which, when known, these defendants pray leave, by proper amendments, to insert in this answer.

* * * * * * *

(*j.*) Because, as defendants are informed and believe, long prior to any invention by said Bell of the alleged improvement specified as his invention in said Letters Patent, numbered 174,465, the same was described in and patented by the following Letters Patent, viz.:

Letters Patent granted by the United States to Thomas A. Edison and George Harrington, dated Aug. 12, 1873, numbered 141,777.

Letters Patent of the United States granted to William Thompson, dated Nov. 17, 1874, numbered 156,897.

Letters Patent of the United States granted to Elisha Gray, July 27, 1875, No. 166,096.

Letters Patent of the United States granted to Elisha Gray, July 27, 1876, No. 166,094.

Letters Patent of the United States granted to Elisha Gray, July 27, 1875, No. 166,095; caveat filed by Elisha Gray in the United States Patent Office Feb. 14, 1876.

Letters Patent of the United States granted to Elisha Gray, April 11, 1876, No. 175,971.

Letters Patent of the United States granted to Elisha Gray, Jan. 16, 1877, numbered 186,340.

British Letters Patent granted to C. F. Varley, 1870, No. 1,044.

British Letters Patent granted to J. H. Johnston, July 29, 1874, No. 2,646.

British Letters Patent granted to George T. Bousfield, dated May 4, 1876, and numbered 1,874.

French patent granted to Leon Scott, dated March 25, 1857; certificate of addition to same dated July 29, 1859.

British Letters Patent granted to John Henry Johnston, dated March 16, 1875, No. 974.

British Letters Patent granted to Charles Wheatstone, dated Jan. 21, 1840, No. 8,345.

British Letters Patent granted to David Hughes, dated April 27, 1858, No. 938.

United States Letters Patent granted to Elisha Gray, dated Feb. 15, 1876, No. 173,460.

Also in other Letters Patent which are now unknown to these defendants, but which when known these defendants pray leave by proper amendments to insert in this answer.

(*k.*) Because, long before any invention or discovery by said Bell of the alleged improvement specified as his invention in said Letters Patent numbered 174,465, the same was described in the following printed publications:

"Electricity and Magnetism" by Jenkins, a book printed and published in London, England, and in the City of New York, in the year 1873, at p. 334.

"Der Electromagnetische Telegraphe," by H. Schellen, a printed book published in Brunswick, Germany, in the year 1867, at pp. 468 and 469.

"The Electric Telegraph" by R. Sabine; a book printed and published in London, England, 1867, at pp. 164, 165, 166 and 167.

"L'Eco d'Italia," 1860.

"Lehrbuch der Technischen Physik," by Hassler Pisko, a book published at Vienna, 1866, Vol. 1, p. 648.

Also in a printed publication in the German

language entitled "Jahresbericht des Physikalischen Vereins zu Frankfurt am Main," a book printed and published in 1862, and particularly at pages 57–64.

A printed publication in the German language entitled "Zeitschrift des Deutsch-Oesterreichischen Telegraphen-Vereins," Vol. 9, a book printed and published at Berlin, in 1862, particularly at pp. 125–130.

A printed publication in the German language entitled "Die Neueren Apparate der Akustik," von Dr. Prof. Fr. Jos. Pisco, printed and published in 1865, particularly at pp. 96–108 and pp. 241, 242.

Yearly report of the Physical Society at Frankfurt-a-M., 1860, 1861, at p. 57, etc.

A French publication entitled "Petit Traité de Physique," par M. J. Jamin, Paris, 1870, and particularly at p. 421.

The "Telegraphic Journal," published in London, in the year 1872, Vol. 1, at p. 4.

"Electricity" by R. M. Ferguson, a printed book published in London and Edinburgh in 1867, at pp. 257 and 258.

"The Telegrapher," published in the city of New York in 1869, Vol. 5, No. 39, at pp.

"The Manufacturer and Builder" for May, 1869, a newspaper published in the city of New York in 1869, Vol. 1, at p. 129.

"Wonders of Electricity," by J. Baile, published in New York City in 1872, at pp. 140, 141, 142 and 143.

"The Telegraphic Journal;" published in London in the year 1875, Vol. 3, at pp. 286, 287 and 288.

"Dingler's Polytechnic Journal" for 1863, Vol. 168, pp. 28 and 185, a book published at Leipsic in 1863.

"Cosmos" for 1864, Vol. 24, pp. 349, 352, a printed book published in Paris in 1864; article by M. St. Edmé.

"Description Reis Telephone, Koenig's Catalogue of Apparatus for 1865," a book printed and published in Paris.

"Applications de l'Électricité by Du Moncel," Vol. 2, p. 255, etc., a printed book published in Paris in 1854 (Bourseul Apparatus).

"L'Anneé Scientifique," by Louis Figuier, 1858, Vol. 1, p. 62, a book printed and published at Paris, France, in 1858.

"Cosmos," by l'Abbé Moigno, 1859, eighth year, Vol. 14, No. 11; article about the "Scott Phonautograph;" a book printed and published in Paris in 1859.

"Traité Elementaire de Physique," by M. Ganot; eleventh edition, 1854, p. 224; a book published in Paris in 1854; article "Scott Phonautograph."

"Comptes Rendus de l'Académie des Sciences," Vol. 53, p. 108, 1861.

"Poggendorf Annalen," 1843, Vol. 59, p. 177, a book printed and published at Leipsic, 1843.

"Didaskalia," a journal published in Frankfort-on-the-Main, Sept. 28, 1854, No. 232, and on May 11, 1862, No. 130, and on May 14, 1862, No. 133.

"Du Moncel's Exposé des Applications de l'Électricité," a book published in Paris, France, in 1856 (p. 246), and in 1857 (p. 110).

"Frankfurter Conversationsblatt," a journal published in Frankfort-on-the-Main, Nov. 29, 1861, and June 30, 1863.

"Die Fortschritte der Physik," a journal published in Berlin (pp. 171, 173), and in 1863 (p. 96).

"Aus der Natur," published in Leipsic, 1862 (Vol. 21, pp. 470, 471 to p. 484).

"Müller Poillet's Lehrbuch der Physik und Meteorologie," published in 1862 in Germany, and in 1863, Vol. 2. p. 352, Fig. 325, and 1868, pp. 386, 388, Figs. 348–350.

"Friederichsdorf Zeitung," a journal published in Homburg in 1862, and also that of 1867 and 1868 (pp. 386, 387, 388, 389).

"Jahresbericht des Physikalischen Vereins" (Vol. 4. pp. 129 to 135), annual report for 1860, 1861, published in 1863, in Frankfort-on-the-Main.

"Böttger's Polytechnisches Notizblatt," Nos. 1–24 inclusive, pp. 65, 81–255, published in 1863.

"Deutsche Klinik," No. 48, pp. 468, 469, published in 1863 in Berlin.

"Deutsche Industrie Zeitung," published in 1863, in Chemnitz (pp. 184–208, 239 and 249).

"Die Gartenlaube," published at Leipsic, 1863 (pp. 807–809).

"Prospectus of Philip Reis," published in 1863 in Frankfort, and in "Pisko's Die Neueren Apparate der Akustik," published in Vienna in 1863.

A further circular, or addition to the preceding, published in Frankfort in 1863.

The two were published with the circular or prospectus of J. Wilh. Albert, mechanician in Frankfort, in 1863.

"Polytechnisches Centralblatt," published in 1863, pp. 857, 858.

Letter of Philip Reis to W. Ladd, Aug. 13, 1863.

"Tagesblatt der 39 Versammlung Deutscher Naturforscher," published in Giessen, in September, 1864.

"Zöllner's Buch der Erfindungen," published in Leipsic and Berlin in 1865 and in 1872.

"Von Karl Kuhns Handbuch der Angewandten Elektricitätslehre," pp. 1021–1026, published in 1866.

"Albert's Catalogue," in 1866 and 1872 and 1873.

"Kneeland's Annual of Scientific Discovery," in 1866 and 1867.

"New York Tribune," Jan. 8, 1869.

"Christian Union," New York, Dec. 25, 1875.

"Scientific American," New York, March 4, 1876.

"Scientific American" (Supplement), Feb. 5, 1876.

"Scientific American" (Supplement), No. 48, 1876.

"Electricity and Magnetism," by Jenkins, in London, 1876.

"Journal of the Franklin Institute of the State of Pennsylvania," Vol. 42, published in Philadelphia in 1869, pp. 419 *et seq.*

"The Manufacturer and Builder," April, 1870.

"Dublin Medical Press," 1863, Vol. 50, No. 1,293, p. 471.

"Cosmos," 1863, Vol. 23, p. 705.

"Zeitschrift des Architectur und Ingenieur Vereins," 1866, Vol. 12, p. 147.

"The Electric Telegraph," by Dr. Lardner, new edition, revised by E. B. Bright, published in London, Eng., in 1867, at pp. 164, 165, 166 and 167.

"Transactions Royal Scottish Society of

Arts," Edinburgh, Vol. 6, 1864, Appendix Q, pp. 184–187.

"Annual Report of American Association for the Advancement of Science," for 1869.

"Knight's American Mechanical Dictionary," 1876, Article, Telephone.

* * * * * * *

11. And these defendants, further answering said bill, deny that the said second Bell patent, No. 186,787, is valid, but upon information and belief allege that it is invalid and void for the following reasons, to wit:—

(*a.*) Because the machine and instrument shown, described and claimed therein is not a patentable invention, but is an inoperative, useless and worthless device.

(*b.*) Because the said Alexander Graham Bell was not the original and first inventor or discoverer of any material or substantial part of the thing patented, but before his alleged invention or discovery thereof, the same or substantially the same thing or things had been invented and used by, and were known to the following named persons, of and at the following named places, to wit:

[Here follow substantial repetitions of the foregoing lists. Ed.]

(*c.*) Because in view of the state of the art at the time of the alleged invention of said Bell the claims of said patent are too broad, covering inventions before made by others, and of which he was not, and his assigns are not, entitled to the exclusive use and enjoyment.

(*d.*) Because the said Bell, in obtaining said patent, surreptitiously and unjustly obtained a patent for that which was in fact invented by another, to wit, Elisha Gray, who was using reasonable diligence in adapting and perfecting the same.

(*e.*) Because the said Bell, in obtaining said Letters Patent, surreptitiously and unjustly obtained a patent for that which was in fact invented by another, to wit, said Thomas A. Edison, who was using reasonable diligence in adapting and perfecting the same.

(*f.*) Because the said Bell, in obtaining said patent, surreptitiously and unjustly obtained a patent for that which was in fact invented by another, to wit, said Daniel Drawbaugh, who was using reasonable diligence in adapting and perfecting the same.

(*g.*) Because the said Bell, in obtaining said patent, surreptitiously and unjustly obtained a patent for that which was in fact invented by another, to wit, said James W. McDonough, who was using reasonable diligence in adapting and perfecting the same.

(*h.*) Because if said Bell ever had any right to a patent for the alleged improvement specified as his invention in said Letters Patent No. 186,787, or any right to have the same secured by Letters Patent, he abandoned and forfeited the same, and lost all such right by his delay in applying for Letters Patent and by the same having been put into public use and on sale more than two years before his application for a patent therefor.

(*i.*) Because the specification of said Letters Patent numbered 186,787 does not sufficiently describe the things attempted to be covered by the claims thereof to enable persons skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct and use the same; and that the alleged improvement attempted to be patented in said Letters Patent did not involve or require invention, and did not differ in any patentable respect from what was before said alleged invention known and used in this country or described in patents and printed publications.

(*j.*) Because there is no mechanical combination between the elements constituting the sixth claim of said Letters Patent No. 186,787, and no invention was required to produce the same.

(*k.*) Because long before any invention of said Bell of the alleged improvement specified as his invention in said Letters Patent No. 186,787, the same was described in and patented by the following Letters Patent, viz.: Letters Patent of the United States granted to Elisha Gray, July 27, 1875, No. 166,095; Letters Patent of the United States granted to Elisha Gray, April 11, 1876, No. 175,971; Letters Patent of the United States granted to A. G. Holcomb, May 16, 1860.

British Letters Patent granted to J. H. Johnston, July 29, 1874, and numbered 2,646.

Letters Patent granted by the Patent Office of the Dominion of Canada in 1875 to Elisha Gray, July 7, 1875, numbered 4,749.

British Letters Patent granted to J. H. Johnston, March 16, 1875, and numbered 974.

British Letters Patent granted to George T. Bousfield, May 4, 1876, and numbered 1,874.

Letters Patent of the United States granted to said Elisha Gray, July 20, 1875, and numbered 165,728.

Letters Patent of the United States granted to said Elisha Gray, Feb. 15, 1876, and numbered 173,460.

Letters Patent of the United States granted to said Elisha Gray, Feb. 15, 1876, and numbered 173,618.

Letters Patent of the United States granted to said Elisha Gray, Jan. 16, 1877, and numbered 186,340.

Letters Patent of the United States granted to said Bell, March 7, 1876, No. 174,465.

And also other Letters Patent, which are now unknown to these defendants, but which, when known, they pray leave by proper amendments to insert in this answer.

(*l.*) Because long before any invention by said Bell of the alleged improvement specified as his invention in said Letters Patent numbered 186,787, the same was described in the following printed publications, viz.:—

"Der Electromagnetische Telegraph," by Dr. H. Schellen, published at Brunswick, Germany, in the year 1867, at pp. 411, 412, 413, 414, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 468 and 469.

"Zeitschrift des Deutsch-Oesterreichischen Telegraphen-Vereins," published at Berlin, Prussia, in the year 1862, Vol. 9, p. 125.

Yearly report of the Physical Society at Frankfurt-a-M., 1860, 1861, p. 67, etc.

"Die Neueren Apparate der Akustik," von Dr. Prof. Jos. Pisko, printed and published in 1865.

"Journal of the German-Austrian Telegraph Association," Vol. 9, p. 125, 1862, and pp. 94–104.

"The Electric Telegraph," by R. Sabine, published in London, England, in 1867, at pp. 136, 137 and 138.

"The Telegraphic Journal," published in London, in 1872, Vol. 1, p. 4.

"Electricity," by R. M. Ferguson, published in London and Edinburgh, in the year 1867, at pp. 257 and 258.

"The Telegrapher," published in the city of New York, in the year 1869, Vol. 5, No. 89, at p.

"The Manufacturer and Builder," published in the city of New York, in the year 1869, Vol. 1, at p. 129.

Similar allegations and lists appear in the answers of the Overland and Clay Commercial Companies.

PUBLICATIONS RELATING TO BOURSEUL.

L'Illustration, Journal Universel, Paris, August 26, 1854, Vol. XXIV., No. 600, p. 139.

Bourseul's Communication.

"The electric telegraph is based on the following principle: An electric current, passing through a metallic wire, circulates through a coil around a piece of soft iron which it converts into a magnet. The moment the current stops, the piece of iron ceases to be a magnet. This magnet, which takes the name of electro-magnet, can thus in turn attract and then release a movable plate (*plaque mobile*) which by its to-and-fro movement produces the conventional signals employed in telegraphy. Sometimes this movement is directly utilized, and is made to produce dots or dashes on a strip of paper which is drawn along by clockwork. The conventional signals are thus formed by a combination of those dots and dashes. This is the American telegraph which bears the name of Morse, its inventor. Sometimes this to-and-fro movement is converted into a movement of rotation. In that way we have either the dial telegraph used on railroads, or the telegraph used in the government system, which by means of two line-wires and two indicating needles reproduce all the signals of the aerial telegraph or semaphore which was formerly used. Suppose, now, that we arrange upon a movable horizontal circle, letters, figures, signs of punctuation, etc. One can understand that the principle we have stated can be used to choose at a distance such and such a character, and to determine its movement, and consequently to print it on a sheet of paper appropriately placed for this purpose. This is the printing telegraph.

"We have gone still further. By the employment of the same principle, and by means of a mechanism rather complicated, it has been possible to reach a result which at first would seem to be almost a miracle. Handwriting itself is produced at a distance, and not only handwriting, but any line or any curve; so that, being in Paris, you can draw a profile by ordinary means there, and the same profile draws itself at the same time at Frankfort. Attempts of this sort have succeeded. The apparatus has been exhibited at the London exhibition. Some details, however, remain to be perfected. It would seem impossible to go beyond this in the region of the marvellous. Let us try, nevertheless, to go a few steps further. I have asked myself, for example, if the spoken word itself could not be transmitted by electricity; in a word, if what was spoken in Vienna may not be heard in Paris? The thing is practicable in this way:

"We know that sounds are made by vibrations, and are made sensible to the ear by the same vibrations, which are reproduced by the intervening medium. But the intensity of the vibrations diminishes very rapidly with the distance; so that even with the aid of speaking tubes and trumpets it is impossible to exceed somewhat narrow limits. Suppose that a man speaks near a movable disc, sufficiently flexible to lose none of the vibrations of the voice; that this disc alternately makes and breaks the connection with a battery; you may have at a distance another disc which will simultaneously execute the same vibrations.

"It is true that the intensity of the sounds produced will be variable at the point of departure, at which the disc vibrates by means of the voice, and constant at the point of arrival, where it vibrates by means of electricity; but it has been shown that this does not change the sounds. It is, moreover, evident that the sounds will be reproduced at the same pitch.

"The present state of acoustic science does not permit us to declare *a priori* if this will be precisely the case with syllables uttered by the human voice. The mode in which these syllables are produced has not yet been sufficiently investigated. It is true that we know that some are uttered by the teeth, others by the lips, etc.; but that is all.

"However this may be, observe that the syllables can only reproduce upon the sense of hearing the vibrations of the intervening medium. Reproduce precisely these vibrations, and you will reproduce precisely these syllables.

"It is, at all events, impossible, in the present condition of science, to prove the impossibility of transmitting sound by electricity. Everything tends to show, on the contrary, that there is such a possibility. When the application of electro-magnetism to the transmission of messages was first discussed, a man of great scientific attainments treated the idea as Utopian; and yet there is now direct communication between London and Vienna by means of a simple wire. Men declared it to be impossible, but it is done.

"It need not be said that numerous applications of the highest importance will immediately arise from the transmission of speech by electricity. Any one who is not deaf and dumb may use this mode of transmission, which would require no apparatus except an electric battery, two vibrating discs and a wire. In many cases, as, for example, in large establishments, orders might be transmitted in this way, although transmission in this way will not be used while it is necessary to transmit letter by letter, and to make use of telegraphs which require use and apprenticeship. However this may be, it is certain that in a more or less distant future, speech will be transmitted by electricity. I have made some experiments in this direction. They are delicate, and demand time and patience; but the approximations obtained promise a favorable result."

"CHARLES BOURSEUL.

"Paris, August 18, 1854."

Didaskalia, Blätter für Geist, Gemüth und Publicität.

Frankfort-on-the-Main, Germany, No. 232, September 28, 1854.

(Magazine for Intelligence, Humor and News.)

"The wonders with which electricity has lately astonished us are about, as it seems, to be increased by a new one, that would not only prepare a great revolution in the electric telegraph as practiced up to the present, but would increase its usefulness in an incalculable manner.

"It is a question of nothing more nor less than an electric transmission of *the spoken word*. The idea originates with a young and educated, though modest young man, Charles Bourseul, who was a soldier of the African army in 1848, where he attracted the attention of the governor-general by a mathematical course which he delivered to his comrades of the garrison in Algeria, and he is now living in Paris. Bourseul's problem, of the practicability of which he is completely persuaded, belongs, perhaps, to those discoveries which the scientific world afterwards declares very easy, and which they would gladly make us believe could easily have been discovered much earlier if they had chosen to give themselves the trouble.

"As is well known, the principle upon which electric telegraphy is based is as follows: An electric current traversing a metallic wire changes a piece of soft iron in the vicinity of which it passes into a magnet. As soon as the current ceases, the magnetic quality also ceases. This magnet, the electro-magnet, can thus alternately attract or let go a movable plate, which by its movements back and forth produces the conventional signals used in telegraphy. Now it is farther known that all tones are brought to the ear only by vibrations of the air, hence are really nothing more than these vibrations of the air, and that the endless variety of tones depends entirely upon the rapidity and amplitude of the sound-waves. Could there now be invented a metallic plate which should be so movable and pliable that it reproduces all the vibrations of tones (like the air), and should this plate be so connected with an electric current that it should alternately make and break the electric current according to the air vibrations by which it was affected, it would thereby be possible also to arrange electrically a second similarly constructed metal plate, so that it repeated simultaneously exactly the same vibrations as the first plate, and it would then be exactly the same as if one had spoken in the immediate vicinity against this second plate, or the ear would be affected precisely as if it received the tones directly through the first metallic wall. The electric telegraph formerly stamped by the Academy as nonsense is now spread throughout all the world as a common phenomenon; if we question in regard to this new idea of a young physicist the principles of physics, they have not only nothing to offer against the possibility of its being carried out, but its success appears in fact to be more probable than did a short time ago that of the electric telegraph itself. If it be practically carried out, the electric telegraph could be operated by every one. There would be need of no farther device and knowledge than a galvanic battery, two vibrating plates and a metal wire; without any other preparation the one must talk against one metallic plate, and the other hold his ear near the other plate, and they could converse with each other as if face to face. The young inventor believes in the success of his efforts, and challenges scientific men to prove that the laws of physics contradict the above-mentioned principles, and thereby make the attempt seem impossible. Meanwhile may the affair enjoy in high degree the attention which it is certainly attracting."

PUBLICATIONS BY REIS AND OTHERS RELATING TO THE REIS TELEPHONE.

Report of Reis Lecture.
Frankfurter Conversationsblatt, Nov. 29, 1861.
Reproduction des Schalles durch den galvanischen Strom. (Frankfurt.)

(Reproduction of Sound by the Galvanic Current. Frankfort).

"For this new discovery, which rightly excites the greatest interest, we have to thank Mr. Reis, teacher in Friedrichsdorf. He has succeeded after many experiments in solving, up to a certain point at least, this problem, which up to the present has been considered insolvable.

"Of all the new discoveries in natural science there are none of so general advantage and which so enter into our practical life as those in the domain of chemistry and physics; in the latter, galvanism in its application to electroplating and telegraphy has achieved remarkable results. At the moment when telegraphy has attained a place in our social life, there begins, perhaps, for the same a new era in the fact that as we in telegraphy make ourselves understood by means of signs, in this we can make ourselves understood by means of tones at a distance.

"Mr. Reis has constructed in a very ingenious manner an apparatus by means of which he has shown some perfectly successful experiments before a large audience in the Physical Society in this city.

"He has made a very happy use of the earlier discovery that the iron core of a wire helix produces tones by the interruptions of the current following each other at very short periods.

"His apparatus for receiving the sound is based upon the arrangement of the human ear. It consists in the first place of a funnel-shaped cavity (to represent the cartilage of the ear) to receive the sound, closed at its narrower part by a membrane, upon which is fastened an elastic strip of platinum which is connected with one of the circuit wires, while the former is in electric connection with the other pole of the battery.

"As soon, then, as the sound-waves set the membrane in vibration, the elastic strip of metal fastened to the same will make the same vibrations,—will alternately rise and fall, thereby touching the other elastic strip and so making and breaking the current.

"The reproduction of the sound by the galvanic current, for it is only such and not a conduction of the sound, is brought about in the manner specified above. Into a wire helix, included in the circuit, is placed a thin metal rod,—*e. g.*, a knitting needle,—which apparatus, in order to increase the tone, is placed upon an easily vibrating support, a resonant box. By means of the current now made, now broken, the iron rod is also set into vibrations, which are communicated to our ear and there reproduce the sound.

"The vibrations of the iron rod correspond with those of the membrane; but as the pitch of the tones is dependent upon the times of vibration of the sounding body, the lower tones escape our notice, while the higher ones are especially noticed.

"Up to the present the reproduction of the tones is indeed weak, and words cannot be reproduced. We leave here the question as to whether this hereafter will be successfully accomplished.

"Mr. Fritz, instrument maker, has just constructed a new instrument with some improvements, and Prof. Böttger will hereafter make experiments with it in the Physical Society, to which we shall at times call attention.

REIS LECTURE.

Jahresbericht des Physikalischen Vereins zu Frankfurt am Main, für das Rechnungs Jahr, 1860–1861.

(Yearly Report of the Physical Society at Frankfort-a-M., 1860–1861, pp. 57–64, published in 1832).

"*On Telephony by means of the Galvanic Current, by Philip Reis.*"

"The extraordinary results in the field of telegraphy have probably often raised the question, If it might not be possible to transmit musical tones themselves [Tonsprache] to a distance? Experiments made in this direction could not, however, produce any result at all satisfactory, because the vibrations of sound-conducting media soon lose their intensity to such an extent that they are no longer appreciable by our senses.

"A reproduction of tones [Tönen] at certain distances by means of a galvanic current has probably been thought of, but the practical solution of this problem has certainly seemed the most doubtful to the very persons who, from their knowledge and appliances, were in the best condition to attack it. To a person having only a superficial knowledge of physics the problem presents far less difficulties, simply because the most of them are unperceived. About nine years ago I also (having an extraordinary enthusiasm for what was new, and an insufficient knowledge of physics) had the boldness to attempt the solution, but was soon forced to desist because the very first experiment convinced me of the impossibility of its solution.

"Later, after further study and experience, I came to see that my first experiment had been a very rough and by no means conclusive one; I did not, however, follow up the subject seriously, because I did not feel myself equal to the difficulties in the way.

"Youthful impressions, however, are strong, and therefore not easily effaced. I could never get rid of the thought of that first experiment and its occasion, notwithstanding all that reason says to the contrary, and thus, half unwillingly, this project of my youth was reviewed in hours of leisure, the difficulties and the means for overcoming them were weighed, but for the present, at least, no experiment was made.

"How indeed could a single instrument reproduce the combined effect of all the organs occupied in human speech? This was always the cardinal question; finally I got the notion of putting the question in another way.

"How is *our ear* affected by the totality of vibrations produced by the organs of speech all simultaneously active? Or, more generally,—

"How are we affected by the vibrations of several simultaneously sounding bodies?

"To answer this question, we must, in the first place, understand what must happen in order that we may perceive a single tone.

"Without our ear, any tone is nothing else than a recurrent condensation and rarefaction of some body repeated at least seven or eight times in a second. If this occurs in the same medium in which we are, the membrane of the ear is at each condensation forced towards the middle ear, to be moved at the subsequent rarefaction in the opposite direction. These vibrations produce a synchronous raising and falling of the hammer upon the anvil (according to other authorities, an approach or receding of the ear-bone particles), and a similar number of tremors in the fluid of the cochlea, in which the filaments of the auditory nerve are distributed. The greater the condensation of the sound-conducting medium at any given moment, the greater is the amplitude of vibration of the membrane and hammer, and consequently the more powerful the blow upon the anvil and the vibration of the nerves by means of the fluid.

"The office of our organs of hearing is, therefore, to transmit with certainty up to the auditory nerve every condensation and rarefaction occurring in the surrounding medium. But the office of the auditory nerve is to bring to our consciousness the vibrations of matter which have occurred in a given time, both as regards number and amplitude. Here, for the first time, certain combinations receive a name; here, certain vibrations are *tones* or *noises* (*Töne* oder *Misstöne*).

"What our auditory nerve perceives is, then, simply the effect of a force coming within the range of consciousness, and this force can be represented, both as to duration and magnitude, graphically by a curve.

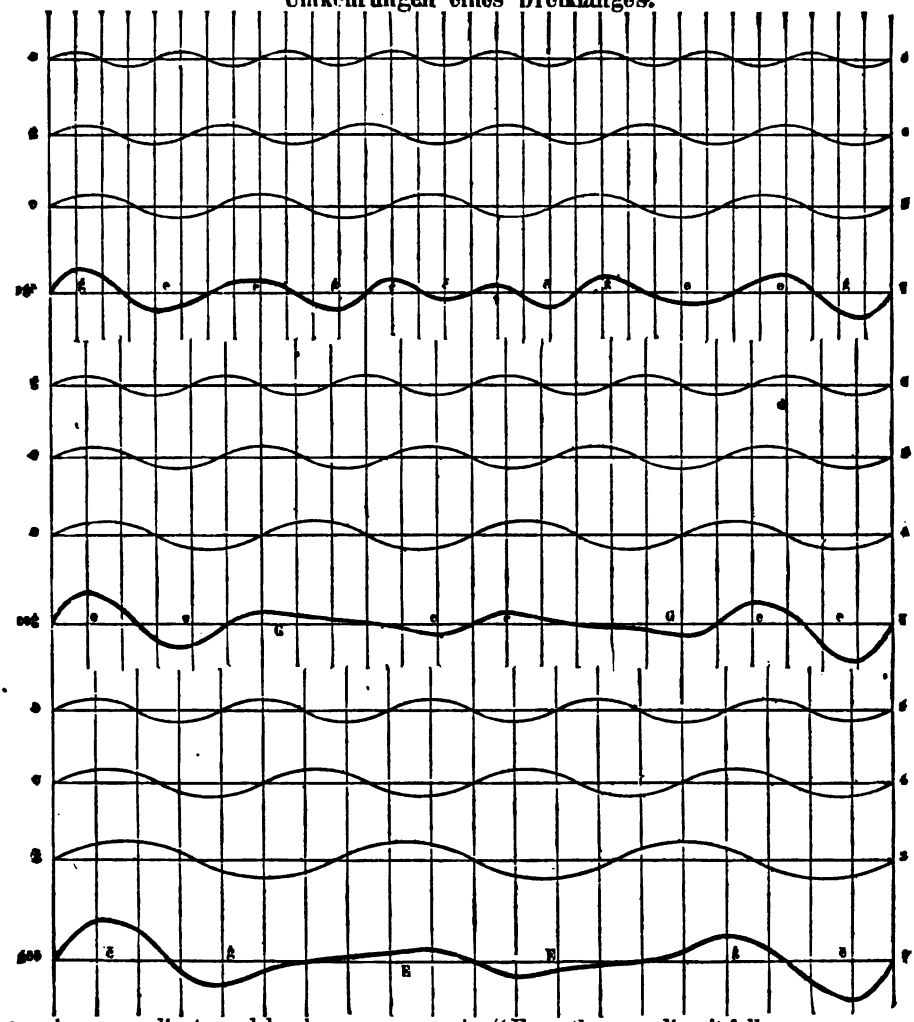
"Let *a b* represent any given time, and the curve above the line condensation (+), the curve below the line rarefaction (—), then any ordinate raised from the end of any abscissa will represent the degree of condensation, at the time represented by its base, in consequence of which the drum of the ear vibrates.

"Our ear can under no circumstances appreciate more than can be represented by these curves, and this indeed is entirely sufficient to give us a clear perception of any tone [ton] or any combination of tones.

"If several tones [Töne] are produced at the same time, the conducting medium is subjected to the influence of several simultaneous forces, and the two following laws will hold good: if the forces act all in the same direction, the amplitude is proportional to the sum of the forces, if the forces act in opposite directions, the amplitudes are proportional to the difference of the opposing forces.

"If, for example, in the case of three tones, we draw the curve of condensation of each separately, then by a summation of the ordinates of corresponding abscissas, we can de-

Umkehrungen eines Dreiklanges. *Plate I.*



termine new ordinates and develop a new curve, which might be called the combination curve. This represents exactly what our ear perceives of the three simultaneous tones. The fact that the musician can distinguish the three tones need not surprise us any more than the fact that any one acquainted with the theory of colors can in green discover blue and yellow; but the combination curves in Plate I. show that this difficulty is a slight one, for in these curves all the relations of the components successively recur. In the case of chords of more than three notes the relations are not so readily seen from the drawing, Plate II., for example. In the case of such chords, however, the skilled musician also finds difficulty in recognizing the separate notes.

"Plate III. illustrates discord [Dissonanz]. Why discords impress us unpleasantly I will leave my readers to judge at this time, though I may perhaps return to the subject subsequently in another paper.

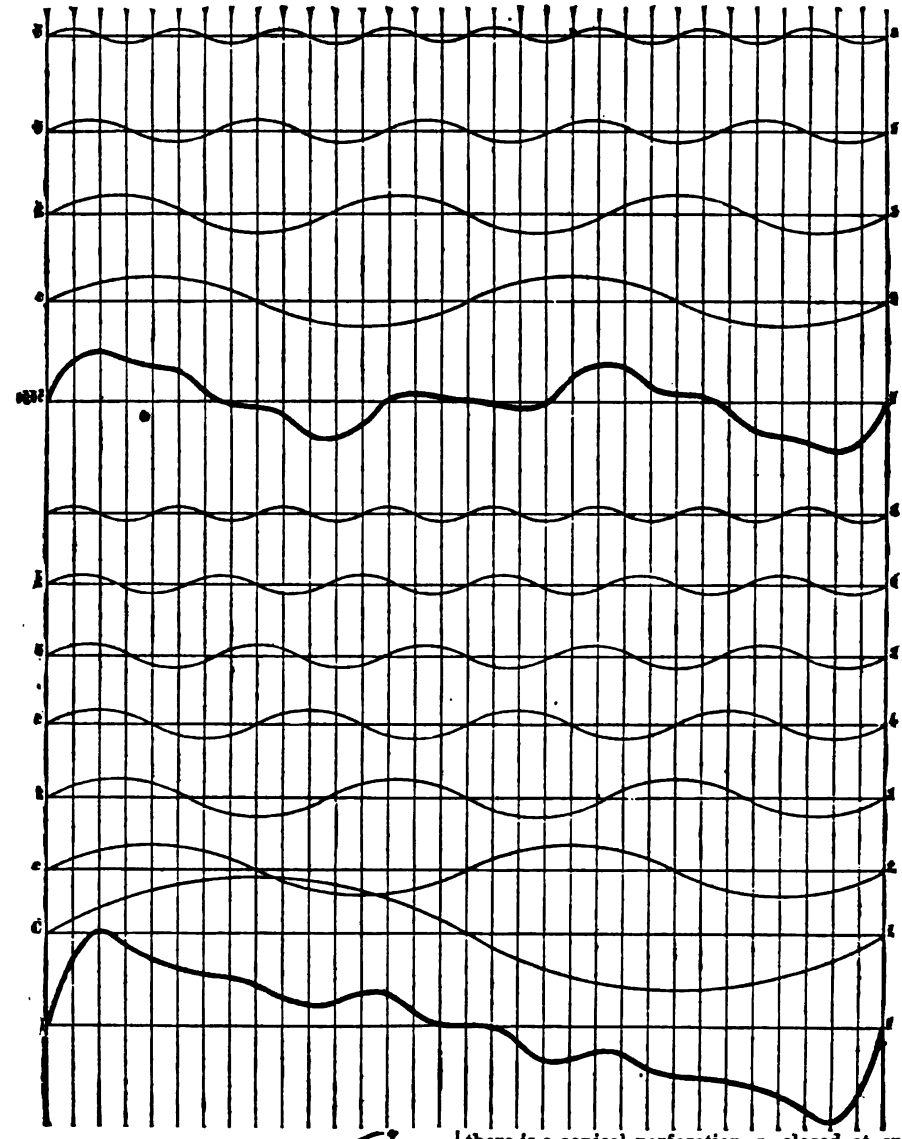
"From the preceding it follows:

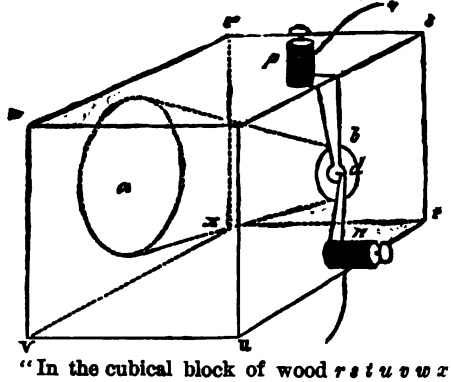
"*First.* Every tone [Ton] and every combination of tones, on striking our ear, causes vibrations on the drum of the ear, the succession of which may be represented by a curve.

"*Second.* The succession of these vibrations alone gives us a conception (sensation) of the tone, and every alteration changes the conception (sensation).

"As soon, then, as it is possible to produce, anywhere and in any manner, vibrations whose curves shall be the same as those of any given tone or combination of tones, we shall receive the same impression as that tone or combination of tones would have produced on us.

"With the above principles as a foundation, I have succeeded in constructing an apparatus with which I am enabled to reproduce the tones of various instruments, and even to a certain extent the human voice. It is very simple, and by means of the figure will be easily understood from the following explanation:

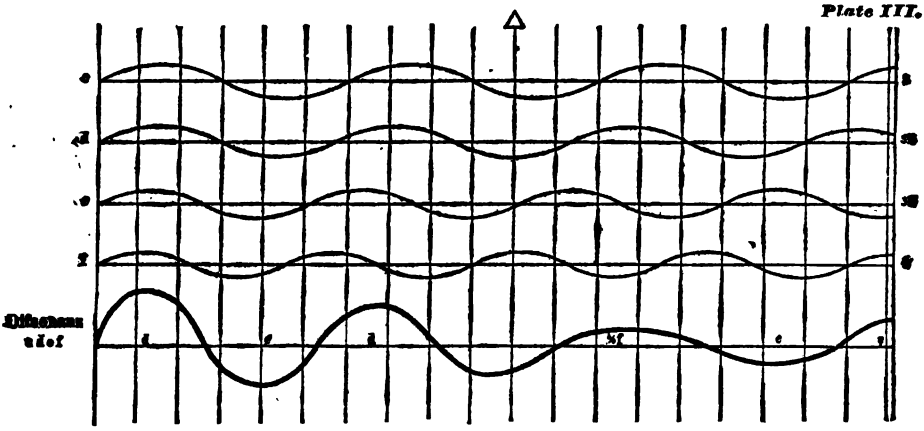




"In the cubical block of wood *r s t u v w x* there is a conical perforation *a*, closed at one end by a membrane *b* (pig's intestine), upon the middle of which there is cemented a conducting strip of platinum; this is connected with the binding screw *p* [auf deren Mitte ein stromleitendes Streifchen Platin festgeklittet ist. Dieses steht mit der Klemme *p* in Verbindung]. From the binding screw *n*, another thin strip of metal [ein dünnes Metallstreifchen] extends until over the middle of the membrane, and ends here in a platinum wire placed at right angles to its length and surface.

"From the binding screw *p*, a conducting wire runs through the battery to a distant station, being connected with a coil of silk-covered copper wire, and this again is connected with a conductor leading back to the binding screw *n*.

Plate III.



"The coil at the distant station is about six inches long, is composed of six layers of fine wire, and, as a core in its centre, has a knitting needle which projects about two inches at both ends. By means of the projecting ends, the coil rests upon two bridges of a resonant case. (All this part can of course be replaced by any other apparatus by means of which the well known 'galvanic tones' can be produced).

"If, now, tones or combinations of tones are produced in the neighborhood of the block, so that sufficiently powerful waves enter the opening *a*, then these sounds cause the membrane *b* to vibrate. At the first condensation the hammer-like wire *d* is pushed back; at the rarefaction it cannot follow the retreating membrane, and the current traversing the strips remains broken [Strom bleibt so lange unterbrochen bis, &c.], until the membrane forced by a new condensation again presses the strip (proceeding from *p*) against *d*. In this way each sound-wave causes a breaking and closing [ein Oeffnen und ein Schliessen] of the current [Stromes].

"At each closing [Schliessen] of the circuit [Kette] the atoms of the iron wire inside the distant spiral are moved away from each other (Pouillet Müller, page 804, Vol. II., fifth edition); on breaking the circuit [beim Unterbrechen des Stromes] these atoms seek to regain their position of equilibrium. When this happens, in consequence of the reciprocal actions of elasticity and inertia, a number of vibrations are produced, and they give the longitudinal sound of the rod (see as above). This is the case if the making and breaking of the current [Unterbrechungen und Schliessungen des Stromes] occur with comparative slowness. If they occur more rapidly than the oscillations of the iron core, due to its elasticity, the atoms cannot complete their course. The paths described become shorter in proportion as the interruptions are more frequent, but then are just as numerous as these.

"The iron wire no longer gives its longitudinal normal tone, but a tone whose pitch corresponds to the number of the interruptions [Unterbrechungen] (in a given time); this is the same as saying that *the rod reproduces the tone* [Ton] *impressed upon the interrupter* [dem Unterbrechungsapparat]. The intensity also of this tone is proportional to that of the original one, for in proportion as this is more intense the motions of the membrane are greater; the motions of the hammer, also, and finally the time during which the circuit remains opened, is greater, and consequently, up to a certain limit, the motions of the atoms in the reproducing wire are greater, we perceiving them as greater vibrations, in just the same way as we would have perceived the original sound-wave.

"As the length of the conducting wire can undoubtedly be made as great as in direct telegraphy, I have called my instrument 'telephone.'

"Now in reference to the capabilities of the telephone, it may be stated that I was enabled to render audible to the members of a large assembly (The Physical Society at Frankfort-a-M.), melodies which were sung (not very loud) into the apparatus in another house (three hundred feet away), with closed doors.

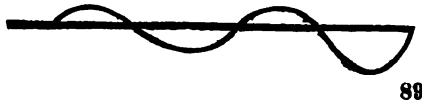
"Other experiments showed that the sounding wire was capable of reproducing complete chords of three tones of a piano, upon which the telephone was placed, and that it reproduces equally well the tones of other instruments, accordion, clarinet, horn, organ-pipes, &c., provided that the tones are within the compass F—f.

"Of course, in all experiments, sufficient precautions were taken to insure that there was no direct conduction of sound. This is very easily done by making a momentary short circuit immediately in front of the coil, by which means its action is temporarily interrupted.

"Hitherto it has not been possible to reproduce the tones of human speech [Tonsprache des Menschen] with a distinctness sufficient for every one. The consonants are for the most part reproduced pretty distinctly, but the vowels as yet not in an equal degree. The cause of this I will attempt to explain.

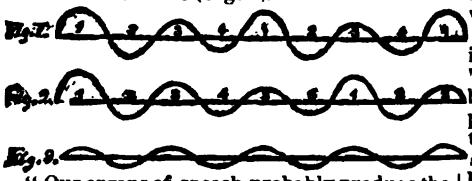
"According to the experiments of Willis, Helmholtz, and others, vowel tones can be produced artificially, if the vibrations of one body are from time to time augmented by those of another, somewhat as follows:—

"An elastic spring is set in vibration by the blow of a tooth on a toothed wheel; the first vibration is the greatest, and each subsequent one is smaller than the preceding.



"If, after a few vibrations of this kind (the spring not coming to rest in the mean time), the tooth wheel imparts a new stroke the following vibration will be again a maximum, and so on.

"The pitch of the tone produced in this way depends upon the number of vibrations in a given time, but the character of the tone upon the number of swellings [Anschwellungen] in the same time. Two vowels having the same pitch would differ in about the way represented by the curves (Figs. 1, 2), while the same tone without any vowel character would be represented by the curve (Fig. 3).



"Our organs of speech probably produce the vowels in the same manner, through the combined action of the upper and lower vocal chords, or of these latter and the cavity of the mouth.

"My apparatus reproduces the number of vibrations, but with an intensity much less than that of the original ones; though, as I have reason to believe, to a certain degree proportional among themselves. But in the case of these generally small vibrations, the difference between large and small vibrations is more difficult to perceive than in the case of the original waves, and the vowel is therefore more or less indistinct.

"Whether or not my views as to the curves corresponding to sound combinations are correct could perhaps be decided by means of the new phonautograph of Duhamel ('Vierordt Physiology,' page 245).

"It may be that for the practical application of the telephone much remains to be done; for physics it has already sufficient interest, from the fact that it opens a new field for research. Friedrichsdorf, near Frankfort-a-M., December, 1861."

Reis Exhibition of 1861.

Fortschritte der Physik, XVII., for 1861, pp. 171–3.

Ph. Reis. *Telephony by means of the Electric Current.*

(Annual Report of the Physical Society of Frankfort-on-the-Main, 1860–1, pp. 57–64.)

"By the name 'Telephone,' the author designates the following apparatus of his own construction by means of which and with the help of the galvanic current he is enabled "to reproduce at a distance the tones [Töne] of different instruments and even to a certain degree the human voice."

"A wooden cube is bored through from one of the faces to the opposite one, the cavity taking the shape of a cone; the smaller opening is closed by means of a membrane (hog's intestine, Schweinsdünndarm). On the middle of the membrane and parallel with it is a thin strip of platinum cemented fast at one end whilst the other end is held by a binding post [Klemme] *p*. From another binding post *q* extends a similar thin strip of metal as far as over the centre of the membrane, and carries a little platinum wire directed towards the membrane at right angles to the strip and the surface of the membrane. From binding post *p* a conductor leads through a battery to a distant coil, which again is connected by another wire to binding post *q*.

"The coil at the distant station is about six inches long, consists of about six layers of thin wire, and encloses as a core a knitting needle which protrudes about two inches at each end. By these protruding ends the coil is supported on two bridges of a sound-board. If, now, tones or combinations of tones are produced in the vicinity of the large opening of the conical cavity so that sufficiently strong waves enter it, these waves will set the membrane into vibrations; by the outward motion of the membrane the platinum strip cemented on it is pressed against the hammer-shaped wire *d* and the galvanic current [Strom] is closed [geschlossen]; by the inward motion of the membrane the current is reopened. The alternate magnetizings and demagnetizings of the core of the coil resulting therefrom will bring forth, if the alternation is slow, the longitudinal tone of the core, and if the alternation [Aufeinanderfolge] is quicker, a longitudinal vibration of the same, the period of which corresponds to the period of the interruptions of the current [Unterbrechungen des stromes] or of the vibrations of the membrane, and consequently to the rate or pitch of the tone which entered the conical cavity. That means, according to the author, that "The rod [Stab] reproduces the tone which was impressed upon the interrupting apparatus [Unterbrechungsapparat]." "The strength of this tone is also proportionate to the original tone, for," as the author, though not very accurately, explains: "The stronger this is the greater the motion of the little hammer, the greater finally the time during which the circuit remains open, and consequently the greater, up to a certain limit, the motion of the atoms in the reproducing rod, which motions affect us as greater vibrations, as the original wave itself would have done." By means of this telephone the author made audible to the members of a large meeting of the Physical Society in Frankfort-a-M., melodies sung not very loud into the apparatus, in a house situated about 800 feet distant, with closed doors. "Other trials showed that the resounding rod is capable of reproducing full chords [Dreiklänge] of a piano on which the telephone rests, and that, in short, it reproduces just as well the tones of other instruments, such as the harmonica, clarinet, horn, organ pipe, &c., provided the tones are within a certain range, from F to f' or thereabout.

"As a matter of course, sufficient care was taken to ascertain whether direct transmission of the sounds had not a share in the result. This was ascertained very simply by establishing for a given time a good shunt circuit directly before the coil, in consequence of which, of course, the activity of the latter ceased for that time.

"It was not possible thus far to reproduce spoken tones [Tonsprache des Menschen] with a distinctness satisfactory to all; the consonants are for the most part distinctly reproduced, the vowels not in the same degree." The author at-

tempts to explain this imperfect reproduction of the vowels by saying that the apparatus reproduces the vibrations to a certain extent indeed with proportionate, but also reduced, strength, and the ear can no longer satisfactorily discern the relation of the proportionately great vibrations which determine the pitch [Tonhöhe] to the small vibrations on which vocal quality [vocal Farbe] depends."

Reis-Legat Article.

Zeitschrift des Deutsch-Oesterreichischen Telegraphen-Vereins, Berlin, 1862, Vol. IX, p. 125.

(Journal of the German-Austrian Telegraph Association, V. 9, p. 125, 1862.)

Concerning the reproduction of sounds by means of galvanic electricity: by V. Legat, Royal Prussian Telegraph Inspector at Cassel, accompanied by copperplates VIII. and IX.

"It might not be uninteresting to make known, in wider circles, the following ideas lately communicated by Mr. Philip Reis to the Society of Physics, and to the meetings of the Free German Institute, at Frankfort-on-the-Main, concerning the reproduction of tones [Tönen] by means of galvanic electricity, and, also, what has been hitherto accomplished towards the realization of this project, in order that the accumulated experiments may serve as a foundation to build upon, and that the capacity of the electric current, which by human ingenuity has already been made serviceable for correspondence, may be developed in this direction also.

"In this essay we shall not deal with the electric current as to its capacity for operating telegraphic apparatus of whatever construction for the reproduction of *visible* signs, but of the application of this current to the production of *audible* signals, of *tones* [Tönen].

"The air waves, which by acting upon the ear excite in us the sensation of sound by primarily setting the tympanum of the ear into vibratory motion, are, as is well known, transmitted to the interior parts of the ear and to the auditory nerves there located by means of a lever apparatus of wonderful delicacy, the auditory bones (hammer, anvil, stirrup); and the attempt to reproduce tones therefore depends upon this: to actuate an artificial imitation of this lever apparatus by means of the vibrations of a membrane corresponding to the membrane of the ear drum, and thereby to open and close [zum Oeffnen u. Schliessen] a galvanic circuit, connected with a distant station by a metallic conductor.

"Before describing the apparatus to be used, it would be proper to inquire how our ear apprehends the vibrations of any one particular tone, and the combined vibrations of all simultaneous tones acting upon it, because thereby we may determine the operations which are to be performed by the transmitting and receiving apparatus in the solution of the problem.

"Examining first the processes which take place in order that the human ear may apprehend any single tone, we find that each tone is the result of alternate rarefactions and condensations repeated within a fixed time. If this operation occurs in the same medium in which the ear is placed, then at each condensation the membrane is forced toward the cavity of the drum, and toward the opposite side at each rarefaction.

"These vibrations cause corresponding movements in the auditory bones, and are thereby transmitted to the auditory nerves.

"The greater the degree of condensation of the sound-conducting medium is at a given time, the greater will be the amplitude of vibration of the membrane and auditory bones, and the greater the consequent result; and in the opposite case, so much the weaker. Hence it is evidently the function of the auditory apparatus to impart with faithfulness to the auditory nerves every condensation and rarefaction which occurs in the surrounding medium. On the other hand, the function of transmitting to our consciousness both the number and amplitude of the resulting vibrations occurring within a given time devolves upon the auditory nerves.

"It is here, in our consciousness, that a certain complex phenomenon receives a specific name; it is here, in our consciousness, that the transmitted vibrations become tones [Tönen].

"Accordingly, that which is apprehended by the auditory nerves is the effect of a force, reaching to our consciousness, and which can be made more easy of comprehension, as to its duration and strength, by graphical delineation.

"For example, let the length of the line *a*——*b* represent a definite period of time, the curves above this line the condensations(†),

and the curves below this line the rarefactions(—); then every ordinate erected at the end of any abscissa will indicate, at the moment of time indicated by this abscissa, the degree of condensation in consequence of which the membrane of the drum vibrates.

"The ear is not capable of perceiving more than can be represented in this way, or more than can be represented by similar curves; this is, however, sufficient to convey to our consciousness any single tone [Ton] or any required combinations of tones. For if several tones are generated simultaneously, then the tone imparting medium is influenced by several forces, acting at the same time, and subject to mechanical laws.

"If all the forces act in the same direction, then the amount of motion is in proportion to the sum of all the forces; if on the other hand the forces act in opposing directions, then the amount of motion is in proportion to the difference between the opposing forces.

"From these principles it follows that the curves representing the condensations of a number of simultaneously generated tones may be combined in a single curve of condensation, which will indicate with precision what our ear apprehends through the reception of these simultaneously acting tones.

"The objection generally made to this proposition, that a musician, or any person, is able to distinguish the simple tones out of which these composite curves are formed or arise, should not be allowed to militate against it, as it is also possible for some who are familiar with the study of colors to distinguish, in green, for example, the mixture of yellow and

blue, in their varied shades; and the one phenomenon as well as the other is referable to the fact that each observer is very familiar with the factors of that product which has been conveyed to his consciousness.

"By the explanations heretofore given, it is easy to construct the curves representing the condensations of various tones, chords, &c., and a few examples are given by way of illustration:

"Fig. 1, Plate VIII, represents a composite curve formed of three tones, in which all the proportions of the components recur successively.

"Fig. 2 represents a similar curve formed of more than three tones; in this case, however, it is no longer possible to represent the proportions so clearly in the drawing, yet an experienced musician will be able to discern them even here, although in practice it might be difficult for him to recognize the separate tones in such a chord.

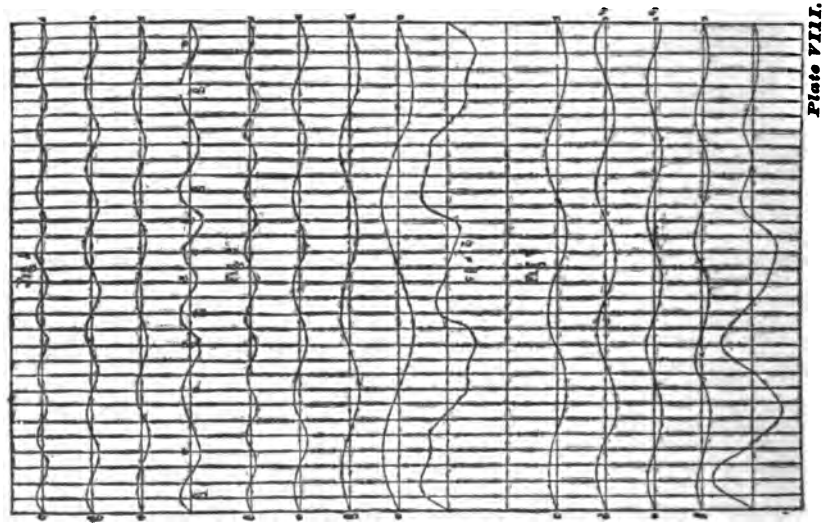
"The advantage of representing the operation of tones upon the human ear after this manner is that it gives the clearest view possible of the course of the process; the representation here given also shows why a discord [Dissonanz], Fig. 3, must affect the ear disagreeably.

"This apparent digression from the subject under consideration was necessary to demonstrate that as soon as we are able, in any place and in any manner, to reproduce vibrations of such curves and intensities as are equivalent to the curves and intensities of the vibrations of any particular tone, or of any particular combination of tones, we shall have the same impressions as were produced upon us by this original tone, or these original combinations of tones.

"The apparatus described hereafter offers the possibility of producing these vibrations in every manner desired; and by the use of galvanic electricity it is possible to evoke, at any distance, vibrations like [gleiche] those which have been so produced, and in this way to reproduce at any place the tones which have been generated at another place.

"In Plate IX, Fig. 4, A is the tone transmitter [Tonangeber], and B the tone receiver [Tonempfänger], and these two instruments are set up at different stations. I must observe at the outset that the arrangement of the instruments for sending backwards and forwards is omitted for greater clearness; and likewise, as the whole thing is not presented as a completed fact, but only to call to the notice of a wider circle what has been already ascertained, the possibility of the working of the apparatus at a distance greater than the limited direct working allows at present is left out of consideration, since these points are easily accomplished by mechanical arrangements and since the most important facts of the phenomena treated are not influenced thereby.

"Let us now turn to the tone transmitter, Fig. 4, A. This on the one hand is connected by the metallic conductor with the tone receiver, Fig. 4, B, at a neighboring station; on the other hand it is connected by means of the electric battery C with the earth, or with the metallic return conductor. The tone transmitter, Fig. 4, A, consists of a conical tube *a b*, about 15 centimetres in length, having a front opening of about 10 centimetres, and a rear opening of about 4 centimetres.



Legal Reproduction von Tönen auf elektro galvanischem Wege.

Plate VIII.

"It appears by practical experiments that neither the material of this tube nor any increase in its length influenced the accuracy of the action of the apparatus. An enlargement of the diameter of the tube impairs the working of the apparatus, and it is desirable that the inner surface of the tube be as smooth as possible. The smaller or rear end of the tube is closed by a collodion membrane *o*, and upon the centre of the circular surface of this membrane rests one end *c* of the lever *c d*, the supporting point *e* of which is sustained by a bracket, and is kept in electrical connection with the metallic conductor. The proper lengths of the respective arms *c e* and *e d* of this lever are regulated by the laws of the lever. It is ad-

visable to make the arm *c e* longer than the arm *e d*, in order that the least motion at *c* may operate with greatest effect at *d*. It is also desirable that the lever itself be made as light as possible, that it may follow the movements of the membrane. Any inaccuracy in the operation of the lever *c d* in this respect will produce false tones at the receiving station. When in a state of rest the contact at *d g* is closed, and a delicate spring *n* maintains the lever in this position.

"The second part of the apparatus, the standard *f*, consists of a metallic support, connected with one pole of the battery C, the other pole of which is connected to the earth, or to a metallic return wire leading to the other station.

"Upon the standard *f* is arranged a spring *g*, with a contact-point corresponding to the contact-point *d* of the lever *c d*; the position of *g* is regulated by the screw *h*.

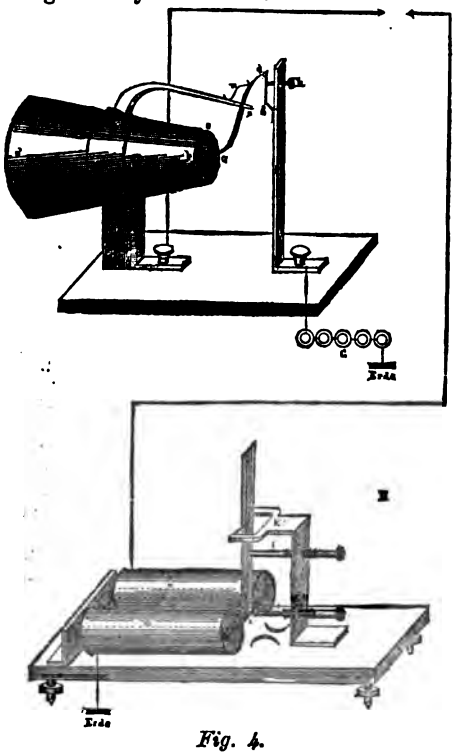


Fig. 4.

"In order not to impair the operation of the apparatus by the action of the air-waves against the rear side of the membrane, it is desirable to place a disc of about fifty centimetres in diameter at right angles to the longitudinal axis of the tube *a b*; this disc may be attached to the tube by a fastening surrounding its outer circumference.

"The tone receiver, Fig. 4, B, consists of an electro-magnet *m m*, which rests upon a sounding-board *n w*; its coil is connected respectively with the metallic conductor and the earth or the metallic return conductor.

"Facing the electro-magnet *m m* is an armature, to which is attached a very long but light and broad lever *i*.

"The lever *i* with the armature is suspended from the standard *k* in the manner of a pendulum, its motion being regulated by means of the screw *l* and the spring *q*.

"In order to increase the capacity of the apparatus, the tone receiver may be placed at one of the focal points of an elliptical chamber of suitable size, and the listener may place his ear at the other focus of this chamber.

"The operation of the apparatus described is as follows:

"When at rest the galvanic circuit [Kette] is closed. When the air, which is in the tube *a b* of the apparatus, Fig. 4, A, is alternately condensed and rarefied, by speaking into it (or by singing or introducing the tones of an instrument), a movement of the membrane closing the smaller opening of the tube is produced, corresponding to such condensation or rarefaction. The lever *c d* follows the movements of the membrane, and opens and closes [öffnet und schliesst] the galvanic circuit [Kette] at *d g*, so that at each condensation of the air in the tube the circuit is opened, and at each rarefaction the circuit is closed [ein Oeffnen und ein Schliessen erfolgt].

"In consequence of this operation, the electro-magnet of the apparatus, Fig. 4, B, in accordance with the condensations and rarefactions of the column of air in the tube *a b*, Fig. 4, A, is correspondingly demagnetized and magnetized [demagnetisirt und magnetisirt] and the armature of the magnet is set into vibrations like those of the membrane, in the transmitting apparatus. But the beam [Balken] *i* attached to the armature communicates these corresponding vibrations of the armature to the air surrounding the apparatus Fig. 4, B, which finally transmits the vibrations so produced to the ear of the listener.

"We have not here to consider the question of the transmission [Fortpflanzung] of tones by means of the galvanic current, but only of the conveyance [Uebertragung] of generated sounds to another place, and in this way that at the latter place a similar cause is produced, and a similar effect obtained. It must not be ignored, however, that while the apparatus described reproduces the exact number of the original vibrations, but not of the same strength [die gleiche Stärke der reproducirten Schwingungen noch nicht erreicht wurde]; [and that the achievement of this result is reserved for an improvement of the apparatus.

"In consequence of the imperfection of the apparatus at this time, the minor differences of the original vibrations are distinguishable with more difficulty—that is, the vowel sounds appear more or less indistinct—inasmuch as each tone depends not merely upon the number of the vibrations of the medium, but also upon its condensation and rarefaction.

"This also explains why chords and melodies were transmitted with marvelous accuracy in the practical experiments hitherto made, while single words in reading, speaking, &c., were less distinctly recognizable, although even in these the inflections of the voice, as in interrogation, exclamation, surprise, calling, etc., were clearly reproduced.

"There is no doubt that the subject we have been considering before it becomes practically valuable for use, will require considerable improvement; it will especially be necessary to

perfect the mechanism of the apparatus to be employed; but I am convinced, by repeated practical experiments, that it is of the greatest theoretic interest to pursue these investigations, and also that a development of practical value will not elude our intelligent century."

INDUSTRIAL GAZETTE.

"*Deutsche Industrie Zeitung, 1863, Chemnitz. April 17, 1863, No. 16, page 184.*

"*Industrial Queries for Exciting Interest and Eliciting Responses.*"

"Of late there has been talk in newspapers about producing definite tones at a distance, similarly to telegraphic dispatches, such, for instance, as conducting the acoustic effects of an instrument far beyond the reach of the audibility of its sound. Do these communications rest upon actual facts?"

(From same Gazette. May 1, 1863, No. 18, page 208):

"Answers. Answer to question in No. 16, page 184. Transmission of Tones by Electricity. According to 'Böttger's Notizblatt,' 1863, No. 6, successful experiments in 'telephony' were made in October, 1861, at Frankfort-a-M. by Professor Ph. Reis, so that it seems not impossible to carry on conversations at miles distance, and even to convey the voice itself with its peculiar undulations, and also the tones of a musical instrument. Heretofore the voice could be reproduced from one house to another only for a distance of 300 feet by means of a peculiar and ingenious apparatus. The arrangement of the same was essentially as follows: The waves of sound were taken up by an elastic surface, and transmitted to a light commutator introduced into the circuit of a galvanic battery (einer federnden Commutator eingeschaltet in den Leitungsdraht). At the other end of the line was introduced a coil of copper wire, inside of which was an iron wire resting upon a sounding board, that was thrown into sonorous vibrations by the changes of current depending upon the waves of sound."

(May 29, 1863, No. 22, page 249.)

"*The reproduction of tones by electro-galvanic means (with a drawing which is the same as the drawing of the apparatus in the Legat article, No. 8, pp. 539–545, supra).*

"Although this subject has already been discussed by us (No. 18, page 208), on account of the great interest it offers we shall return to it more in detail. We enclose a drawing of an apparatus used by Mr. Ph Reis, in Frankfort-a-M, taken from the Zeitschrift des Deutsch-Oesterreichschen Telegraphen Vereins, 1862, folios 6, 7, and 8. We take the liberty of following the lead of the above-mentioned source in entering into a short discussion of the nature of tones.

"The undulations of the air that excite in us, by operating upon the ear, the sensation of sound, by setting the drum of the ear into vibration, are transmitted, as is well known, by a series of levers of admirable delicacy; that is, by the small bones of the ear (hammer, anvil, and stirrup) to the inner portion of the ear, and to the nerves that lie at that point. The attempt to reproduce tones depends upon the following: To set in motion an artificial imitation of this series of levers by the vibration of a membrane which takes the place of the drum, and to make use of them to open and close a galvanic circuit which is connected by a metallic conductor with a remote station.

"If we take into consideration the phenomena that take place when we perceive a sound by the sense of hearing, we find that every tone is the result of rarefactions and condensations of the air repeated several times in a certain period. At every condensation the membrane of the drum is pressed inwards, and at every rarefaction outwards. These vibrations produce a simultaneous motion of the small bones of the ear and a consequent transmission to the nerves of the ear. The greater the compression of the sound-conducting medium at any particular moment, the greater is also the amplitude of vibration of the membrane and small bones of the ear, and *vice versa*. The object, therefore, of the organs of hearing is to transmit with certainty the rarefactions and condensations of the sound-conducting medium to the nerves of hearing. On the other hand, it remains their object to bring to our perception the vibrations occurring in a given time with reference to number as well as to amplitude. It is only in our perceptions that a given combination receives a definite name; that vibrations become sounds.

"Anything other than the effect of such single vibrations the organs of hearing are unable to take up, and these organs themselves are competent to perceive single tones as well as combinations of tones, for if several tones are produced at the same time, the sound-conducting medium is under the influence of several simultaneous forces which, according to the laws of mechanics, can be replaced by a force which produces the same effect as all the single ones together. If all the forces operate in the same direction the magnitude of the motion is proportional to the sum; if they operate in opposite directions the magnitude of the motion is proportional to the difference of the opposite forces. In that way several simultaneous tones operate upon our hearing simply by a definite alternation of rarefactions and condensations of the sound-conducting medium as in the case of single tones. The tone itself depends apparently only upon the number of vibrations and the power upon the amplitude of the vibrations (perhaps also the strength).

"Now, as regards the apparatus, the upper figure is the transmitter and the lower one the receiver or reproducer.

* "The transmitter consists of a metallic conical pipe *a b*, about 15 centimetres in length, 10 in diameter at *a* and 4 in diameter at *b*. At *b* the opening is closed by a membrane *o* of collodion stretched tight. Upon the centre of the same rests the end *c* of lever *c d*, whose fulcrum is placed at *e* on a support. The lever is to be made as light as possible, and its arm *c* longer than its arm *d*, so that the smallest motion at *c* will operate at *d* with the greatest amount of force. In the condition of rest the contact *d g* is closed and a weak spring *n* holds the lever fast in this position of rest. Besides, there is attached to the apparatus a metallic standard *f*, connected with one pole of the battery, while the other pole is led to the ground through *e*. On the standard *f*

(* The letters refer to the preceding cut.)

is secured the spring *j* opposite the contact-point *d* of lever *c d* at *d*, the position of which (spring) can be regulated by a screw *h*.

"The receiver consists of an electro-magnet *m m* resting upon a sounding-board R, and whose coils are in connection with a metallic conductor and with the earth at E. Opposite the electro-magnet is an armature connected with a lever, as long as possible but light and broad. This lever is fastened to the support *k* after the manner of a pendulum, and its motions are regulated by a screw *b* and spring *g*.

"To increase the efficiency of the apparatus the receiver and reproducer can be set up in one focus of an elliptical concavity of proper size, while the listening ear of the hearer is placed in the other focus.

"The operation of the apparatus is now as follows: The tones of the voice or of an instrument are conducted into the conical pipe *a b*. By reason of their vibration the membrane is set into similar vibration, and in this way operates the opening and closing of the electric conductor. In consequence of this the magnet in the receiver will be magnetized and demagnetized corresponding to the vibration of the tones, and the armature of the lever *i* is set in vibrations corresponding to those of membrane *o*. The wide surface of lever *i* transmits these vibrations to the air, and by this means they reach the ear of the hearer. In this transmission of tones, the only question is one of transmission of vibrations, a problem that magneto-electric telegraphy is certainly sufficiently far advanced to deal with.

"A friendly communication was sent us some time ago by Mr. J. F. Quilling of Frankfort-a-M., according to which the capacity of the apparatus to transmit tones to a considerable distance clearly and with their characteristic timbre [Klangfarbe] is fully established. Mr. Q. writes us that by means of the telegraphic conductor with which the apparatus of Mr. Ph. Reis was connected, two remote parts of the city were united, and although it was not possible with the present construction of the apparatus to transmit spoken words [gesprochenen Wörter], they succeeded so well with the tones that were sung that not only were the melodies of songs reproduced distinctly and perfectly at a tolerably remote station, but known voices could be recognized. All present capable of judging, Mr. Q. adds, who availed themselves of the opportunity of witnessing the experiment, agreed that the possibility is before us of making one's self understood verbally at any distance in the way shown by Mr. Reis."

BÖTTGER'S ARTICLE.

Böttger's Polytechnisches Notizblatt, 1863, No. 61, p. 81.

On the Transmission of Tones at any desired Distance, by Means of Electricity. (*Telephony*).

"Two decades ago the problem of giving signs, by means of electricity, from distances had not yet been entirely solved. Since then telegraphy has reached such a perfection and telegraph wires have so greatly spread that even the keenest desires have not much left to ask for.

"Now there appears a first earnest trial to reproduce tones at any desired distance, by means of electricity.

"This first trial, which has been crowned with success, has been repeated in the lecture room of the Physical Society of Frankfort-on-the-Main, before numerous assembled members, on the 26th of October, 1861, by Mr. Ph. Reis, teacher of natural sciences at Friedrichsdorf, near Frankfort. Into one part of his apparatus, located in a building about three hundred feet distant, and having all the doors and windows closed, melodies were sung, but not very loudly. The same could be heard by the members in the lecture room, through the second part of the apparatus.

"These wonderful results were attained with the following very simple apparatus: A small, light box, a kind of hollow wooden tube, has a larger opening in the front, and a smaller one on the opposite side. The latter is covered with a very fine membrane (sausage skin), and the same is tightly stretched; a small, flexible piece or strip of platina, fastened to the wood of the box, touches the membrane at its centre, and a second strip of platina is fastened by one end to the wood at a different place, and has at its other end a fine horizontal point touching the other strip of platina, where it lies on the membrane.

"As is known, tones are produced by the rapid succession of condensations and rarefactions of the air. If the vibrations of the air, called waves, strike the thin membrane, they push the same against the strip of platina that touches it, and then allow it to immediately vibrate back into the hollow cube (called the artificial ear), and so cause the membrane to assume forms alternately bent towards the cube and from the same. The strip of platina lying against the membrane is thus set into a swinging motion, so that it is alternately pressed on to the platinum point of the second strip and then leaves the same.

"If one of the strips is connected by a wire to one of the poles of a voltaic battery, and the electricity is conducted to any desired distance by a wire connected to the other pole and is then carried through a helix six inches in length, wound with six layers of thin silk-covered copper wire, and from there is carried back to the second strip of platina on the wooden cube by means of an insulated wire, then, at every vibration of the membrane, an interruption of the current of electricity [Unterbrechung in der Strömung der Electricität] will be caused, as the point on the one strip of platina no longer touches the other strip. Through the hollow of the spiral a thin iron wire (a thick knitting needle) about ten inches in length is passed, so that it projects out of each end of the spiral about two inches, and these projecting ends each rest on a bridge of a sounding-board.

"It is known that if an electric current is passed through a helix that surrounds an iron wire, at every interruption a tone, produced by the vibrations of the iron wire, is audible. If the makings and breakings of the current [Unterbrechungen des Stromes] follow each other rather slowly, the different positions (in regard to the length of the bar) which the molecules will be caused to assume by the electricity will produce a tone, its so-called proper longitudi-

nal tone, which depends on the length and thickness of the bar or wire.

"If the interruptions and reconnections of the current [Unterbrechungen des electrischen Stromes] in the spiral take place faster than the vibrations of the smallest parts of the wire, which in turn depends upon the elasticity of the wire, they cannot complete their course, receive new shocks, the vibrations get to be smaller but more rapid, and as numerous as the interruptions follow each other. The piece of wire no longer gives its longitudinal tone, but a tone which, according to the number of interruptions in a certain time, is higher if they are more frequent and lower if they are less frequent. It is known that the pitch of a tone depends on the number of air-waves that follow each other in one second. We have seen that the number of interruptions of the electric current [Unterbrechungen des electrischen Stromes] by the membrane and the strips of platina is dependent upon this.

"Consequently the iron wire must give a tone of the same pitch as the sound which was received by the membrane. As electricity is hardly impaired when conducted a great distance, if the proper apparatus is used, it is evident that a tone acting on a membrane in one place can be made audible at any desired distance by the iron wire.

"That the tone is made audible only by electric vibrations and not by direct transmission of the air-waves through the wires can be most strikingly proved by noticing the fact that no tone is heard at the spiral if a good short circuit be established; *i. e.*, if, for instance, a small strip of metal is laid across the two wires, directly in front of the spiral. The reproduced tones are weaker than the originals, but the number of vibrations is the same. It is easy to reproduce the tones in the proper pitch. As the vibrations are smaller, which is the cause of the weakness of the tone, it is much more difficult, however, for our ear to estimate the difference in the size of the vibrations.

"The character of a tone depends upon the number of swellings it has; *i. e.*, with tones of the same depth, consequently of the same number of waves per second, such as having the fourth, sixth, eighth, tenth, or sixteenth wave stronger than the rest.

"The physicists have shown that if a spring is vibrated by the teeth of a cog-wheel, the first vibration is the greatest, and every following one is smaller. If, however, before the spring comes to rest, another tooth strikes it, then the next vibration will be equal to the first strongest one, but the vibrations of the spring will not be any more numerous than before. Vowel tones can be artificially produced in this way.

"Although we may be far from being able to converse with a friend a hundred miles away and recognize his voice, as though he was sitting alongside of us, the impossibility of attaining this result can no more be claimed.

"The probability that this result will be attained is almost as great as, by the wonderful experiments of Niepce, the reproduction of natural colors by photography."

REIS'S LETTER TO LADD.

Journal of the Society of Telegraph Engineers, and of Electricians for March, 1883, No. 46.

Reis's Telephone.

"The following is a copy of an autograph description of Reis's telephone which has been presented to the library by Mr. William Ladd, Member:—"

"INSTITUT GARNIER,
FRIEDRICHSDORF.

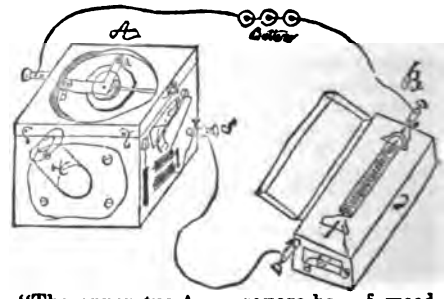
"DEAR SIR:

I am very sorry not to have been in Frankfort when you where there at Mr. Albert's, by whom I have been informed that you have purchased one of my newly-invented instruments (Telephone), though I will do all in my power to give you the most ample explanations on the subject. I am sure that personal communications would have been preferable, specially as I was told that you will show the apparatus at your next scientifical meeting, and thus introduce the apparatus in your country

"Tunes and sounds of any kind are only brought to our conception by the condensations and rarefactions of air or any other medium in which we may find ourselves. By every condensation the tympanum of our ear is pressed inwards, by every rarefaction it is pressed outward, and thus the tympanum performs oscillations like a pendulum. The smaller or greater number of the oscillations made in a second gives us, by help of the small bones in our ear and the auditory nerve, the idea of a higher or lower tune.

"It was no hard labor, either to imagine that any other membrane besides that of our ear could be brought to make similar oscillations, if spanned in a proper manner and if taken in good proportions, or to made use of these oscillations for the interruption of a galvanic current. However, these were the principles which guided me in my invention; they were sufficient to induce me to try the reproduction of tunes at any distance. It would be long to relate all the fruitless attempts I made until I found out the proportions of the instrument and the necessary tension of the membrane. The apparatus you have bought is now what may be found most simple, and works without failing when arranged carefully in the following manner:

"The apparatus consists of two separated parts, one for the singing station, A, and the other for the hearing station, B.



"The apparatus A is a square box of wood, the cover of which shows the membrane, *c*, on the outside, under glass. In the middle of the latter is fixed a small platina plate to which a flattened copper wire is soldered, on purpose to conduct the galvanic current. Within the circle you will further remark two screws: one

of them is terminated by a little pit in which you put a little drop of quicksilver, the other is pointed. The angle, which you will find lying on the membrane, is to be placed according to the letters, with the little hole *a* on the point *a*, the little platina foot *b* into the quicksilver screw, the other platina foot will then come on the platina plate in the middle of the membrane.

"The galvanic current coming from the battery (which I compose generally of three or four good elements) is introduced at the conducting screw near *b*, wherefrom it proceeds to the quicksilver, the movable angle, the platina plate and the complementary telegraph to the conducting screw *s*. From here it goes through the conductor to the other station B, and from there returns to the battery.

"The apparatus B, a sonorous box on the cover of which is fixed the wire spiral with the steel axis, which will be magnetic when the current goes through the spiral. A second little box is fixed on the first one, and laid down on the steel axis to increase the intensity of the reproduced sounds. On the small side of the lower box you will find the corresponding part of the complementary telegraph.

"If a person sing at the station A, in the tube *x*, the vibrations of air will pass into the box and move the membrane above, thereby the platina foot *c* of the movable angle will be lifted up, and thus will open the stream at every condensation of air in the box. The stream will be re-established at every rarefaction. In this manner the steel axis at station B will be magnetic once for every full vibration, and, as magnetism never enters nor leaves a metal without disturbing the equilibrium of the atoms, the steel axis at station B must repeat the vibrations at station A, and then reproduce the sounds which cause them. *Any* sound will be reproduced if strong enough to set the membrane in motion.

"The little telegraph which you find on the side of the apparatus is very useful and agreeable for to give signals between both of the correspondents. At every opening of the stream, and next following shutting, the station A will hear a little clap, produced by the attraction of the steel spring. Another little clap will be heard at station B in the wire spiral. By multiplying the claps and producing them in different measures, you will be able as well as I am to get understood by your correspondent.

"I am to end, sir, and I hope that what I said will be sufficient to have a first try; afterwards you will get on quite alone.

I am, sir,

Your most obedient servant,

PH. REIS.

FRIEDRICHSDORF, 13-7-63.

To Mr. William Ladd.

BRITISH ASSOCIATION REPORT ON REIS.

Report of the Thirty-third Meeting of the British Association for the advancement of Science, in August and September, 1863, published 1864.

On an Acoustic Telegraph, by W. Ladd.

"This instrument consists essentially of two distinct pieces of apparatus; that for transmitting the signal has a small mouthpiece. On the right-hand side there is a finger key forming part of the circuit, and an electro-magnet, with a vibrating armature and binding screw to connect with one of the line-wires. Within a case under a glass cover is an elastic membrane, in the centre of which is fixed a platinum plate in connection with the finger key. A like piece of angular metal resting on three pins is so placed that the pin at the angle rests on the plate in the centre of the membrane, the other two resting in cups on its edge so as to allow a free motion on the points. In the body of the receiver box is suspended a soft-iron core surrounded by a coil of silk-covered wire, one end of which is in connection with a finger key and the other with the binding screw. The method of producing sound in the receiving instrument depends upon the fact that at the moment of magnetizing or demagnetizing a piece of iron there is an alteration in the arrangement of the particles which gives rise to a slight ticking noise. Having connected the transmitter by means of an insulated wire with the receiver, and the binding screws having been brought in connection with a battery of three or four elements, if the finger key on the transmitter be pressed the person at the receiving station hears the ticking noise. To convey a musical note or sound the operator places his mouth to the tube in front of the instrument and sings a note, when immediately the membrane begins vibrating in accordance with the note sounded, and at each vibration breaks contact between the pin and plate in its centre. This forming part of the circuit causes the iron core in the receiving instrument to be magnetized and demagnetized a number of times equal to the number of vibrations of the membrane, and so conveys to the receiver an impression of a musical sound. The finger keys and small magnet at the sides of the instruments are for the purpose of varying the methods of communication by the combination of single sounds, and can also be used with the other parts for the purpose of regulating the lengths of the notes and dividing them into varying portions, so as to form a sound alphabet somewhat similar to the signals written by Morse's telegraph."

PROSPECTUS OF MR. ALBERT.

J. Wilh. Albert,
Mechanician,
Frankfort on the Main.

FRANKFORT-A-M., August, 1863.

"SIR:

I take the liberty of sending you the accompanying prospectus, begging you to give it your kind attention; it relates to the very interesting apparatus of Mr. Reis, for the production of tones with the aid of galvanism:

"THE TELEPHONE.

"This apparatus, which can be had through me, is at all times exhibited for inspection in my warehouse, and besides I am quite willing to give every information regarding it. My warehouse of physical, optical, and chemical instruments and apparatus is now: Neue Mainzerstrasse-No. 34 AM. Taunusthor, only three minutes' walk from the several railroad stations,

and therefore may be visited by any one, however short his stay in Frankfort may be."

"Awaiting your kind order, I am,
Respectfully yours,
J. Wilh. Albert."

CIRCULAR OF REIS OF AUGUST, 1868.

(This is on the same sheet of paper as the foregoing.)

"SIR:

Having succeeded two years ago in demonstrating the possibility of reproducing tones with the aid of the galvanic current and in manufacturing an apparatus for that purpose, the subject has been so highly appreciated by the most renowned men of science, and I have received so many encouragements, that I have striven since that time to improve my originally very imperfect apparatus, in order to give to others also the facility of experimenting.

"I am now able to offer an apparatus which satisfies my expectations, and with which every physicist will succeed in repeating these interesting experiments regarding the reproduction of tone (Tonreproduction) at distant stations.

"I believe that it is the wish of many that these instruments should come into the possession of laboratories; as however, their manufacture demands a complete knowledge of the leading principles and a great experience in this matter, I have resolved to make the most important part myself, and to intrust to the mechanician only the secondary parts and the external outfit. Mr. J. Wilh. Albert, mechanician at Frankfort on the Main, is commissioned to sell them. I have enabled him to offer them at the prices of 21 and 14 florins (12 and 8 Prussian thalers) in two qualities, which differ only in the external outfit. The instruments can also be had directly from me at the same price by cash payment. Every apparatus is examined by me before being shipped, and has attached my name, the serial number, and the date of construction."

Friedrichsdorf b. Homburg, v. d. Höhe,
August, 1863.

PHIL. REIS,
Teacher at L. F. Garnier's Boys' Institute.

"(In manuscript on the foregoing is the following:)"

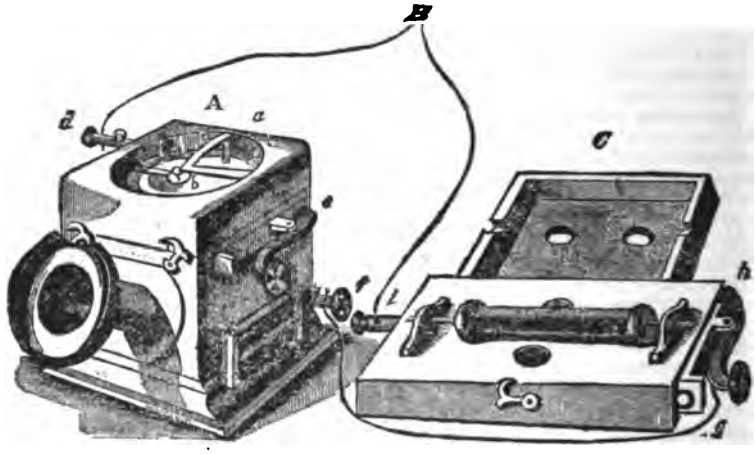
"Descriptions of the above are to be found in Müller-Pouillet's Lehrbuch der Physik Braunschweig, Vieweg & Son; Pisko, die Neueren Apparate der Akustik, Wien, Gerold's Son; 1865.

REIS'S DESCRIPTIVE CIRCULAR.

(This and the foregoing are on two similar printed sheets.)

"The apparatus consists of two parts, as may be seen in the woodcuts above, the telephone proper A, and the reproducing apparatus C. These two parts are to be placed at such a distance from each other that singing or the sound of a musical instrument can be heard in no other manner except through the apparatus from one station to another.

"Both parts are connected with each other



and with the battery B, the same as in an ordinary telegraph. The battery must be sufficient to produce at station A the attraction of the armature of the electro-magnet placed at one side (three or four six-inch Bunsen cells are sufficient for several hundred feet of distance).

"The galvanic current then goes from B to the binding post *d*, from there through the copper strip, to the platina disc in the centre of the membrane, then through the foot *c*, of the angle towards the binding post B, *in the small hollow of which a drop of quicksilver is inserted.* From here the current goes through the small telegraph apparatus *e f;* then to the key of the station C, and through the coil surrounding *i* back to B.

"If now sufficiently strong tones are produced before the mouthpiece, their vibrations will put in motion the membrane and the angular little hammer [winkelförmige Hämmerchen] which lies on it; for every full vibration the circuit is once opened and again closed [einmal geöffnet und wieder geschlossen], and thereby are produced at station C in the core of the coil, just the same number of vibrations [ebensoviele Schwingungen hervorgebracht] which are there perceived as tones or as combinations of tones [Accords]. By placing the

cover tightly over the axis of the coil the tones at C are greatly strengthened. Besides the human voice [Menschenstimme] there can be reproduced (according to my experience) just as well the tones [Töne] of good organ pipes from F to C and those of the piano; to that end the box *a* must be placed on the sounding board of the piano; out of thirteen chords a skilled experimenter could make out ten clearly. The telegraph apparatus placed on one side is evidently unnecessary for the reproduction of tones, but it is a very useful addition for convenient experimenting. With its aid it is possible to easily and surely make one's self intelligible [sich verständigen] with the person at the other station.

"This may be done somewhat in the following simple manner: After the apparatus has been put up completely, one satisfies one's self of the continuity of the connection and the strength of the battery by opening and closing the circuit whereby at A is heard a striking of the armature and at C a very perceptible ticking of the coil.

"By a quick succession of makes and breaks at A, C is asked whether he is ready for experimenting, whereupon C answers in the same manner.

"By agreement between the two stations simple signals can be given by opening and closing the circuit 1, 2, 3, or 4 times, *e. g.*, one stroke—sing; two strokes—speak, etc.

"I telegraph words by numbering the letters of the alphabet and communicating their numbers.

"1 stroke A,
2 strokes B,
3 strokes C,
4 strokes D,
5 strokes E, etc.

"Z would consequently be indicated by 25 strokes.

"But these numbers of strokes would take too much time and not be sure in counting. Therefore I put a dactyl for every 5 strokes, hence

"—U U for E,
—U U and 1 stroke for F, etc.

"Z: —UU—UU—UU—UU—U, which is quicker, and more easily executed and better understood.

"Still better is it to indicate the letters by numbers which are in inverse proportion to the frequency of their occurrence.

9 August, 1863, Friedrichsdorf, *b* Homburg, v. d. Höhe.

PHIL. REIS,
Teacher of A. L. Garnier's Boys' Institute."

BÖTTGER'S ACCOUNT OF REIS'S IMPROVED APPARATUS.

Dingler's Polytechnic Journal, Vol. 169, p. 399.
Concerning the Improved Telephone.

"In the meeting of the Physical Society, held on July 4, at Frankfort-a-M, a member of the society, Mr. Philip Reis, from Friedrichsdorf, near Homburg before the Heights, exhibited some of his improved telephones (Apparatus for the Reproduction of Tones at any desired distance by means of the Galvanic Current). It is two years since Mr. Reis first gave publicity to his apparatus, and although the performances of the same in their simple primitive form were astonishing, yet they had this great defect, that experimenting with the same was possible only for the inventor. The instruments exhibited in the above-mentioned meeting scarcely reminded one of the earlier forms.

"Mr. Reis has striven to give the same a form pleasing to the eye, so that they now will worthily fill a place in every physical cabinet. This new apparatus can now be easily managed (worked) by every one, and works with great certainty. Melodies sung quite lightly at a distance of about three hundred feet were reproduced by the instrument set up, much more distinctly than formerly. The musical scale was especially sharply reproduced.

"The experimenters could even reproduce words, although, indeed, only such as had been often heard by them.

"In order now that others, less experienced, may be able to even make themselves understood through the apparatus, the inventor has fixed at the side of the same a small, yet, according to his explanation, entirely sufficient arrangement, whose speed of communication indeed is not so great as that of the more recent telegraphs, but which works very surely, and assumes no especial skill in the person working it. We would call the attention of gentlemen busying themselves with physics to the fact that the inventor now has this interesting apparatus manufactured for sale under his supervision (the principal [important] parts he makes himself), and the same can be had of him directly or through the instrument maker, Wilhelm Albert, at Frankfort-on-the-Main, in two qualities, differing only in outward finish, at 14 and 21 florins, respectively (Böttger's Polytechn. Notizblatt, 1863, No. 15)."

Reis Improved Apparatus.

Die Fortschritte der Physik, Berlin, 1863, p. 96.
Ph. Reis Improved Telephone (Dingler, CLXIX., 399).

"Herr Reis is said to have improved, quite essentially, his telephone. With the former instrument, experimentation was possible at the hands of the inventor himself, only.

"The instrument (to be had at Albert's, in Frankfurt-a-M, for 14-21 fl.) has now, it is reported, a shape more pleasing to the eye, and can be operated easily by any one. At a distance of 300 feet tunes were reproduced far more distinctly than ever before. The scales are reproduced with peculiar precision. The experimenters were able even to communicate words, only such, however, as had been already often heard by them."

Gartenlaube Reis Improved Apparatus.
(The "Gartenlaube," No. 51, December, 1863.)
The Musical Telegraph.

"The surprising results in telegraphing have often excited the question whether it may not be possible to communicate the language of sound itself to a distance. The trials made in this direction had till now produced no satisfactory results, because the vibrations of sound-conducting bodies soon diminish so much in force that they are no more perceptible for our senses.

"People, perhaps, had already thought of a reproduction of sound at certain distances with the aid of the electric current, but those who have been the best fitted to attack the question

by their knowledge and resources, were the ones who doubted the most of a practical solution of that question. Those who are but superficially acquainted with natural science do not see the many difficulties this problem offers, if they are at all acquainted with it. Thus, about eleven years ago, a young man, Mr. Philip Reis, at present teacher of natural science at the Garnier Institute for Boys at Friedrichsdorf, near Homburg, had the hardihood to work at the solution of this problem. But soon he was obliged to desist from it because his very first effort seemed to convince him of the impossibility of a solution. Later, however, after further studies and many experiments, he saw that his first effort was but a rudimentary one, and by no means convincing. However, he did not recommence to attack the question seriously for some time, not feeling himself strong enough to vanquish the obstacles on his road, although he never banished his early idea entirely from his thoughts.

"How can a single instrument reproduce simultaneously 'the combined effects of all the organs active in human speech?' This seemed to him the chief question. Later he put this question more methodically: 'How does our ear perceive the composite vibrations of all the organs of speech acting at the same time?' or, expressed more generally, 'How do we perceive the vibrations of several bodies sounding simultaneously?'

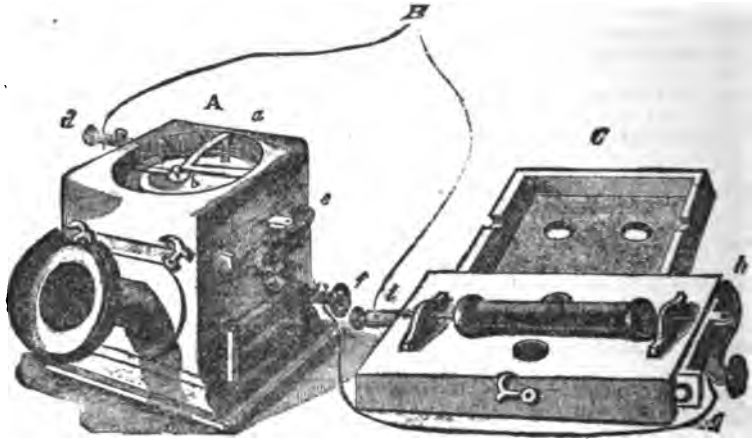
"If we throw a stone into quiet water there are produced on the surface uniform waves which progress symmetrically outward; the further they go the weaker they become, till they finally disappear.

lea, in which the auditory nerves terminate. The latter are excited and produce the *sensation of sound*.

"Now, if the waves of vibration follow regularly and with a certain swiftness (sixteen in the second at least), we shall have the sensation of a musical *tone*. The latter is the *higher* the quicker the condensations follow each other, and the louder the *stronger* or higher the waves rise, as it were.

"Our ear cannot perceive anything except condensations and rarefactions, wave crests and wave hollows. And, nevertheless, we receive the most varied auditory impressions, we distinguish the sound of the voices, we hear at the same time in quite different directions and can distinguish the different sources; nay, in a complete large orchestra, each of the numerous instruments is specially noticed by its peculiar sound, so that we decompose at every moment the total impression into its several parts according to the height and depth, strength and weakness, or according to the timbre (or quality) [Klangfarbe].

"Referring to our simile, this is about the same as if we throw two or more stones at different places into a calm pond. The wave lines cross each other, strengthen each other at some points, weaken each other at others, and the surface has a ruffled, hillocked aspect. But, nevertheless, our eye can detect the different systems of rings, and can trace them back to their several causes. If we succeed in transmitting with the galvanic current the oscillations of a sounding body to a distance, so that there another body is put to equally rapid and, in respect to each other, equally strong oscil-



"It is quite similar with that what we call sound and tone. A body made to vibrate through any impulse affects the surrounding air, and causes waves in it, which follow each other at the same rate as the vibrations of the body. As those rings on the water consist in swellings and depressions, so also the vibrations of the air consist of alternate condensations and rarefactions. If they reach our ear, every condensation presses the tympanum towards the interior of the cavity, and puts in motion the adjacent group of small bones which communicates the motion to the liquid of the cochlations, the problem of 'Telephoning' is solved.

"For then exactly the same phenomena of waves are called forth on the distant points as the ear receives at the place of origin; therefore they also must make the same impression. The ear will distinguish at the distant points, not only the single tones, according to their varying height and depth, but also to the proportionate force of the vibrations, and not only single melodies, but the performance of a whole orchestra; yes, even speech must be heard at the same time in places very distant

from each other. Mr. Reis was the first one to prove by experiments the possibility of solving this problem. He has succeeded in constructing an apparatus to which he gives the name *Telephone*, and which enables one to reproduce tones, with the aid of electricity, at any given distance. Already, in October, 1861, he made rather successful experiments with a very simple, rudely made apparatus, before a numerous audience at Frankfort. On July 4 of the present year he presented an essentially improved apparatus at an assembly of the 'Physical Union,' which transmitted by closed doors and windows a melody sung moderately loud, to a distance of about three hundred feet, so that it could *be heard plainly*.

"In order to give an opportunity to larger circles, especially to scientific men, to convince themselves of the efficiency of this essentially improved apparatus, Prof. Böttger, of Frankfort-a-M., made lately (at an assembly of German physicists and doctors in Stettin, in the sectional meetings for natural sciences) several experiments which certainly would have been crowned with still more success if the hall in which the session was held had been located in a less noisy part of the city and filled with a less numerous audience.

"Although, for the present, we are not so far along as to be able to converse with a friend at a distance of several hundred miles, so much at least is certain, that with the aid of the telephone songs of all kinds, melodies, especially in the middle registers, can be reproduced most clearly at unlimited distances. These wonderful results are obtained with the following simple apparatus, which we show here in one fourth of its size.

"A small box A (the telephone proper), a kind of hollow cube has a mouthpiece S on the front side, and a somewhat smaller opening on the upper side of the box. The latter is closed with a fine membrane (skin from the intestines of a hog) tightly stretched. A narrow strip of platina *m*, connected with the screw post *d*, touches directly the membrane on its centre; a slender platina point *k*, attached to the angle *a b*, touches the strip of platina which rests on the membrane. If one sings into the mouthpiece S (by filling the same entirely with the mouth) the thin membrane vibrates and the attached platina strip receives likewise a vibrating motion so that it is alternately pressed against and leaves the platina point *k*.

"From the binding post *d* which communicates with the platina strip resting on the membrane a conducting wire is connected with one of the poles of a galvanic battery B (about three to four six-inch Bunsen elements), and then the electricity is led through a wire attached to the second pole of the battery to the distant station C; there at *i* it passes through a coil *l l* formed of copper wire covered with silk thread, then back again to screw *f*, and there to the platina point *k*. At every vibration of the membfane an interruption of the electric current [Unterbrechung des electrischen Stromes] takes place by the platina point parting from the platina strip.

"Within the wire coil at station C is a thin iron wire (a strong knitting needle) which is about ten inches long, and which with its two ends projecting out of the coil for about 2 inches, each rests on two bridges of a sounding box. This is the *reproducing* apparatus.

"At every interruption of the current [Unterbrechung des Stromes] in the coil the iron rod is made to vibrate. If the motions follow with a certain rapidity they produce a tone which is rendered audible by the sounding box. As the rate of the interruptions depends on the pitch of the tone that has been sung into the mouthpiece, the same tone is sounded with the same pitch from the sounding box. The length of the circuit has no influence upon this. It is true the electric current loses force the farther it goes, but there is no reason why relays should not be employed, the same as in telegraphing, and with their aid any number of reproducing apparatuses be set into simultaneous vibrations. Mr. Reis has endeavored to give to his improved apparatus a form which should also be pleasing to the eye, so that it might fill worthily its place in any physical laboratory. He has applied, moreover, to the side of the telephone, as well as to the reproducing apparatus, a small telegraph arrangement, which is a very good addition for convenient experimenting. (It is indicated in the drawing by the letters *e f h g*). By alternately opening and closing the circuit with the key *e* or *h* the most varied signals may be given after mutual agreement; for instance, if one is ready for singing; if everything has been understood; whether one should stop singing or commence anew, etc.

"Mr. Reis himself manufactures the principal parts of the telephone, for which no small amount of physical knowledge and experience is necessary. The mechanician, Wilhelm Albert, at Frankfort, is charged with manufacturing the less important parts and the external outfit, as well as with the sale of the instrument at a low price."

KUHN'S DESCRIPTION OF REIS.

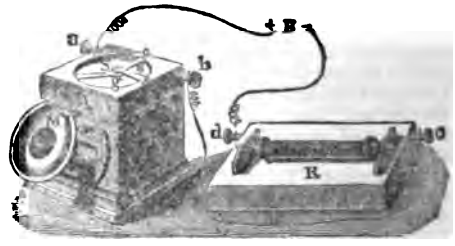
Handbuch der Angewandten Elektricitätslehre, Von Karl Kuhn, 1865, pp. *1017–1021*.

"The experiments made by Reis in Frankfurt-a-M, on the 26th October, 1861, have proved, however, that when the breaks of the current [Stromunterbrechungen] follow each other almost continuously and very quickly in a coil provided with a thin iron core, the iron wire can enter into longitudinal vibrations, and in this way be enabled to reproduce sounds of different pitch. An exact reproduction of the sounds does not take place, however, but only an imitation; for this reason it cannot be questioned here of transverse vibrations [transversal Schwingungen]. A phenomenon [Erscheinung] has otherwise been heard of, which belongs to the afore-mentioned class, in which the intensity and the timbre [Klang] of the sound accompanying it (the phenomenon) depend among other things on the strength of the current [Strom stärke] and on the number of breaks of the same, and in which, as it seems, the pitch of the tones also can vary under different circumstances. We can, however, hardly imagine by what arrangements it could be feasible to coax tones of any given height or depth out of an iron or metal tube split on one side, while it (the tube) is affected by the alternate currents of an induction apparatus the coil

(Rolle) of which surrounds it. Yet the possibility cannot be controverted that the principle of Neef's circuit-breaker (Unterbrecher) might contribute to the solution of the problem in question. It has been employed for local purposes, either with or without modifications, in the study and investigation of acoustic phenomena. Thus Petrina has used the principle of Neef's circuit-breaker [Unterbrecher] for his electric harmonica in this way,—that instead of the Neef hammer a little rod was chosen, the transverse vibrations of which rendered the tone. "There are four little rods of various lengths side by side, the motions of which are checked by means of levers managed by finger keys." That principle was used previously by Dove, in a modified manner, to set strained strings and elastic springs into acoustic vibrations of constant amplitude by means of an electric magnet, and, in this way, to be enabled to investigate constant tones. It appears from Legat's published communications that "the ideas submitted by Ph. Reis of Friedrichsdorf in the Physical Society and in the meetings of the German Hochstift in Frankfurt-a-M, about the reproduction of sounds by means of electricity" referred to arrangements of a similar kind. Legat mentions in his paper all that has been done thus far towards the realization of that project, and we borrow from it that part only which throws some light on the construction of a telegraphic apparatus with which it is said to be possible to produce vibrations and make sounds in any desired manner, and through which the employment of electricity is said to make it feasible to bring forth at any given distance vibrations similar to the first produced ones, and in this way to reproduce at a certain place tones originally produced at another place.

"This apparatus is composed of a transmitter and of a receiver. (See cut *ante*, page 910.)

"The transmitter consists in a conical tube *a b* about 15 cm. long, 10 cm. at the front, 4 cm. at the back opening; the choice of the material as well as a greater length is indifferent; a greater width, on the contrary, is disadvantageous; the surface of the interior must be as smooth as possible. The narrower back opening is closed by a membrane of collodion *o*, and on the middle of the circular surface formed by this membrane rests one end *c* of lever *c d*, the fulcrum of which is held by a support and remains connected with the metallic circuit. This lever, one arm *c e* of which must be considerably longer than *e d*, should be as light as possible so as to follow easily the motions of the membrane, as an uncertain obedience [folgen] on part of lever *c d* would produce imperfect tones at the receiving station. In the state of rest, the contact *d g* is shut and a weak spring *n* holds the lever fast at rest. On the metallic support *f* which is connected with one of the poles of the battery is a spring *g*, with a contact which touches the contact of lever *c d* at *d* and the position of which is regulated by screw *h;* over tube *a b* a disc must be placed which encircles the outer circumference of the tube closely, so that the efficacy of the apparatus may not be impaired through the effect of the air-waves coming round and striking against the rear end. This disc at right angles with longitudinal axis of the tube measures about fifty (?) cm. in diameter The receiver (Fig. 505) consists of an electro-magnet *m m* which rests on a sounding-board, and the coil of which is in connection with the metallic conductors, and with the ground. Opposite the electro-magnet is an armature connected with a lever as long as possible, but light and broad, which latter with the armature, is fastened pendulum-like on the support *k*. Its motions are regulated through screw *l* or spring *o*. "In order to increase the efficacy of the apparatus, this receiver can be placed in one focus of an ellipsoidal enclosing box of suitable size, while the ear of the hearer is placed at the other focus." The working of the two apparatuses (the mode of connection of which is visible in the woodcuts), the transmitter being placed at one station and the receiver at the other, is as follows: By speaking, singing, or the intromission of instrumental sounds into tube *a b*, in consequence of the condensation and rarefaction of the column of air, a motion of the membrane *c* corresponding to these changes is brought about. Lever *c d* follows the motions of the membrane, and opens or closes the circuit, according as a condensation or a rarefaction of the air inside takes place. As a consequence the electro-magnet *m m* (Fig. 505) is correspondingly demagnetized or magnetized, and the armature affixed to it (as well as the armature lever) is set into similar vibrations as the membrane of the transmitter. Through lever *i* connected with the armature, similar vibrations are communicated to the surrounding air and (the increasing effect of the sounding-board helping) the tones so produced finally reach the ear of the listener. In respect to the operations of this apparatus, the author remarks that the receiver does reproduce the exact number of the original vibrations, but that a reproduction of the original intensity has not yet been attained. For that reason, it is added, small differences in the vibrations are appreciated with difficulty, and in the practical experiments made thus far, it was possible to transmit with astonishing faithfulness chords, airs, etc., whilst in reading, speaking, etc., single words were more indistinctly heard. The apparatus just described is said to have been one of the constructions which Reis has used himself in his experiments. The underlying principles might give hopes of a farther improvement of the apparatus, but the telephone which, according to later reports, Reis has finally decided upon, has the disposition represented in Fig. 506, although the principle on which it is founded does not stand quite in harmony with the above-mentioned investigations of Wertheim, for instance:



"The telephone proper A consists of a hollow wooden box provided with a short sound-funnel S, and the upper side of which is open in

the centre and covered over tightly with a delicate membrane. On the middle of the latter a thin platinum disc is fastened, from which on one side a platinum strip establishes circuit connection with the contact of the key at *e*, from which place the metallic connection is effected with one end of the coil of a small electro-magnet provided with a spring armature, whilst the other end is in contact with screw *f*. The reproducing apparatus C set up at the receiving station consists simply of a coil about six inches long formed by winding six layers of copper wire; in the axis of the coil a thin iron wire ten inches long (a knitting needle), protruding out of each end of the coil about two inches, is so disposed that with its bridge-like supports it rests on a sounding-board. By means of screw *i* and of the key at *h g* the coil is thrown into the circuit and the connection of both apparatus is effected in the manner mentioned; a battery being placed at B, the course of the current is easily followed out. It can flow from B through *d c* and *c b* to *e* and *f*, and from here to the receiving station, and at *i* return to the battery, or it can start in the opposite direction according as *d* or *i* forms the starting point of the current. The circuit can be broken at will at each of the two stations by pressing the key lever, and a connection can be established thus in either direction; but the discontinuous currents which are to produce the sounding of the iron wire at C are obtained in this way: By singing or the blowing of instruments towards the sound-funnel S the membrane at A is made to vibrate; if this can be brought about, it will happen, as was demonstrated by the experiments, that the iron wire of the receiver assumes isochronal vibrations, and whenever this is the case, it reproduces the same tones which set the membrane to vibrating at the transmitting stations.

"My own experiments have demonstrated that every melody starting from *c* and embracing the entire extent of an average male voice, when sung into the telephone can be reproduced by the receiver at C. The timbre [Klang] or quality of the sounds thus reproduced is not pleasant—they are almost like the sounds of toy trumpets, at times also like the buzz of a fly caught in a spider's web, and the like; yet the experiments of Reis are certainly interesting enough to challenge attention.

"A reproduction of the words spoken in the telephone with or without variation of pitch was audible at the receiver only in a corresponding noise [entsprechendes Geräusch], while a discriminate perception of single vocal sounds, syllables or words could not be had. According to communications made on this subject by Reis, he has succeeded in reproducing the tones of organ pipes not covered, and those of a piano; in this latter case the transmitter was placed on the sounding-board of the piano."

Catalogue of J. Wilh. Albert, Mechanician at Frankfort-on-the-Main, 1866.

Extract from preface. "All instruments and apparatus will always be constructed according to the latest designs and improvements. In order that the construction may be better understood we have printed herein references where a description can be found as follows:

"*M-P. Müller-Pouillet's Lehrbuch der Physik, vi Auflage.*"

[Other books also named.]

From body of catalogue.

"839. Telephone of Reis for reproduction of tones by electricity with description, 21 fl.

"M-P. Fig. 325–327. Pisco, Akustik, Fig. 60."

"840. The same in simpler design, fl. 14."

"Electricity," by Robert M. Ferguson, William and Robert Chambers, London and Edinburgh, 1867, p. 257.

"The Telephone.—This is an instrument for telegraphing notes of the same pitch. Any noise producing a single vibration of the air, when repeated regularly a certain number of times in a second (not less than thirty-two), produces, as is well known, a musical sound. In Art. 115, we found that when a rod of iron was placed in a coil of insulated wire, and magnetized by a current being sent through the coil, it gave out a distinct tick when it was demagnetised by the stoppage of the current. A person when singing any note causes the air to vibrate so many times per second, the number varying with the pitch of the note he sings, the higher the note the greater being the number of vibrations. If we then, by any means, can get these vibrations to break a closed circuit in which the coil just mentioned is included, the note sung at one station can be reproduced, at least so far as pitch is concerned, at another. Reis's telephone (invented 1861) accomplishes this in the following way:

"A A (Fig. 141) is a hollow wooden box with two round holes in it, one on the top, the other in front. The hole at the top is closed by a piece of bladder S, tightly stretched on a circular frame; a mouthpiece M is attached to the front opening.

"When a person sings in at the mouthpiece, the whole force of his voice is concentrated on the tight membrane, which in consequence vibrates with the voice. A thin strip of platinum is glued to the membrane, and concentrated with the binding screw *a*, in which a wire from the battery B is fixed. A tripod *e f g* rests on the skin. The feet *e* and *f* lie in metal cups on the circular frame over which the skin is stretched. One of them *f* rests in a cup containing mercury, and is connected with the binding screw *b*. The third foot, *g*, consisting of a platinum point, lies on the circular end of the strip of platinum just mentioned. This point, being placed on the centre of the oscillating membrane, acts like a hopper, and hops up and down with it. It is easy to understand how, for every vibration of the membrane, the hopper will be thrown up for the instant from connection with its support, and how the close circuit is thus broken at every vibration. The receiving apparatus R consists of a coil of wire placed in circuit, enclosing an iron wire, both being fixed on a sounding box. The connections of the various parts of the circuit are easily learned from the figure. Suppose a person to sing a note at the mouthpiece which produces three hundred vibrations a second, the circuit is broken at the bladder three hundred times, and the iron wire ticking at this rate gives out a note of the same pitch. The note is weak, and in quality resembles the sound of a toy trumpet. Dr. Wright uses a receiving apparatus of the following kind: The

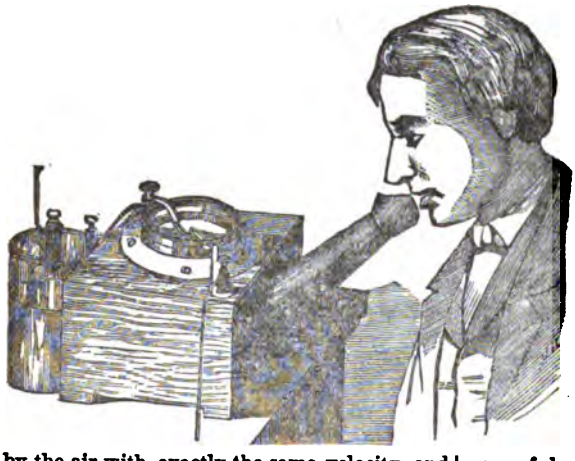
line current is made to pass through the primary coil of a small induction coil. In the secondary circuit he places two sheets of paper, silvered on one side, back to back, so as to act as a condenser. Each current that comes from the sending apparatus produces a current in the secondary circuit which charges and discharges the condenser, each discharge being accompanied by a sound like the sharp tap of a small hammer. The musical notes are rendered by these electric discharges, and are loud enough to be heard in a large hall."

From *The Manufacturer and Builder*, A Monthly Journal devoted to the Advancement and Diffusion of Practical Science, New York, May, 1869, Vol. I., No. 5, pp. 129, 130.

The Telephone, by Dr. Van der Weyde.

"One of the most remarkable recent inventions connected with telegraphy is the telephone, an instrument which transmits directly the pitch of the sound by means of a telegraph wire,—either an air wire or submarine cable,—so that, for instance, when the operator at one end of the wire sings or plays on an instrument any tune, as 'Yankee Doodle' or 'Hail Columbia,' it will be heard and distinguished plainly at the other end. This invention may, in its present state, have no direct practical application, but be a mere scientific, although highly interesting, curiosity; but who can say that it does not contain the germ of a new method of working the telegraph, or some other useful practical purpose.

"The telephone is not the result of an accidental discovery, but of a thorough study of the laws of electro-magnetism and of sound. It is founded on the fact that the difference in pitch of different tones is caused by different velocities of vibrations of the elastic sounding body; which vibrations are transmitted to and by the air with exactly the same velocity, and from the air may be communicated to a properly stretched membrane, like a piece of bladder or very thin sheet of india rubber, stretched like a drumhead, which these also will vibrate with exactly the same velocity as the air and the original sounding body, be it the human voice, organ pipe, string or any musical instrument. If, now, at the centre of this little drumhead there be attached a small disc of some metal not easily burned by electric currents,—for instance, platinum,—while at the same time a platinum point may, by means of a screw, be so adjusted as to come very nearly in contact with this small platinum disc, it is clear that, when the membrane is put in vibration, a succession of contacts between the disc and point will be produced, of which the number in each second will exactly correspond with the number of vibrations in each second of the sounding body or the tone produced by it. That part of the apparatus which serves to send off the tune or melody is represented in the illustration, Fig. 2. It consists simply of a square wooden box, provided at the side with a kind of mouthpiece similar to that of a speaking tube, and at the top with an opening, over which the membrane just mentioned has been



stretched. The small piece of platinum attached to the centre of this little drumhead is, by means of a very flexible strip of some metal that conducts well, attached to one pole of the galvanic battery, of which only one cup is represented in the figure, although for a long wire several cups will, of course, be required. The reason why this connection near the platinum disc is a flat, thin and flexible strip is, that any rigidity would interfere with the freedom of vibration of the membrane to which it is attached. The point coming in contact with this small vibrating disc is connected with the ground wire, the other pole of the battery with the air wire or submarine cable. It is clear, from this explanation, that at every contact of the platinum point a wave of electricity will be sent over the wire, and as many waves in a second as there are contacts; and as there are as many contacts as there are vibrations in every second, the number of electric waves will be always exactly equal to the number of vibrations corresponding with the pitch of

each tone, be it fifty, one hundred, two hundred or five hundred in every second.

"The instrument in which this succession of waves is made audible at the other end of the telegraph wire is founded on the fact—first investigated by Professor Henry, of the Smithsonian Institute at Washington—that iron bars, when becoming magnetic by means of electric currents passing around them, become slightly elongated, and at the interruption of the current are at once restored to their original length. It is represented in the cut, Fig. 3, and consists of an elongated wooden box, of which the top is made of thin pine wood, similar to the sounding-board of a stringed musical instrument, to which are attached two bridges carrying long pieces of moderately thick and very soft iron wire, which, for nearly their whole length are surrounded by a coil similar to the coil of the electro-magnets used in telegraphing. One end of this coil is attached to the telegraph wire, the other to the ground wire, as represented in the figure. At every instant that a contact is established at the station where the sound is produced, and a current wave thus transmitted, these wires will become magnetic, and consequently elongated; and they will be shortened again at every interruption of the current. And as these currents and interruptions succeed each other with the same velocity as the sound vibrations, the elongations and shortenings of the magnetized iron wires will succeed each other with exactly the same velocity, and consequently they will be thrown into a state of longitudinal vibrations corresponding with the original musical tone, which vibrations will then be communicated to the sounding-board in exactly the same manner as is the case with the vibrations of the strings in all stringed instruments, thus becoming more audible at the receiving station.

"It is clear, from the foregoing explanations, that no quality of tone can be transmitted. Much less can articulate words be sent, notwithstanding the enthusiastic prediction of some persons, who, when they first beheld this apparatus in operation, exclaimed that now we would talk directly through the wire. It is from its nature able to transmit only pitch and rhythm,—consequently melody, and nothing more. No harmony nor different degrees of strength or other qualities of tone can be transmitted. The receiving instrument, in fact, sings the melodies transmitted, as it were, with its own voice, resembling the humming of an insect, regardless of the quality of the tone which produces the original tune at the other end of the wire.

"This instrument is a German invention, and was first exhibited in New York, at the Polytechnic Association of the American Institute, by Dr. Van der Weyde. The original sounds were produced at the farther extremity of the large building (the Cooper Institute), totally out of hearing of the association; and the receiving instrument, standing on the table of the lecture room, produced with its own rather nasal twang the different tunes sung at the other end of the line, rather weakly, it is true, because of the weak battery used, but very distinctly and correctly."

Das Buch der Erfindungen, Gewerbe und Industrien, Leipzig, 1872.

[Book of Inventions, Trades and Industries.]

Telephony.

"It sounds more than wonderful when the possibility is asserted of carrying on a conversation with another person at a distance of hundreds of miles through the electric telegraph wire, so that he can hear with his bodily ear our voice with all its peculiarities, that he should hear the melody we are singing, and that he should feel, when we laugh, precisely as if he was standing alongside of us.

"But this possibility has, to a certain degree, already become to be a fact.

"The master teacher, Reis, in Frankfurt-on-the-Main, had the good idea to make of the electro-magnetic telegraph 'which has heretofore been an eye reaching over many lands,' an ear which should reach full as far.

"In this strange organ of hearing, the electro-magnetic apparatus takes the part of those bones of the ear which carry the commotion from one membrane to another, and the only difference between the cavity of the ear and the union of two such stations is, that in one case we are made sensible of the striking of the sound-waves against the ear drum by means of a lever, and in the other by means of the commotion of an iron rod. * * *

"As early as October, 1861, Reis had made successful trials with his apparatus. A melody sung with a medium loud voice was reproduced perfectly at a distance of one hundred metres. Although the problem of 'far speaking' may so far only be considered solved in theory, and the apparatus has not yet that perfection which would make it possible for a speaker to interest large gatherings at numerous distant parts of the earth, it is nevertheless interesting enough to be described in this place."

From *Scientific American*, New York, March 4, 1876.

The Invention of the Telephone, by P. H. Van der Weyde, M. D.

"In connection with Mr. Gray's application of the telephone to the simultaneous transmission of several different telegraphic messages over one wire at the same time, and his paper read before the American Electrical Society (published on p. 92, *Scientific American*, Supplement for Feb. 5), it may be interesting for the readers of this paper to obtain some information in regard to the invention of the telephone, by Reuss. As mentioned in the article above referred to, Page and Henry observed that, by rapid magnetization and demagnetization, iron could be put into vibrations isochronic with the interruptions of the current; and later, Marian experimented extensively in this direction, while Wertheim made a thorough investigation of the subject, which induced Reuss, of Friedrichsdorf, near Hamburg, Germany, to apply this principle to the transmission of musical tones and melodies by telegraph; and he contrived an apparatus which we represent in the engravings.

"The telephone of Reuss consists of two parts, the transmitting and receiving instrument. Fig. I represents the former, and is

placed at the locality where the music is produced; Fig. II, the latter, is placed at the station where the music is to be heard, which may be at a distance of 100, 200 or more miles; in fact, as far as the battery used can carry the current; while the two instruments are connected with the battery and the telegraph wire in the usual manner. One pole of the battery is connected with the ground plate, the other

with the screw, marked 2 in our Fig. I., and thence over a thin copper strip *n*, with the platinum disc *o*, attached to the centre of the membrane stretched in the large top opening of the hollow and empty box K, intended to receive and strengthen the vibrations of the air, produced by singing before the funnel-shaped short tube attached to the opening in T. Over the platinum disc *c*, attached to the elastic membrane, is a platinum point attached to the arms *b c* and *b* K, while a set screw brings this point in slight contact with the platinum disc mentioned. A part of the box is represented as broken and removed, in order to show the internal construction. The strip *a b c*, is connected with the end *s*, of the switch *t s*, and the screw connection, 1, at the lower right hand corner, and also through the telegraph wire, to the instrument Fig. II, at the receiving station, which may be situated at a distance of many miles. Here the current enters by the screw connection 3, and passes through the spiral *g*, surrounding the soft iron wire *d d*, of the thickness of a knitting needle, and leaves the apparatus at the screw connection 4, whence it obtains access to the ground plate, and so passes, through the earth, back to the battery. The spiral and iron wire *d d*, is supported on a hollow box B, of thin board; while a cover D, of the same material is placed on top, all intended to strengthen the sound produced by the vibrations which the interruption of the current caused in the iron wire *d d*, so as to make these vibrations more audible by giving a large vibratory surface, in the same way that the sounding-board of a pianoforte strengthens the vibrations of the air caused by the strings, and makes a very weak sound quite powerful.

"If a flute be played before the opening T, or if a voice be singing there, the vibration of the air inside the box K causes the membrane *m* to vibrate synchronically, and this causes the platinum disc *o* to move up and down with corresponding frequency. At every downward motion the contact of this disc with the platinum point, under *b*, is broken, and therefore the current is interrupted as rapidly as the vibrations occur. Let, for instance, the note C be sounded; this note makes sixty-four full vibrations in a second, and we have, therefore sixty-four interruptions of the electric current, which interruption will at once be transmitted through the telegraph lines to the receiving instrument, and put the bar *d d*, into exactly similar vibrations, making the very same tone C audible, and so on for all other rates of vibration. It is clear that in this way not only the rhythm of music can be transmitted (and this can be done by the ordinary telegraph), but the very tones, as well as the relative durations and the rests between them, can thus be sent, making a full and complete melody. The switch *t s*, Fig. I, is intended, in connection with a similar one in Fig. II, to communicate between the stations, with the help of the electro-magnet E, to ascertain if station, Fig II, is ready to received the melodies; then it gives the signal, by manipulating the switch, which is received by the attraction of the armature A, the latter arrangement being a simple Morse apparatus attached to the telephone.

Professor Heisler, in his *Lehrbuch der Technischen Physik* (3d edition, Vienna, 1866), says, in regard to this instrument: "The telephone is still in its infancy; however, by the use of batteries of proper strength, it already transmits, not only single musical tones, but even the most intricate melodies, sung at one end of the line to the other, situated at a great distance, and makes them perceptible there with all the desirable distinctness." After reading this account in 1868, I had two such telephones constructed, and exhibited them at the meeting of the Polytechnic Club of the American Institute. The original sounds were produced at the further extremity of the large building (the Cooper Institute), totally out of hearing of the Association, and the receiving instrument, standing on the table in the lecture room, produced (with a peculiar and rather nasal twang) the different tunes sung into the box K, at the other end of the line; not powerfully, it is true, but very distinctly and correctly. In the succeeding summer I improved the form of the box K, so as to produce a more powerful vibration of the membrane, by means of reflections effected by curving the sides; I also improved the receiving instrument by introducing several iron wires in the coil, so as to produce a stronger vibration. I submitted these, with some other improvements, to the meeting of the American Association for the Advancement of Science, and on that occasion (now seven years ago) expressed the opinion that the instrument contained the germ of a new method of working the electric telegraph, and would undoubtedly lead to further improvements in this branch of science, needing only that a competent person give it his undivided attention, so as to develop out of it all that it is evidently capable of producing.

"Before leaving this subject, I wish to draw special attention to the fact that the merits of this invention consist chiefly in the absence of musical instruments, tuning forks, or their equivalents, for producing the tones; any instrument will do,—flute, violin, human voice, etc. If the aërial vibrations are only connected into the box, Fig. I, the apparatus will send the pitch as well as the duration of the different tones, with the rests between, therefore not only transmitting perfect rhythm, but a complete melody, with its long and short notes. The two parts of the apparatus may even be connected each to a separate pianoforte; and if this were done in a proper manner, a melody played on the pianoforte connected with the transmitting instrument, Fig. I, would be heard in the

pianoforte at a great distance connected with the receiving instrument, Fig. II.

The defendants in these actions all alleged that Bell's invention or discovery, mentioned in his Letters Patent were not new or original, but had been, prior to his alleged invention or discovery, invented or discovered by other persons to whom Letters Patent had been issued; among whom were Elisha Gray, to whom several patents have been issued; Cromwell Fleetwood Varley, to whom English Patents had been issued, and others a long list of whom is mentioned in the answer of the Clay Commercial Telephone Company

In this court it was claimed, and the charge made in briefs for the Overland and Drawbaugh Companies, that Bell's application, as originally filed in the Patent Office, did not contain his present fourth claim or any description of the Variable Resistance Method, and that all which now appears in his specification on that subject, including the fourth claim, were surreptitiously interpolated afterwards. Bell's application was filed Feb. 14, 1876, and during the same day, Elisha Gray filed a caveat in which he claimed as his invention the art of transmitting vocal sounds telegraphically through an electric circuit. The charge was made in the printed brief of Mr. Hill (as stated in the opinion in this case) that "Mr. Bell's attorneys had an underground railroad in operation between their office and Examiner Wilbur's room in the Patent Office, by which they were enabled to have unlawful and guilty knowledge of Gray's papers as soon as they were filed in the Patent Office," and "that an important invention and a claim therefor were bodily interpolated into Bell's specification between February 14, 1876, and February 19, 1876," in consequence of knowledge of Gray's caveat improperly obtained. The following is a copy of Gray's said caveat referred to in said charge:

UNITED STATES PATENT OFFICE,

ELISHA GRAY, OF CHICAGO, ILLINOIS.

Transmitting Vocal Sounds Telegraphically.

Gray's Caveat.

Filed February 14, 1876.

"*To all whom it may concern:*

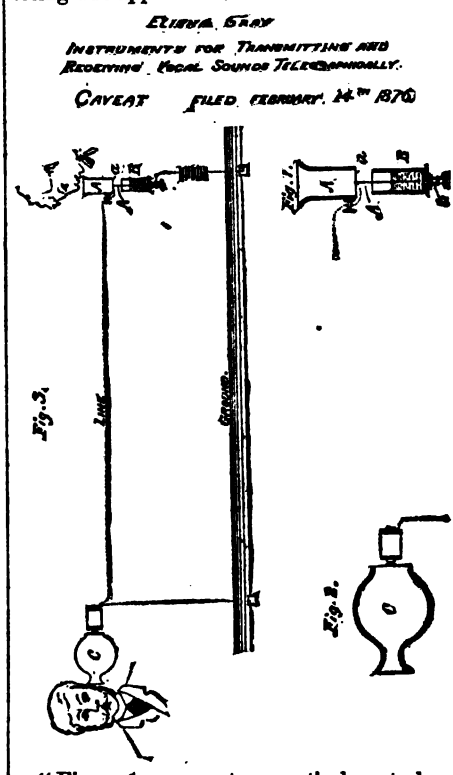
"Be it known that I, ELISHA GRAY, of Chicago, in the county of Cook, and State of Illinois, have invented a new *Art of transmitting vocal sounds telegraphically*, of which the following is a specification:

"It is the object of my invention to transmit the tones of the human voice through a telegraphic circuit, and reproduce them at the receiving end of the line, so that actual conversations can be carried on by persons at long distances apart.

"I have invented and patented methods of transmitting musical impressions or sounds telegraphically, and my present invention is based upon a modification of the principle of said invention, which is set forth and described in Letters-Patent of the United States, granted to me July 27, 1875, respectively numbered 166,095, and 166,096, and also in an application for Letters-Patent of the United States, filed by me February 23, 1875.

"To attain the objects of my invention, I devised an instrument capable of vibrating responsively to all the tones of the human voice, and by which they are rendered audible.

"In the accompanying drawings I have shown an apparatus embodying my improvements, in the best way now known to me, but I contemplate various other applications, and also changes in the details of construction of the apparatus, some of which would obviously suggest themselves to a skillful electrician, or a person versed in the science of acoustics, on seeing this application.



"Figure 1 represents a vertical central section through the transmitting instrument.

"Figure 2, a similar section through the receiver; and figure 3 a diagram representing the whole apparatus.

"My present belief is, that the most effective method of providing an apparatus capable of responding to the various tones of the human voice is a tympanum, drum or diaphragm, stretched across one end of the chamber, carrying an apparatus for producing fluctuations in the potential of the electric current, and consequently varying in its power.

"In the drawings, the person transmitting sounds is shown as talking into a box or chamber, A, across the outer end of which is stretched a diaphragm *a* of some thin substance, such as parchment or gold beaters' skin, capable of responding to all the vibrations of the human voice, whether simple or complex. Attached to this diaphragm is a light metal

rod A, or other suitable conductor of electricity, which extends into a vessel B, made of glass or other insulating material, having its lower end closed by a plug, which may be of metal, or through which passes a conductor *b*, forming part of the circuit.

"This vessel is filled with some liquid possessing high resistance, such, for instance, as water, so that the vibrations of the plunger or rod A, which does not quite touch the conductor *b*, will cause variations in resistance, and, consequently, in the potential of the current passing through the rod A.

"Owing to this construction, the resistance varies constantly, in response to the vibrations of the diaphragm, which, although irregular, not only in their amplitude but in rapidity, are nevertheless transmitted, and can, consequently, be transmitted through a single rod, which could not be done with a positive make and break of the circuit employed, or where contact points are used.

"I contemplate, however, the use of a series of diaphragms in a common vocalizing chamber, each diaphragm carrying an independent rod, and responding to a vibration of different rapidity and intensity; in which case contact points mounted on other diaphragms may be employed.

"The vibrations thus imparted are transmitted through an electric circuit to the receiving station, in which circuit is included an electro-magnet of ordinary construction, acting upon a diaphragm to which is attached a piece of soft iron, and which diaphragm is stretched across a receiving vocalizing chamber *c*, somewhat similar to the corresponding vocalizing chamber A.

"The diaphragm at the receiving end of the line is thus thrown into vibration corresponding with those at the transmitting end, and audible sounds or words are produced.

"The obvious practical application of my improvement will be to enable persons at a distance to converse with each other through a telegraphic circuit, just as they now do in each other's presence, or through a speaking tube.

"I claim, as my invention, the art of transmitting vocal sounds or conversations telegraphically through an electric circuit."

Witnesses: ELISHA GRAY.
WILLIAM J. PEYTON,
WILLIAM D. BALDWIN.

One item of evidence, on which the charge of the fraudulent interpolation into Bell's Specifications above mentioned is rested, is a paper handed by Bell to George Brown of Toronto, describing his invention which was intended to be used in England to secure a British Patent in which what is now claimed to be an interpolation in the American application is not to be found. The following is a copy of such paper:

*Bell's George-Brown Specification, No. V.**

UNITED STATES PATENT OFFICE.

[ALEXANDER GRAHAM BELL, of Salem, Assignor to himself and Thomas Sanders, of Haverhill, and Gardiner G. Hubbard, of Cambridge, Massachusetts.]

To all whom it may concern:

Be it known that I, ALEXANDER GRAHAM BELL, of Salem, Massachusetts, have invented certain new and useful improvements in telegraphy, of which the following is a specification:

In [another application for] letters patent granted to me [in] April 6th, 1875 (No. 161,739), I have described a method of and apparatus for transmitting two or more telegraphic signals simultaneously along a single wire by the employment of transmitting instruments, each of which occasions a succession of electrical impulses differing in rate from the others; and of receiving instruments each tuned to a pitch at which it will be put in vibration to produce its fundamental tone by one only of the transmitting instruments; and of vibratory circuit-breakers operating to convert the vibratory movement of the receiving instrument into a permanent make or break (as the case may be) of a local circuit in which is placed a Morse sounder register, or other telegraphic apparatus. I have also therein described a form of autograph telegraph based upon the action of the above-mentioned instruments.

In illustration of my method of multiple telegraphy I have shown in the [application] PATENT aforesaid, as one form of transmitting instrument an electro-magnet having a steel spring armature which is kept in vibration by the action of a local battery. This armature in vibrating makes and breaks the main circuit, producing an intermittent current upon the line-wire. I have found, however, that upon this plan the limit to the number of signals that can be sent simultaneously over the same circuit is very speedily reached; for when a number of transmitting instruments, having different rates of vibration, are simultaneously making and breaking the same circuit, the effect upon the main line is practically equivalent to one continuous current.

My present invention consists in the employment of a vibratory or undulat[ing]ORY current of electricity in place of a merely intermittent one; and of a method of, and apparatus for, producing electrical undulations upon the line-wire. The advantages [claimed for the undulatory current over the] I CLAIM TO DERIVE FROM THE USE OF AN UNDULATORY CURRENT IN PLACE OF A merely intermittent one, are—

1. That a very much larger number of signals can be transmitted simultaneously over the same circuit.

2. That a closed circuit and single main battery may be employed.

3. That communication in both directions is established without the necessity of using special induction-coils.

4. And that—as the circuit is never broken—a spark-arrester becomes unnecessary.

It has long been known that when a permanent magnet is caused to approach the pole of an electro-magnet a current of electricity is induced in the coils of the latter, and that when it is made to recede a current of opposite polarity to the first appears upon the wire. When, therefore, a permanent magnet is caused to vibrate in front of the pole of an electro-magnet, an undulatory current of electricity is induced in the coils of the electro-magnet, the undula-

*NOTE.—Accompanying this were sketches of first seven figures in this Vol. and to which reference is made by letters and figures. Ed.

Words in square brackets [ ] erased in original.

tions of which correspond in rate of succession to the vibrations of the magnet, in polarity to the direction of its motion, and in intensity to the amplitude of its vibration. That the difference between an undulatory and an intermittent current may be more clearly understood, I shall describe the condition of the electrical current when THE ATTEMPT IS MADE TO TRANSMIT two musical notes [of different pitch are] simultaneously [transmitted along the same wire] FIRST UPON THE ONE PLAN AND THEN UPON THE OTHER. Let the interval between the two sounds be a major third. Then their rates of vibration are in the ratio of 4 : 5.

Now, when the intermittent current is used the circuit is made and broken four times by one TRANSMITTING instrument in the same time that five makes and breaks are caused by the other [instrument].

A and B (Figs. I, II, and III) represent the intermittent currents produced; four impulses of A being made in the same time as five impulses of B. *c c c*, etc., show where and for how long time the circuit is made, and *d d d*, etc., indicate the duration of the breaks of the circuit.

The line A + B shows the total effect upon the current when the transmitting instruments for A and B are caused [to] simultaneously to make and break the same circuit. The resultant effect depends very much upon the duration of the make relatively to the break. In Fig. I the rate is as 1: 4; in Fig. II as 1: 2; and in Fig. III the makes and breaks are of equal duration.

The combined effect A + B (Fig. III), is very nearly equivalent to a continuous current.

When many transmitting instruments of different [pitch] RATES OF VIBRATION are simultaneously making and breaking the same circuit, the current upon the main line [loses altogether its intermittent character and] becomes for all practical purposes continuous.

[But now] next consider the effect when an undulatory current is employed.

Electrical undulations induced by the vibration of a body capable of inductive action can be represented graphically without error by the same sinusoidal curve, which express the vibration of the inducing body itself, and the effect of its vibration upon the air.

For, as above stated, the rate of oscillation in the electrical current corresponds to the rate of vibration of the inducing body; that is, to the pitch of the sound produced; the intensity of the current varies with the amplitude of vibration; that is, with the loudness of the sound; and the polarity of the current corresponds to the direction of the motion of the vibrating body; that is, to the condensations and rarefactions of air produced by the vibration. Hence the sinusoidal curve A or B* (Fig. IV) represents graphically the electrical undulations induced in a circuit by the vibration of a body capable of inductive action.

The horizontal line (*a b d f*) represents the zero of current; the elevations (*c c c*) indicate impulses of positive electricity; the depressions (*e e e*) show impulses of negative electricity; the vertical distance (*cd* or *ef*) of any [point on] PORTION OF the curve from the zero line expresses the intensity of the positive or negative impulse at the part OBSERVED; and the horizontal distance (*a a*) indicates the duration of the electrical oscillation.

The vibrations represented by the sinusoidal curves A and B (Fig. IV) are in the ratio aforesaid, of 4: 5; that is, four oscillations of A are made in the same time as five oscillations of B.

The combined effect of A and B, when induced simultaneously on the same circuit, is expressed by the curves A + B (Fig. IV), which is the algebraical sum of the sinusoidal curve and B. This curve (A + B) also indicates the actual motion of the air when the two musical notes considered are sounded simultaneously.

Thus, when electrical undulations of different rates are simultaneously induced in the same circuit, an effect is produced exactly analogous to that occasioned in the air by the vibration of the inducing bodies.

Hence the coexistence [of] UPON a telegraphic circuit of electrical vibrations of different pitch is manifested—not by the obliteration of the vibratory character of the current, but by peculiarities in the shapes of the electrical undulations; or, in other words, by peculiarities in the shapes of the curves which represent those undulations.

[Undulatory currents of electricity may be produced in many other ways than that described above, but all the methods depend for effect upon the vibration or motion of bodies capable of inductive action.]

There are many [other] ways of producing undulatory currents of electricity, but all of them depend for effect upon the vibration or motion of bodies capable of inductive action. A few of the methods that may be employed I shall here specify.*

[I shall specify a few of the methods that may be used to produce the effect.]

When a wire through which a continuous current of electricity is passing is caused to vibrate in the neighborhood of another wire an undulatory current of electricity is induced in the latter.

When a cylinder upon which are arranged bar-magnets is made to rotate in front of the pole of an electro-magnet an undulatory current is induced in the coils of the electro-magnet.

Undulations may also be caused in a continuous voltaic current by the vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies.

In illustration of the method of creating electrical undulations I shall show and describe one form of apparatus for producing the effect.

I prefer to employ for this purpose an electro-magnet (A, Fig. 5) having a coil upon only one of its legs (6). A steel spring armature (*c*) is firmly clamped by one extremity to the uncovered leg (*d*) of the magnet, and its free end is allowed to project above the pole of the covered leg. The armature (*c*) can be set in vibration in a variety of ways (one of which is by wind), and in vibrating it yields a musical note of a certain definite pitch.

When the instrument (A) is placed in a

Words in small capitals interlined in original.
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* "A or B" interlined in original.

*This paragraph (four lines) interlined in original.
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voltaic circuit (*g b e f g*) the armature (*c*) becomes magnetic, and the polarity of its free end is opposed to that of the magnet underneath. So long as the armature (*c*) remains at rest no effect is produced upon the voltaic current, but the moment it is set in vibration to produce its musical note a powerful inductive action takes place and electrical undulations traverse the circuit (*g b e f g*). The vibratory current passing through the coils of the distant electro-magnet (*f*) causes vibration in its armature (*h*), when the armatures (*c h*) of the two instruments (A I) are normally in unison with one another; but the armature (*h*) is unaffected by the passage of the undulatory current when the pitches of the two instruments (A I) are different [from one another].

A number of instruments may be placed upon a telegraphic circuit (as in Fig. VI). When the armature of any one of the instruments is set in vibration all the other instruments on the circuit which are in unison with it respond, but those which have normally a different rate of vibration remain silent. Thus if A (Fig. VI) is set in vibration, the armatures of A^1 and A^2 will vibrate also, but all the others on the circuit remain still. So also if B^1 is caused to emit its musical note the instruments B B^2 respond. They continue sounding so long as the mechanical vibration of B^1 is continued, but become silent the moment its motion stops. The duration of the sound may be made to signify the dot or dash of the Morse alphabet, and thus a telegraphic despatch can be transmitted by alternately interrupting and renewing the sound.

When two or more instruments of different pitch are simultaneously caused to vibrate all the instruments of corresponding pitches upon the circuit are set in vibration, each responding to that one only of the transmitting instruments with which it is in unison. Thus the signals of A are repeated by A^1 and A^2, but by no other instruments upon the circuit; the signals of B^2 by B and B^1, and the signals of C^1 by C and C^2, whether A, B^2, and C^1 are successively or simultaneously set in vibration.

Hence, by these instruments, two or more telegraphic signals or messages may be sent simultaneously over the same circuit without interfering with one another.

I desire here to remark that there are many other uses to which these instruments may be put, such as the simultaneous transmission of musical notes differing in loudness as well as in pitch, and the telegraphic transmission of noises or sounds of any kind.

When the armature *c* (Fig. V) is mechanically set in vibration the armature *h* responds not only in pitch but in loudness. Thus when *c* vibrates with little amplitude, a very soft musical note proceeds from *h*, and when *c* vibrates forcibly the amplitude of vibration of *h* is considerably increased, and the sound becomes louder. So if A and B (Fig. VI) are sounded simultaneously (A loudly and B softly) the instruments A^1 A^2 repeat loudly the signals of A, and the instruments B^1 B^2 repeat gently those of B.

One of the ways in which the armature (*c*), Fig. VI, may be set in vibration has been stated above to be by wind. Another mode is shown [by] IN Fig. VII [which], WHEREBY motion can be imparted to the armature by means of the human voice or by the tones of a musical instrument.

The armature *c* (Fig. VII) is fastened loosely by one extremity to the uncovered pole (*d*) of the electro-magnet (*b*), and its other extremity is attached to the centre of a stretched membrane (*a*). A cone, A, is used to converge sound vibrations upon the membrane. When a loud sound is uttered in the cone the membrane (*a*) is set in vibration, the armature (*c*) is forced to partake of the motion, and thus electrical undulations are caused upon the circuit E *b e f g*. These undulations are similar in form to the air vibrations caused by the sound —that is, they [are] CAN BE represented graphically by similar curves. The undulatory current passing through the electro-magnet (*f*) influences [the] ITS armature (*h*) to copy the motion [s] of the armature (*c*). A similar sound to that uttered into A is then heard to proceed from L.

[Having described my invention, what I claim and desire to secure by letters patent is as follows:

1. A system of telegraphy in which the receiver is set in vibration by the employment of (vibratory or) undulatory currents of electricity.

2. The method of creating an undulatory current of electricity by the vibration of a permanent magnet or other body capable of inductive action.

3. The method of inducing undulations in a continuous voltaic current by the vibration or motion of bodies capable of inductive action.

4. The method of and apparatus for transmitting vocal or other sounds telegraphically by (inducing in a continuous voltaic circuit) CAUSING ELECTRICAL undulations similar in form to the vibrations of the air accompanying said vocal or other sounds, the whole for operation substantially as HEREIN shown and described.]

In this specification the three words "oscillation," "vibration," and "undulation" are used synonymously.

By the term "body capable of inductive action" I mean a body which, when in motion, produces dynamical electricity. I include in the category of bodies capable of inductive action brass, copper, and other metals, as well as iron and steel.

Having described my invention, what I claim and desire to secure by letters patent, is as follows:

1. A system of telegraphy in which the receiver is set in vibration by the employment of undulatory currents of electricity.

2. The combination of a permanent magnet or other body capable of inductive action with a closed circuit, so that the vibration of the one shall produce electrical undulations in the other or in itself.

Thus (*a.*) The permanent magnet or other body capable of inductive action may be set in vibration in the neighborhood of the conducting wire forming the circuit.

(*b.*) The conducting wire may be set in vi-

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bration in the neighborhood of the permanent magnet.

(c.) The conducting wire and the permanent magnet may both simultaneously be set in vibration in each other's neighborhood; and in any or all of these cases electrical undulations will be produced upon the circuit.

3. The method of producing undulations in a continuous voltaic current by the vibration or motion of bodies capable of inductive action, or by the vibration or motion of the conducting wire itself in the neighborhood of such bodies.

4. The method of and apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds.

(Indorsement.)

These papers were received by me from Professor Alex. G. Bell in the winter of 1875–'6, shortly before I left for England. I can fix the exact date by reference to my books and papers, but have not these at hand now.

Toronto, 12 Novem., 1878.

GEO. BROWN.

In regard to this defense of fraudulent interpolation in Bell's specification, it is to be observed, as is stated by this court in its opinion, "that during the whole course of the protracted litigation upon the Bell patent no argument was ever presented based on this discrepancy until the brief of Mr. Hill was filed in this court on the 18th of January, 1887, six days before the argument in these appeals was begun." "Certainly there is nothing in the pleadings in any of the cases to direct attention to the materiality of this fact." The facts in regard to this alteration are quite particularly stated by this court in its opinion.

Gray's caveat was sworn to at Washington, February 14, 1876, and filed on the same day.

When the electrical examiner took up Bell's application for examination in February, he found that the caveat of Gray had been filed on the same day. The statute about interferences between applications and caveats (R. S. 4902) provides:

"Such caveat shall be filed in the confidential archives of the office, and preserved in secrecy, and shall be operative for the term of one year from the filing thereof; and if application is made within the year by any other person for a patent with which such caveat will in any manner interfere, the commissioner shall deposit the description, specification, drawings and model of such application in like manner in the confidential archives of the office, and give notice thereof, by mail, to the person by whom the caveat was filed."

After receiving the notice, the caveator may, "if he desires to avail himself of his caveat," file an application within three months.

The examiner gave to Mr. Bell's solicitors the following notice:

"Feb. 19, 1876.

"*Telegraphy.*—In this case it is found that the first, fourth, and fifth clauses of claim relate to matters described in a pending caveat.

"The caveator has been notified to complete, and this application is suspended for ninety days, as required by law."

"Z. F. WILBUR, Ex'r."

At the same time he sent to Gray the following notice:

Feb. 19, 1876.

"*Sir*,—You are hereby notified that application has been made to this office for Letters Patents for telephonic telegraph, etc., with which the inventions described in your caveat, filed on the 14th day of February, 1876, apparently interferes, and that said application has been deposited in the confidential archives of the office, under provision of Sec. 4902 of the Revised Statutes of the United States, which section reads as follows:" (Then follows copy of R. S. 4902).

"If you would avail yourself of your caveat, it will be necessary for you to file a complete application within three months from this date, three days additional, however, being allowed for the transmission of this notice to your place of residence."

"Very respectfully,
R. H. DUELL,
Commissioner."

"Elisha Gray, care W. D. Baldwin, present."

Also the following notice:

"Examiner's Room, No. 118, U. S. Patent Office, Washington, D. C., Feb. 19, 1876.

"E. Gray, care W. D. Baldwin:

"In relation to the following notice in relation to your caveat, it may be well to add that the matters in the app'n referred to seem to conflict with your caveat in these particulars, viz.:

"1st. The receiver set into vibration by undulatory currents.

"2d. The method of producing the undulations by varying the resistance of the circuit.

"3d. The method of transmitting vocal sounds telegraphically by causing these undulatory currents, etc.

"Z. F. WILBUR, Examiner."

Mr. Bell's solicitors, believing that their application was filed early in the day, doubted whether the caveat was filed as early as the application, and thereupon addressed to the Commissioner of Patents a communication on the subject.

On this the examiner then added the following indorsement:

"Examiner's Room, 118, Feb'y 25, 1876.

"The cash blotter in the chief clerk's room shows conclusively that the application was filed some time earlier on the 14th than the caveat.

"The app'n was received also in 118 by noon of the 14th; the caveat not until the 15th.

"Z. F. WILBUR, Ex'r."

Upon this, he sent to Mr. Bell's solicitors the following communication:

"Examiner's Room, No. 118, U. S. Patent Office, Washington, D. C., Feb. 25, 1876.

"A. G. Bell, care Pollock & Bailey, present:

"Feb. 14, 1876. Telegraphy.—The suspension of this application, having been declared under a misapprehension of app't's rights, is withdrawn.

"Z. F. WILBUR, Ex'r."

The memorandum or fee-ticket says that the money was paid February 14, 1876, and adds, "*Paper will be filed to-day.*"

Mr. Gray wrote to Mr. Bell Feb. 21, 1877, that he was aware that the caveat was filed some hours later than the application.

The defendants also set up that James W. McDonough, of Chicago, was a first inventor of the speaking telephone. He was called as a witness.

His original apparatus was long before destroyed, and even his model was lost in the Patent Office fire. A few experimental pieces remain, but essentially the whole proof as to what his instrument was, rests on the description in his application of April 10, 1876, and the memories in 1881 of himself and of the members of his family. He never tried it except in his own room in his house. It was never seen except there and by the members of his household.

He was a large furniture manufacturer in Chicago, and had taken several patents for furniture, casters, etc.

McDonough's application is explicit in its description of the operation of the apparatus by which he wished to transmit speech. It is

Fig. 1

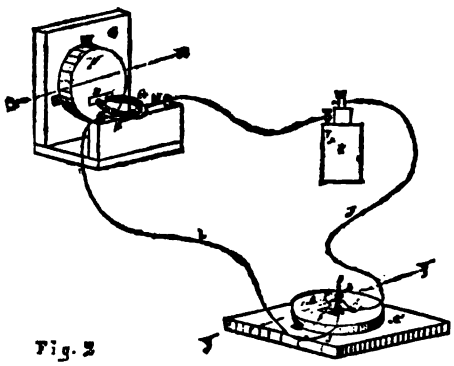
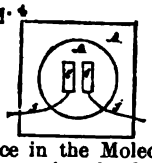


Fig. 2

Fig. 3

Fig. 4



given in full in the evidence in the Molecular and Overland Cases and contains the following:

"The object of my invention is to provide a means for transmitting articulate sounds from one place to another through the medium of electricity; and it consists in the combination with an electrical battery circuit wires, armature, magnet and circuit-breaker, of a transmitting and a receiving membrane or sounding apparatus, so constructed as to vibrate in accord with the vibrations of articulate sound, and so arranged relative to the magnet and circuit-breaker that the vibrations of the transmitting membrane or apparatus, produced by articulate sounds, are transmitted by the electrical current to the receiving membrane or apparatus, and so as to cause a like vibration of the receiving membrane or apparatus, and* it to produce the articulate sounds transmitted from and by the transmitting membrane or apparatus. My invention also consists in the novel construction of the circuit-breaker, as is hereafter more fully described." "D′ is the circuit-breaker which consists of an arch-shaped piece of metal loosely secured at its centre upon the bolt D, and is bent upwards at each end, and from the membrane A, as shown in Fig. 3, so as to form depending V-shaped points adapted to rest upon the respective plates C, C′. The circuit-breaker D′ is so fitted upon the bolt D as to admit of a free and easy ascending and descending movement, the limit of its ascending movement being determined by its contact with the nut E on the bolt, and the descending movement being limited by its contact with plates C, C.

"The operation of my said telelogue is as follows: The transmitting membrane A, being sensitive to the vibrations of articulate sounds produced thereon, is caused to vibrate in sympathy therewith, thereby imparting an upward movement of the circuit-breaker at each vibration, and disconnecting it from the plate C C and alternately breaking and closing the circuit, when the intermittent current alternately magnetizes and demagnetizes the magnet G′, attracting the armature H, and causes it and the membrane F to vibrate simultaneously with the vibrations of the transmitting membrane A, and in accord therewith, and so that the said membrane F reproduces the articulate sounds transmitted from and by the membrane A.

"I do not limit myself to the construction and arrangement of the circuit-breaker D′, as shown and described, as other means may be employed; as, for example, one of the plates C may be attached to the membrane; and the other made either in the form of a plate or needle, and attached direct to the connecting wire, and adjusted to rest upon the plate so as to break the connection by the vibrations of the membrane, which will accomplish the same result. It will be observed that each end of the circuit-breaker D′ is bent upward from the membrane; the object being to prevent local attraction and render its action more sensitive to the lighter vibrations of the membrane. The articulate sounds may be taken direct from the magnet or through any substance or material sufficiently sensitive to the vibration of sounds to reproduce them by contact with the magnet.

"Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is:

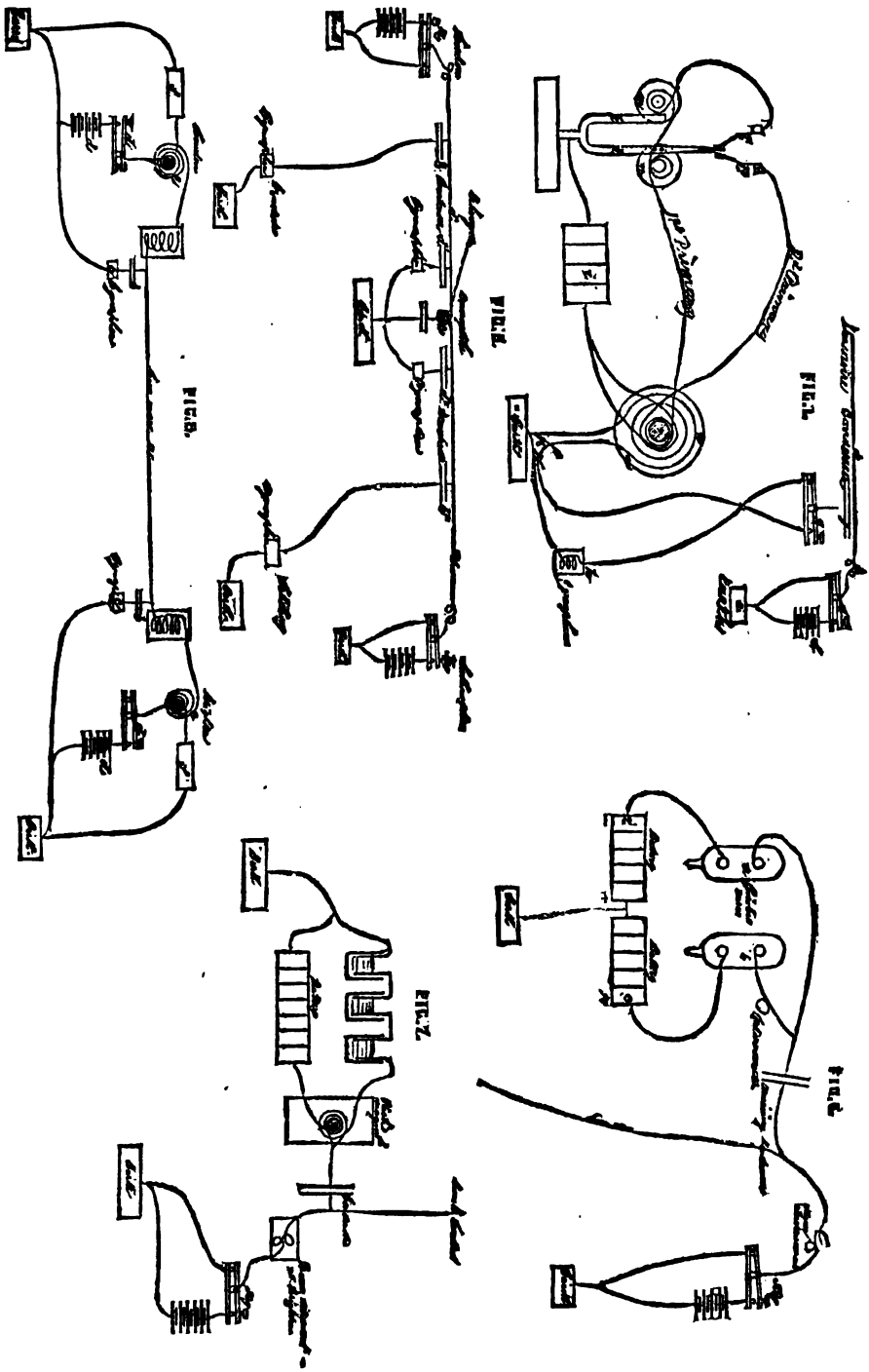
"1. The combination with the battery, circuit wires, magnet, armature and circuit-breaker of the transmitting membrane A, and receiving membrane F, substantially as, and for the purpose, specified.

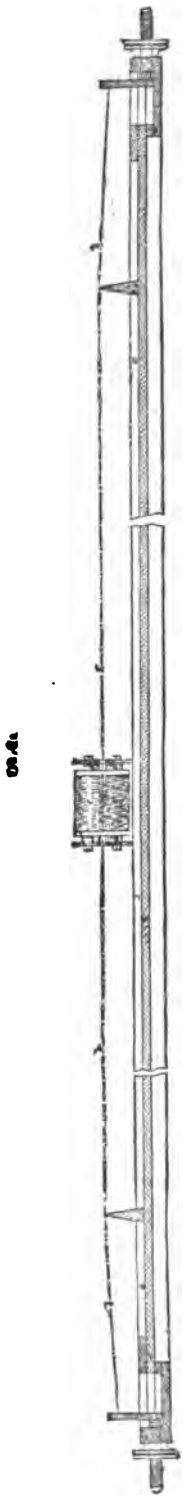
"2. The combination with the plates C, C, of the circuit-breaker D′, whereby the circuit is alternately opened and closed by the vibrations of the membrane A, substantially as specified.

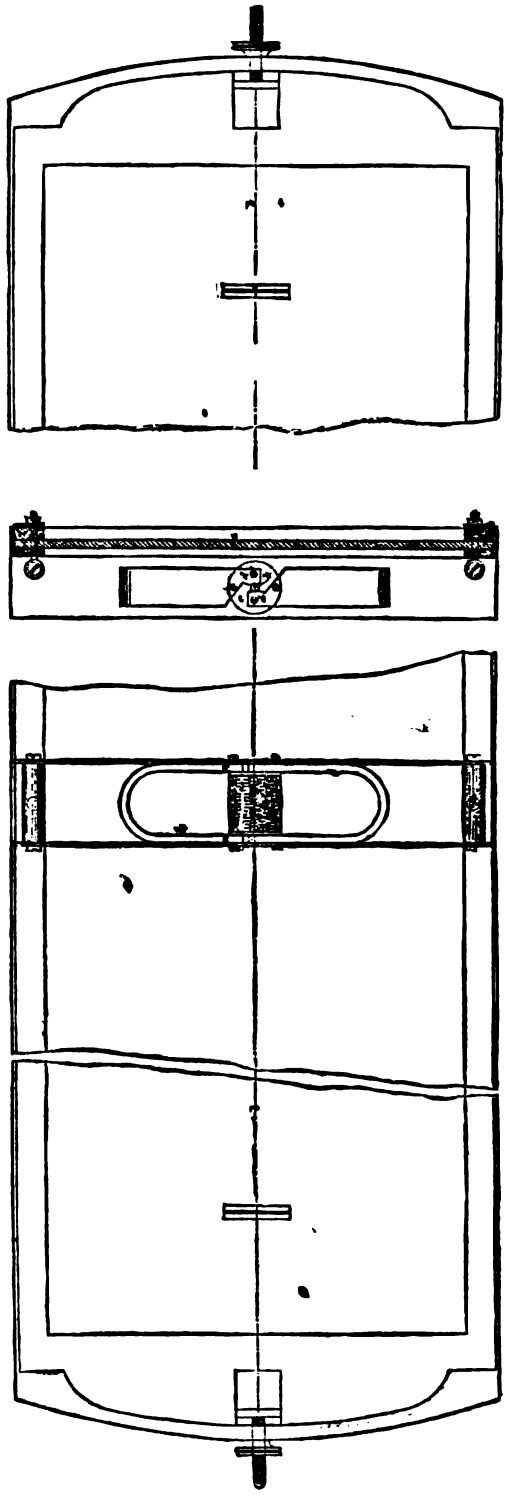
*A word, probably "cause," is wanting in the original.—*Ed.*

"8. The combination of the bolt D, and adjusting nut E, of the circuit-breaker D', substantially as and for the purpose specified."

The following are the specifications of the two patents of Cromwell Fleetwood Varley of London, England, granted, one June 2, 1868, in the United States, and the other Oct. 8, 1870, in England, for "Improvements in Electric Telegraphs" which are claimed to have anticipated the invention of Bell.







UNITED STATES PATENT OFFICE.

CROMWELL FLEETWOOD VARLEY, OF LONDON, ENGLAND.

Improvements in Telegraphing.

Specification forming part of Letters Patent No. 78,495, dated June 2, 1868.

To all whom it may concern:

Be it known that I, CROMWELL FLEETWOOD VARLEY, of London, England, temporarily residing in New York, County of New York, and State of New York, have invented certain new and useful Improvements in Electric Telegraphs; and I hereby declare the following to be a full, clear and exact description of the same.

The objects of my invention are to cut off the disturbance arising from earth-currents, to obtain a high speed of signalling through long circuits, and, should the conductor become partially exposed, to preserve it from being eaten away by electrolytic action.

No means, prior to my invention, had been devised for effecting the first and third of these results. I have devised several other methods less perfect than those hereinafter described, but all embodying the general principle of my invention.

The invention consists of the arrangement of well-known apparatus, whose action, being of an electric and magnetic character cannot be explained by drawings or models; but the accompanying diagrams and specification will enable those skilled in the art to understand the invention.

The telegraphic signals in this invention are made to depend upon the rate of change of electrical potential, and not upon the strength of the current or charge in the cable.

As the earth-currents—*i. e.*, the electric variations in the earth itself—change their strength slowly, the indications produced by them with this invention, in which the strength of the signals depends upon the rate of change of strength, are so feeble as to escape notice, and the embarrassment arising from this cause on long lines is, to all practical purposes, avoided.

There are two modes by which this is effected, and a higher rate of signalling through long cables obtained. The first plan is by means of an induction-coil. The cable at the receiving end of the circuit is connected to the primary wire of an induction-coil, and through it to the earth. The secondary wire is connected to the telegraph instrument. This arrangement is represented by Diagram No. 1.

Explanation of its action: On a current passing through the primary wire of the induction-coil, the iron core becomes magnetized, and this magnetization produces a current in the secondary wire, which acts upon the telegraphic instrument.

When the current in the primary wire has reached its maximum force, and is flowing steadily through, the iron core is magnetized to a certain fixed amount, and then the current in the secondary wire ceases. If, now, any change in the strength of the current through the primary wire occurs, the amount of magnetization of the iron core will vary, and a corresponding current in the secondary wire will result.

The earth-currents seldom pass from zero to their maximum and back again to zero (prior to changing sign) in less than five or six minutes, while the telegraphic signals are generally produced in a small fraction of a second.

With the former, although the currents are often very strong, the rate of change of strength is extended over several minutes, and consequently the current in the secondary wire is very feeble, as its strength is mainly dependent upon the rate of variation of the magnetism of the iron core.

The signaling currents or impulses are much more rapid or sudden, and consequently the variation of the magnetism of the iron core is much more sudden, and the currents generated thereby in the secondary wire are comparatively powerful and distinct.

Thus, then, suppose the earth to send a current through the line—say a positive (+) current from the sending to the receiving station—and to slowly magnetize the iron core, and, for ease of explanation, suppose this earth-current to remain for a time steady and uniform in strength; let, now, the sending station make a signal. In doing so his battery adds its strength to or opposes the earth-current, according as the signal sent is + or— (positive or negative).

This sharp and comparatively sudden addition to or subtraction from the earth-current produces a rapid augmentation or diminution of the magnetism in the iron core, and thus produces a distinct signal in the secondary wire.

For still further explanation, suppose the earth-current to be +, and to have a strength of 100 plus or positive, and the signal current to have a strength of 10, if a positive signal be sent, the current will rapidly rise at the receiving end in the proportion of 100 to 110. This rapid increment of magnetism will produce a positive signal in the secondary wire, corresponding to the increment 10. But if a negative signal be sent, then the battery will be opposed to the earth-current, and the current will rapidly fall at the receiving end in the proportion of 100 to 90, the magnetism in the iron coil will experience a rapid decrease, and a negative signal will be produced in the secondary wire corresponding to the decrement (or negative increment) 10, although the current through the line or cable still remains strongly positive.

As the strength of those secondary signals is almost entirely dependent upon the rate of increment and decrement of the current through the primary wire, and as the slowest line yet constructed need not require so much as half a second to produce a clear signal, while the earth takes five minutes or six hundred half seconds, the current arising in the secondary wire from the earth-current (which, although assumed to be ten times stronger, is six hundred times slower) is $\frac{10}{1000}=\frac{1}{100}$ part only of the strength of the signal, and the effects of the earth-current are consequently practically cut off.

When signaling through a very long cable, a rapid succession of signals charges the cable and produces an electric wave which is a long while subsiding, and acts at the receiving end

in a somewhat analogous manner to the earth-current just described. This prevents signals from being transmitted in rapid succession by the ordinary means.

The above apparatus, which may be popularly described as disentangling the short high crested waves from the large long swells, enables clear distinct signals to be produced rapidly one after the other.

The strength of the signals through the cable or telegraph circuit is produced by the rate of the increments and decrements of current, and not by the current itself; and as an imperfect illustration, if the great earth-current through the cable be compared with an Atlantic swell whose height is five fathoms, but spreading horizontally over five or six hundred fathoms, and whose sides will have an angle of say one hundred and seventy-eight degrees, and if the signals be compared with the ripples produced by the wind upon the back of the swell, and whose angles are each, say, sixty degrees, then an apparatus that will indicate these angles would scarcely notice the angle of one hundred and seventy-eight degrees, which is nearly a straight line (or one hundred and eighty degrees), while the small waves, with an angle each of sixty degrees, would be distinct, and such apparatus would disentangle the small signals from the big swell, paying almost no attention to the latter. Electric waves are entirely different from water waves; but the illustration may serve to explain the action of the former.

The second plan of effecting the above is more expensive in construction, but more perfect in action. A large condenser is inserted in the circuit at one or both ends, according to the circumstances of the case. At the receiving end of the line I prefer the following arrangement (Diagram No. 2), which gives a rapid rate of signaling.

The cable is connected to the one armature of the condenser through the telegraph receiving instrument, and the other armature is connected with the earth. The cable is also connected to the earth by means of a resistance coil, which is best when made of a long length of insulated copper wire, wound round an iron core.

On a current running through the line or cable it finds at the distant end two routes or channels, viz., the resistance coil and the condenser. The condenser route at the first moment offers no other sensible resistance than that of the receiving instrument, while the other, owing to the magnetic inertia of the iron core, offers at the first moment a considerable resistance. The condenser is rapidly charged, and as soon as it is charged to the full force or potential of the current in the cable, all the rest of the electric current goes through the resistance coil to earth, and no more current is shown upon the receiving instrument. If, now, the potential in the cable be reduced or increased a little the change in the condenser is reduced or increased in proportion and a negative or positive signal can be distinctly produced at pleasure, although the electric current or charge in the line or cable has not changed sign, but only varied in strength. The resistance coil, between the cable and the earth, may be dispensed with; but then the little signal wave does not reach its maximum so rapidly, and consequently the signals are not so rapid (*vide* Diagram 6).

Observe, the receiving instrument may be placed between the second armature of the condenser and the earth or ground, instead of between the cable and the first armature. A condenser may also be employed at the sending end of the line or cable, either with or without a condenser at the receiving end of the line or cable. When a condenser is inserted at the sending end only of the line the resulting signal is very similar to that produced by a condenser at the receiving end only; but the disturbing action of the earth-current, however, is more felt when the condenser is only placed at the sending end, because the earth-current has to charge the cable in addition to the condenser, all of which charging current has to pass through the receiving instrument. When the condenser is used at the sending end of the cable or line (Diagram 3), the cable is connected to the one armature of the condenser, and the telegraph key to the other armature of the condenser. An ordinary double or reversing key is generally used, so that when the one is depressed a positive charge is communicated to the condenser armature attached to it, and when the other is depressed a negative charge is communicated to it.

If the key had been connected to the line or cable in the usual manner, a constant or permanent current would have been produced through the cable so long as the contact was maintained, and this current would only begin to die away when the contact with the battery was broken or reversed. But when the condenser is interposed in the circuit, as described, so soon as the current from the battery has charged the condenser, the current from the condenser is arrested and variations in the length of the battery-contact beyond a fixed amount will produce no change in the amount of current thrown into or induced in the cable. In this way great uniformity and regularity of signals are obtained.

At the sending end of the line it is sometimes advisable to use a smaller condenser than at the receiving end, and higher battery power, because the more sharp and sudden the impulse is given the quicker will the signal appear at the distant end.

If the dimensions of the condenser be reduced, say halved, and the battery power be augmented in the inverse ratio, then the shock or impulse will be the same in amount but more sudden, producing a rather more rapid signal at the distant end; but the disturbing action of the earth-currents is reduced as the dimensions of the condenser are reduced at the receiving end.

In some cases, such, for example, as where the Morse instrument is used, it is advisable to connect together the two armatures by means of a very large resistance, as shown in Diagram 6, so that after the condenser is charged the current through the cable shall not entirely cease. Thus the sharp sudden impulse of the condenser charges the cable and would produce a dot, but not a line or dash. The weak current through the large resistance, however, maintains the current in the cable, and a dash is produced, the Morse armature being held down by

this weak current so long as the key is held down.

On the key being elevated the charged condenser is connected to the ground if the condenser be at the sending end; and in discharging itself the condenser produces a short, sharp current in the cable in the opposite direction, which rapidly terminates the signal at the distant end of the cable.

All cables are liable to have their insulation impaired. When this is the case, and the proper conductor is exposed to the sea water the copper is decomposed whenever a positive current is permitted to flow from the copper into the water, forming a chloride of copper, which is soluble and effuses itself and floats away.

If the cable be kept always negative to the water the action of the positive current flowing into the wire from the water is to preserve the wire from decomposition.

To effect this I place a condenser at each end of the cable (Diagram 7), and also connect to the cable, through a large resistance (or long coil of fine wire), a battery whose positive pole is connected to the earth at a negative pole to the resistance coil. This keeps the cable always negative to the water, and yet the signals through it and the condensers are either positive or negative, at pleasure. Suppose the signal impulse to be a positive one it weakens the negative character of the charge in the cable, and also in the distant condenser, and immediately a corresponding positive signal is produced in the distant instrument.

If the signal impulse be negative it increases the negative charge in the cable and also in the distant condenser, and therefore produces a negative signal in the distant instrument, and thus, although positive and negative impulses are produced at the distant end, the cable has been only less or more negative, but never positive to the sea, and therefore the conductor has been constantly under the preservative action of the negative current.

Thus, then, the action of the condensers and battery has not been only to cut off the effect of the earth-currents and to expedite the transmission of signals, but also to preserve the conductor of the cable from destruction if exposed to the sea water.

In Diagram 7 the place of the switches or commutators is shown. These have been omitted in the other diagrams to simplify them. These commutators are of the ordinary well known form, common to most systems of submarine telegraphing, and are not a part of this invention.

Having now described my invention and the manner in which the same is or may be carried into effect, what I claim and desire to secure by letters patent is:

1. In so arranging telegraphic apparatus as to work by the variation of the increment and decrement of electric potential, and not by the direct action of the electric current itself, as and for the purposes set forth.

2. The use of an induction-coil at the receiving end of the cable, one of its wires being connected between the cable and the ground, and the other or secondary wire connected with the receiving instrument, as and for the purposes set forth.

3. The use of a condenser or condensers between the receiving end of the cable and the earth, with or without resistance coils between the cable and the earth, as and for the purposes set forth.

4. The use of a condenser at the sending end of the cable, with or without resistance coils, connecting its two armatures, as and for the purposes set forth.

5. The use of a condenser at each end of the cable, the cable being connected with the ground through a resistance coil and a battery so as to keep the cable always negatively electrified, as and for the purposes set forth.

In testimony whereof I have signed my name to this specification before two subscribing witnesses. C. F. VARLEY.

(Diagrams omitted correspond to those on pp. 923 & 924.)

A. D. 1870, 8TH APRIL, No. 1044.

Electric Telegraphs.

Letters Patent to Cromwell Fleetwood Varley, of Beckenham, in the County of Kent, for the Invention of "Improvements in Electric Telegraphs."

Sealed the 7th June, 1870, and dated the 8th April, 1870.

PROVISIONAL SPECIFICATION LEFT BY THE SAID CROMWELL FLEETWOOD VARLEY AT THE OFFICE OF THE COMMISSIONER OF PATENTS, WITH HIS PETITION, ON THE 8TH APRIL, 1870.

I, CROMWELL FLEETWOOD VARLEY, of Beckenham, in the County of Kent, do hereby declare the nature of the said Invention for "Improvements in Electric Telegraphs," to be as follows:

This Invention has for its object the increase of the transmitting power of telegraph circuits by enabling more than one operator to signal independent messages at the same time upon one and the same wire to and from independent stations.

In working land lines it is usual to produce the signals by means of the passage of a current of electricity producing magnetic action, as in the Morse or Hughes instruments, or chemical action, as in the Baines machines.

By my invention I superpose upon the currents used for working the ordinary telegraphs rapid undulations or waves which do not practically alter the mechanical or chemical power of the ordinary signal currents, and by new apparatus hereinafter described these undulations are made to produce distinct and independent audible or other signals so long as these undulations are produced, whether ordinary signal currents be flowing or not.

As a rough mechanical illustration of the way in which I propose to pass two sets of elastic signals simultaneously and in either direction through the same line-wire without interference I will suppose a rope stretched over two distant pulleys by means of weights at each end; if the near weight be raised the distant one falls. In this way signals are transmitted by the connecting rope, which may be called current signals; if now two small pulleys ca-

pable of rising and falling rest upon the rope between but near to the supports they will simply rotate when the rope is shifted backwards and forwards; if now an operator at one end strike the rope, vibrations or waves will be produced which will cause the other small pulley to dance or make vibration signals. Consequently the operator who shifts and the operator who strikes the rope can each produce independent signals on one and the same rope. Suppose the rope to travel over several fixed pulleys the operation of shifting the rope will produce distinct current signals from end to end of the line as before, but between each fixed pulley vibrations can be produced, and so a number of intermediate stations can communicate independently of each other and independently of the current signals through the line.

With this mechanical simile the following will be more easily understood.

The way in which I carry my electric invention into operation is as follows:

An electro-magnet offers at the first moment great opposition to the passage of a current of electricity, and therefore it may be considered as partially opaque to the transmission of very rapid alternations or electric waves. I attach to the line at desirable parts condensers. In the first instance I will assume only two condensers, one at each end, attached near each end of an ordinary telegraph line. The first or communicating station produces in its condenser rapid charges and discharges; these add to and take from the line a number of small electric impulses without affecting the mean magnetizing power of the currents through the line. These impulses charge and discharge the second condenser at the other end.

These undulations in the second condenser can be utilized in the following manner:

1. If the condenser be made of paper and metal foil the rapid charges and discharges produce a musical sound.

2. If those rapid alternations be made to pass round a helix containing an iron rod a musical sound is produced.

3. If these currents pass round a helix containing a magnetized harmonium tongue the currents make it vibrate audibly if the currents be properly timed, and the effect is increased if a feeble current of air be passing the tongue. By adding tubes of proper length and sounding-boards and other appliances for communicating vibrations the power of the signal is increased.

4. By placing the magnetized tongue of a musical comb between the poles of an electro-magnet with only a small iron core, or inside a coil, it is made to vibrate whenever these undulations are passing.

5. Another method of producing sound from the undulations consists of stretching a music wire through hollow helices; the currents magnetize and demagnetize the tone, this wire being also placed between the poles of permanent magnets. Harmonious currents cause this wire to vibrate. In some cases it may be useful to employ inharmonious currents to stop or silence the vibrations. The two latter methods will only speak when vibrations of harmony with the tongue are made to pass, and consequently in some cases two or more distinct sets of vibrations can be made to act on two or more sets of apparatus differently tuned, and to permit of several distinct communications to be transmitted simultaneously upon the same section of a single line-wire. By introducing between the receiving condenser and a Morse or other ordinary receiving instrument a current reverser keeping time with the vibrations, these alternating currents are made to flow through the receiving instrument in one direction, and are then competent to work the Morse or other ordinary receiving instrument.

6. When it is desirable to subdivide the vibrating sections of a line an electro-magnet, or, what is better, two electro-magnets are inserted in the circuit, and a condenser may with advantage be placed between the circuit and the earth, connecting the condenser with the circuit between the two electro-magnets. In this way, without interfering materially with the ordinary signals through the line, the vibrating sections are separated from each other, by withdrawing the iron cores from the electro-magnets, or, short circuiting the electro-magnets, the vibrations are passed through to the next station.

7. Another method consists of inserting a reflecting galvanometer between the condenser and the earth (or between the line and the condenser); the vibratory or secondary signals can be read off by observing its vibrations.

8. Vibrations are rendered sensible by placing a movable iron bar between the poles of an electro-magnet or inside a helix, and one or both of its ends between the poles of permanent magnets; the latter are covered with brass or any non-magnetic matter; the vibration currents cause it to vibrate between the poles of the electro or permanent magnets, and so produce distinctly audible sounds.

9. There are other methods of utilizing these superposed vibrations, such as connecting to the condenser an electrometer like that of Milner or Pettier. An intermediate Morse or other such line instrument would cut off the vibration signals or reduce them much; this opposition of the intermediate electro-magnet may be cut off by connecting the terminals of a condenser to the circuit on each side of the magnet.

There are several methods of producing these vibrations in the wire:

1. If a tuning fork be placed between the poles of an electro-magnet with a spring contact so arranged that when at rest the battery current flows through the electro-magnet the latter will attract the tuning fork and break the circuit; the magnetism then ceases and the tuning fork springs back and renews the circuit; in this way it keeps vibrating so long as the battery is in action. A secondary wire around this magnet produces currents in opposite directions, and by placing this secondary wire in circuit with the line-wire the necessary vibrations are produced.

2. The secondary wire may be connected between the earth and the condenser attached to the line-wire; this method does not add to the resistance of the main circuit, and is therefore preferable.

3. A tongue similar to those used in harmoniums is made to vibrate by air between contact points, and so connect the condenser al-

ternately with the battery and the ground, and so produce the alternations, or it may be made to connect the condenser alternately to the + or — pole of a battery whose opposite poles are connected to the earth.

4. A magneto machine rapidly rotating will do the above duty equally well if its speed of rotation be controlled by a good governor. The tuning fork and vibrating tongue arrangement can be set to and can keep up any desirable rate of vibrations. The ordinary telegraph keys and switches are used for connecting the various parts of the apparatus together. In constructing the dry paper condensers it is best to dip the paper in varnish and attach metal leaf (such as gold, silver, or copper) to the paper, and lay these metal-coated papers between metal foil.

The double speaking apparatus of Dr. Gintl, or of Firschen, can be used on lines working with the above-described vibrations. When these are used I prefer inserting a hollow helix between the double speaker and the line, and by inserting iron rods in this helix the difficulty arising from the inductive capacity of the line is almost wholly removed. This is a new improvement, and will render these apparatus actually useful instruments.

SPECIFICATION *in pursuance of the conditions of the Letters Patent, filed by the said Cromwell Fleetwood Varley in the Great Seal Patent Office, on the the 8th October, 1870.*

To all to whom these presents shall come, I, CROMWELL FLEETWOOD VARLEY, of Beckenham, in the County of Kent, send greeting.

Whereas Her most Excellent Majesty Queen Victoria, by Her Letters Patent, bearing date the Eighth day of April, in the year of our Lord One thousand eight hundred and seventy, in the thirty-third year of Her reign, did, for Herself, Her heirs and successors, give and grant unto me, the said Cromwell Fleetwood Varley, Her special license that I, the said Cromwell Fleetwood Varley, my executors, administrators, and assigns, or such others as I, the said Cromwell Fleetwood Varley, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an Invention for "Improvements in Electric Telegraphs," upon the condition (amongst others) that I, the said Cromwell Fleetwood Varley, my executors or administrators, by an instrument in writing under my, or their, or one of their hands and seals, should particularly describe and ascertain the nature of the said Invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said Letters Patent.

Now know ye, that I, the said Cromwell Fleetwood Varley, do hereby declare the nature of the said Invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement thereof, that is to say:

This Invention has for its object the increase of the transmitting power of telegraph circuits by enabling more than one operator to signal independent messages at the same time upon one and the same wire to and from independent stations.

In working land lines it is usual to produce the signals by means of the passage of a current of electricity producing magnetic action, as in the Morse or Hughes instruments, or chemical action, as in the Baines machines.

By my Invention I superpose upon the currents used for working the ordinary telegraphs rapid undulations or waves which do not practically alter the mechanical or chemical power of the ordinary signal currents, and by new apparatus hereinafter described these undulations are made to produce distinct and independent audible or other signals so long as these undulations are produced, whether ordinary signal currents be flowing or not.

As a rough mechanical illustration of the way in which I propose to pass two sets of electric signals simultaneously and in either direction through the same line-wire without interference, I will suppose a rope stretched over two distant pulleys by means of weights at each end. With such an apparatus, if the near weight be raised the distant one falls, and in this way signals may be transmitted by the connecting rope, which may be called current signals. If now two small pulleys capable of rising and falling rest upon the rope between but near to the supports they will simply rotate when the rope is shifted backwards and forwards; but if now an operator at one end strike the rope vibrations or waves will be produced, and will cause the small pulley at the other end to dance, and so vibration signals may be given. Consequently the operator who shifts and the operator who strikes the rope can each produce independent signals on one and the same communicating cord. Suppose the rope to travel over several fixed pulleys, the operation of shifting the rope will produce distinct current signals from end to end of the line as before, but between each fixed pulley and the next to it vibrations can be produced, and so a number of intermediate stations can communicate independently of each other and independently of the current signals through the line.

With this mechanical simile the following will be more easily understood.

The way in which I carry my electric invention into operation is as follows:

Condensers are attached to the line at the places where the wave signals are to be communicated and received. In the first place, let us assume only two condensers, one at each end, attached near each end of an ordinary Morse telegraph circuit. The first or communicating station to make a signal produces in its condenser rapid charges and discharges by means described; further on these add to and take from the line a number of small electric impulses without affecting the mean magnetizing power of the ordinary Morse currents through the line. These impulses charge and discharge the second condenser at the other end, and this condenser is coupled with a receiving instrument which is sensitive to these undulations and renders them apparent by sound or otherwise.

Figure 1 is a diagram of the instruments at one of the stations of such a line; *a* is the line-wire, I will suppose it to be an ordinary land line-wire 50 miles long and suspended in the usual way; *b* is the Morse instrument, *c* the sending key for the Morse signals, *d* the battery in connection with this key, and *e* its earth connection; *f* is a condenser of about 8 micro-farads, one armature of which I couple with the line-wire and the other with a key *g*, which when not depressed puts the condenser in communication with the wave signal receiving instrument *h*, which I call a "cymaphen;" this instrument is shown at Figures 2, 3 and 4. The key *g* when depressed for sending a wave signal puts the condenser in connection with the apparatus by which such waves are generated; this apparatus consists of a battery *i*; ten quart cells of Daniel's battery will be suitable.

One pole of the battery *i* is connected with the tuning fork *k*; this fork may conveniently be of such dimensions as to make 200 vibrations in a second. l^1, l^2 are two platina pointed contact-making springs, capable of fine adjustment by means of screws. The spring l^1 when the fork is at rest is in metallic contact with it or with a metal arm attached to it, and the spring l^2 is removed just out of contact. The current from the battery *i* then passes in the coils of the electro-magnet *m*, the poles of which have between them the two horns of the tuning fork. The coils of this magnet may be about 8¼ inches long and 1¼ inches diameter, and of No. 16 (B.W. G.) silk-covered copper wire. When the current is flowing through the coils of the electro-magnet the horns of the fork *k* are drawn apart and the spring l^1 loses its contact; then as the attraction of the magnet ceases the horns of the fork spring back; this remakes the contact, and so a continual tremor is communicated to the tuning fork. In the same circuit with the electro-magnet there is at *n* a primary coil wound upon a bundle of iron wires as a core, and on the same core but wound in the opposite direction is a second primary coil which is in connection with the spring l^2, so that currents pass alternately in the two primary coils, and at each alternation the polarity of the core is reversed. On the core there is also another or secondary coil, in which currents are induced by the changes of polarity of the iron core. One end of this secondary coil is connected with the earth, and the other when a wave signal is to be sent is by the key *g* put in connection with the condenser *f*, and produces in it rapid charges and discharges. The core may conveniently consist of a bundle of thin soft-iron wires, 1 inch in diameter and 32 inches long. On the centre of the bundle is wound for a length of eight, the first primary coil consisting of four layers of No. 16 silk-covered copper wire. Over this is wound the second primary coil consisting also of four layers, and outside this again is wound the secondary coil, consisting of eight layers of No. 24 silk-covered wire. The ends of the bundle composing the core are folded over so as completely to enclose the coils.

A small resistance coil *o*, or a condenser of about two micro-farads, is placed between the poles of the secondary coil to take off the violence of the shock, so that the operator shall not be inconvenienced. The wave signal receiving instrument *h* is shown in plan at Figure 2, in longitudinal section at Figure 3, and in transverse section at Figure 4. It consists of an iron frame containing a sounding-board *a* over bridges, at the ends of which a hard drawn iron or steel wire *b* is stretched from one end to the other; this wire is about four feet and six inches long between the bridges; it is of No. 14 gauge, and is strained so as to sound the same note as the tuning fork of the sending instrument. This wire passes through a hollow helix *c*, three inches in length, ⅛ of an inch internal diameter and 1¼ inches external diameter. The helix is wound with No. 35 B. W. G. copper wire insulated with silk. This coil is attached to the frame supporting the sounding-board, but does not touch the latter. Two horse-shoe magnets *d* are placed one on each side of the wire. The currents magnetize the wire inside the helix, and so cause it to be attracted and repelled from one magnet to the other. When the wire is properly tuned so as to vibrate synchronously with the apparatus at the distant end, making the alternations in the current, the sound from very feeble currents is distinctly audible. A piece of felt or leather resting against the wire is sometimes used to "damp" the wire and stop its vibrations as soon as the impulses cease. A small piece of metal similar in dimensions to a gold five-franc piece may be made to rest by a spring lightly against the sounding-board somewhere near its centre. When the vibrations of the latter are powerful enough to make this piece of metal dance, the sound is increased in power four or five times by this little disc or sound reinforcer, or the sound may be augmented by clipping on to the wire near the helix a disc of about the size of a penny piece of thin sheet metal; this causes the vibration of the wire to produce a greater disturbance in the air than it otherwise would, and a louder sound is perceived.

By attaching a stethescope to the sounding-board for the reader to rest his ear against, very feeble sounds are rendered sufficiently audible; I prefer to use a Scott Allison's stethescope.

The sounding-board may be replaced by a strained diaphragm or drumhead, on which one of the bridges over which the wire is strained is supported; this arrangement gives a better sound with very feeble currents, but with moderate currents the sounding-board appears to have the advantage.

Two sets of wave signals may be transmitted and received simultaneously through the same wire, and independently of the current signals if a sufficient difference be made in the periods of the two sets of waves. Thus, if waves of 200 vibrations in the second, and waves of 850 or 900 vibrations in the second, be simultaneously transmitted and received by two separate cymaphens, the one adjusted to the slow, and the other to the rapid vibrations, they may be separately read, as the vibrations which affect the one are inoperative on the other. This arrangement is not applicable when working long distances, as the rapid waves would in a long distance be lost.

Figure 5 is a diagram illustrating the arrangements I make when the wave signals are used to communicate between intermediate or branch stations without interfering with the

working by ordinary instruments of the main line; *a* is the line-wire, say between London and Southampton, and through it it is desired that the intermediate station, Basingstoke, shall without interference with the through messages be able to communicate to and fro with the branch stations, Windsor and Salisbury. At these branch stations I provide wave signal apparatus such as already described in respect to Figure 1, coupled with condensers b^1, b^2, at the places where the branches run into the main line. At the intermediate station, Basingstoke, I divide the line-wire into two sections (as far as the wave signals are concerned) by introducing at *c* an instrument which is opaque to these waves, whilst it allows the ordinary long current signals to pass freely. This opaque instrument *c* I call "echocyme," and on either side of it I connect with the line-wire a condenser d^1, d^2, and wave signaling apparatus, as already described.

An electro-magnet offers at the first moment great opposition to the passage of a current of electricity, and may be considered as nearly opaque to the transmission of very rapid alternations of current or electric waves. The "echocyme" may consequently be a simpie electro-magnet, or what is better is to wrap an induction-coil with two wires so as to form one continuous coil; this is put into the line circuit. The junction between these coils is connected to the one armature of the condenser, whose other armature is connected to the earth. The momentary action of a current on passing through one wire charges the condenser. The secondary action upon the other wire checks the current that the condenser would have sent on through the other wire on to the remainder of the main line circuit; by varying the size of the condenser according to the nature of the line and currents employed a nearly absolute stopper of the vibration signals is produced. The coil which I have used for this purpose has the following dimensions: iron bundle one inch in diameter, length of coil 8 inches, and wound with No. 26 insulated copper wire to a diameter of two inches. The condenser connected between the "echocyme" and the earth in the case which I have taken for illustration should be of about $\frac{1}{10}$ of a micro-farad. At the termini Morse or other ordinary instruments may be used.

There are various ways in which the wave signal receiving apparatus may be constructed, although that which I have already described I prefer; thus the condenser itself may be the receiving instrument.

If the condenser be made in the following manner the rapid charges and discharges will produce a musical sound. Sheets of tinfoil (for example, one foot square) are separated by one or more sheets of thin dry paper; the 1st, 3rd, 5th, &c. sheets are joined together; the the 2nd, 4th, 6th, &c. also joined together. The odd-numbered sheets are connected to a binding screw or terminal, and the even-numbered sheets to another terminal. Such a condenser consisting of from 20 to 50 sheets will be found to be much agitated and to produce a loud note with 500 alternations of current per second if the potential be 50 to 100 volts.

In constructing the dry-paper condensers the following method seems to answer best: Very thin uniform paper is dipped in shellac varnish, coated on one side with gold leaf, and then dried. The non-gilt surfaces of 2 sheets of paper are put together so as to leave the gilt surfaces outside; the tinfoil plates are placed outside of these and built up in the usual manner, connecting the 1st, 3rd, 5th, 7th, &c., plates to one armature of the condenser, the 2nd 4th, 6th, 8th, &c., being joined to the other armature of the condenser. If the rapid alternations of current be made to pass round a helix containing an iron rod, the iron rod will issue a feeble but distinct sound. The rod used may be $\frac{1}{4}$th of an inch in thickness, 18 inches in length, and covered to a diameter of one inch with No. 35 insulated copper wire. This arrangement requires strong currents. If the currents pass round a flat coil in which a magnetized harmonium tongue is placed, the currents will act upon it like the needle of a galvanometer and cause it to vibrate.

The sound is increased by causing a feeble current of air to pass the tongue. If a steel tongue, similar to one of those used in a musical box, be magnetized and placed inside a helix of fine wire, and its lip is placed between the poles of a powerful permanent magnet, the alternating currents will cause the tongue to vibrate and produce a musical sound so long as the alternations are operating. By coating a wire, strained, as is shown in Figures 2 and 3, near the coil, with a short tube of gold or platinum, and letting a light spring formed of the same metals rest against the wire, a relay is produced, which, bringing into operation a local battery, can be used to increase the sound or to relay on the signals to another line.

A thick music wire, much thicker than those used in pianofortes, is found to give the best results for sound. A thin wire is thrown into greater oscillation than a thick one, and admits of being utilized for visible signals in the following way: A steel wire of about No. 40 gauge is stretched through the helix in front of a very narrow slit. A flame is passed behind the slit, but the light coming through is checked by the wire; the moment, however, the wire is put into vibration light passes, a lens is placed in front, and by it a magnified image of the luminous slit is projected upon a white screen so long as the wire vibrates. Vibrations are rendered sensible by placing a movable iron bar between the poles of an electro-magnet or inside a helix, and one or both of its ends between the poles of permanent magnets; the latter are covered with brass or any non-magnetic matter. The vibration currents cause it to vibrate between the poles of the electro or permanent magnets, and so produce distinctly audible sounds.

Another method of utilizing these alternations is by introducing between the receiving condenser and a Morse or other ordinary receiving instrument a current reverser keeping time with the vibrations; these alternating currents may be made to flow through the receiving instrument in one direction, and are then competent to work the Morse or other ordinary receiving instrument. Or a similar result may be obtained by the arrangement shown at Figure 6, which consists in connecting the receiving condenser to two "Geisler's" vacuum tubes *a* and *b*; the latter are connected with voltaic batteries C, Z, consisting of a large

number of elements. The one tube *a* is connected to the "positive pole" of a battery whose "negative pole" is connected to the earth. The second tube *b* is connected to the "negative pole" of a battery whose "positive pole" is to earth. These batteries must have nearly power enough to make a current pass through the tubes; for example, supposing three hundred cells of a battery be able to leap across the exhausted tube 290 should be used with each tube. When a positive current arrives it will help the battery whose positive pole is connected to the earth and cause a current to pass through its tube *b*. The next instant the current is reversed; this causes a current to pass through the other tube *a*; in this way an electric valve is produced separating the positive from the negative currents, and producing a rapidly intermittent current in one direction only. If a reflecting galvanometer be enclosed in the circuit formed by the batteries and the tubes the wave signals will be indicated by it.

Another method of producing an electric valve for separating the positive from the negative currents, is illustrated by Figure 7, and consists in connecting, say, 5 cells of Daniell's battery with 8 cups containing dilute sulphuric acid with platinum plates joined up so as to form 8 decomposition cells in series. Between the battery and the 8 cups is inserted the galvanometer or other instrument that is to be worked; the junction between the instrument and the cups or decomposition cells is connected to the condenser. The other junction between the battery and the decomposition cells is connected to the earth. The first action of the battery is to polarize the platinum plates, when the current almost entirely ceases, the three pairs of polarized platinum plates balancing the 5 Daniell's cells. The moment a current arrives from the condenser it finds two channels open to the earth,—the one the battery, the other the decomposition cells. Suppose the positive pole of the battery to be in connection with the earth and a positive current arriving from the condenser; at first it divides itself, part going through the battery, part through the decomposition cells. The action of the current upon the latter is to depolarize them; and they then immediately resist its flow. The next moment a negative current flows from the condenser, this negative current is assisted by the partly depolarized plates, and the battery and the former become repolarized. It is best to wrap the instrument, as the diagram shows, with two wires connecting the one with the cups, the other wire with the battery, and their junction with the condenser. The result is that whether it be a negative or positive current that is sent into this arrangement the action upon the instrument is the same, and thus out of alternating currents a continuous action is produced. The platinum plates for this purpose must be very small and very close together, to reduce as much as possible their inductive capacity and resistance.

Another method consists of inserting a reflecting galvanometer between the condenser and the earth (or between the line and the condenser); the vibratory or secondary signals can be read off by observing its tremor. The mirror of this galvanometer must be deadened by water or other damper, and it is best to produce the signals by interrupting the vibrations instead of the reverse. The vibrations keep the mirror oscillating, the image becomes spread out, and the light enfeebled. The moment the vibrations are cut off the light contracts. The effect is the "spread out" light is feeble, the "concentrated" is bright, and thus the signals can be flashed by long and short duration like the Morse alphabet.

Another method of utilizing these superposed vibrations is to connect to the condenser an electrometer like that of Milner or Pettier. A resistance coil of about 1,000 ohms is connected between the condenser and the earth as a shunt to the electrometer to prevent the Morse signals from affecting it to any sensible extent; or the wave signals may be read by the sense of touch. For this purpose I use a handle made of hard charcoal, and divided into two parts longitudinally. The parts are separated by a sheet of gutta percha, and are connected the one with the armature of the condenser, the other with the earth. The handle being moistened and covered with a rag wetted with weak salt and water is firmly grasped in the hand.

An intermediate Morse or other such line instrument would cut off the vibration signals or reduce them too much; this opposition or opacity of the intermediate instrument is destroyed by connecting the terminals of a condenser to the circuit on each side of the magnet. Thus, if I wish wave signals to pass a Morse instrument I couple the armatures of a condenser of 8 to 10 micro-farads with the line-wire, one on either side of the Morse instrument. The working of the Morse line, if there are many instruments in circuit, is also in this way improved.

There are several methods of producing electric waves in the lines in addition to that already described.

A tongue similar to those used in harmoniums is made to vibrate by air between contact-points, and so connect the condenser alternately with the battery and the ground, and so produce the alternations; or it may be made to connect the condenser alternately to the + or — pole of a battery whose opposite poles are connected to the earth.

A magneto machine rapidly rotating will do the above duty equally well if its speed of rotation be controlled by a good governor.

The double-speaking apparatus of Dr. Gintl, or of Frischen, can be used on lines working with the above-described vibrations.

Figure 8 is a diagram of this arrangement. *a* is the line wire; *b*, *b*, the condensers; *c*, *c*, the cymaphens, wave signal transmitters, and parts connected therewith; *d d* are the current signal keys and batteries; and *e e* are the magnets of Dr. Gintl or Frischen's receiving instruments; and *f f* are their resistance coils. I prefer wrapping the magnets *e*, *e*, with 3 or 4 wires, using one wire between the key and the earth through its resistance coil, and the two or three wires joined into one circuit attached to the line-wire. I insert a hollow helix between the double speaker and the line, and by putting iron rods in this helix the difficulty arising from the inductive capacity of the line is almost wholly removed; this is a new improvement and will render these apparatus actually useful instru-

ments. The helix may conveniently be of No. 26 silk-covered wire and 10 inches long, with a diameter inside of 1¼ inches, and outside of 4 inches; small iron rods are placed in this helix one by one until it is found that the finger-key does not affect the indicator of the home receiving instrument. By using these instruments, these apparatus together with cymaphens, as is shown in figure 8, three messages can be sent from end to end of such a circuit at the same time independently of each other; for this purpose the cymaphen key must have a spring contact, so that the circuit between the condenser and the earth is never broken until the contact with the secondary coil is complete.

I would remark that in electric telegraphs the use of sound signals is not claimed by me and is not new; for example, in working step by step instruments in which a pointer should indicate the desired letter on a dial, it has been common, when the instrument is out of order and fails to indicate correctly, to give sound signals; by its means such sound signals are read according to the Morse alphabet, a short sound such as the escapement of the receiving instrument makes when moving a few steps only representing a dot, and a long sound such as the escapement makes when moving over many steps representing a dash.

Having thus described the nature of my invention, and the manner of performing the same, I would have it understood that I claim the construction of electric telegraphs in such manner that current signals and wave signals may be simultaneously transmitted through the same line-wire, and may be rendered sensible at the receiving station by separate instruments, the one sensitive to currents of appreciable duration and the other to electric waves or vibrations.

I also claim the construction of electric telegraphs with, at the transmitting station, an instrument capable of originating in the line-wire a succession of rapid and regular electric waves, and at the receiving station a strained wire, a tongue, or such like instrument adjusted to vibrate in unison with the electric waves, and, being magnetized by them, oscillating to and from the pole or poles of a magnet in its vicinity.

I also claim in the construction of electric telegraphs the dividing a conducting wire into sections by instruments which I have called "echocyme," which allow current signals to pass freely but stop wave signals, so that whilst the wire is being used as a whole for through signals the sections into which it is divided may each or all be employed for the transmission of local messages.

I also claim the construction of electric telegraphs with, at the transmitting station, an instrument capable of originating in the line-wire a succession of rapid and regular electric waves, and at the receiving station a condenser consisting of thin sheets capable of being agitated by such waves.

I also claim the construction of electric telegraphs with, at the transmitting station, an instrument capable of originating in the line-wire a succession of rapid and regular electric waves, and at the receiving station an instrument which on receiving such waves delivers a current of electricity to an indicating or receiving instrument suitable to be worked with ordinary current signals.

I also claim the combination with Dr. Gintl and Frischen's double-speaking apparatus of a hollow helix connected between the receiving instrument and the line-wire, such helix having rods or pieces of iron inserted into it.

In witness whereof, I, the said Cromwell Fleetwood Varley have hereunto set my hand and seal, this Seventh day of October, in the year of our Lord One thousand eight hundred and seventy.

CROMWELL F. VARLEY. [L. S.]

The following, as to the meaning of some of the words employed in the Bell patent and in the art, is taken from counsel's brief in behalf of the Bell Company:

"Sound-Waves" and "Undulations."

When the wind blows on a sheet of water, waves rise on its surface; a chip dances up and down on the surface of these waves; a boat or a ship rocks, rolls and pitches by reason of them; painters draw or try to draw, their contour—the line of their curiously-curved surfaces. But nothing of this sort takes place in the air where we are. We are not on the surface of the air. There is no surface to be thrown into waves and show a line. It is all about us; it always presses on all sides, but not always equally.

If you are in a tightly packed and excited crowd, you are pressed on all sides; but as the people in the crowd sway a little, you are sometimes jammed more tightly, and again presently have a little more elbow room. You and each of your neighbors touch each other all the time; but if the people in the part where you are move closer together, in their effort to see something, you are pressed a little more; if some of them are attracted to turn and move a little away from you, you are pressed less. These movements of greater or less pressure are due to a slight to-and-fro movement of the different individuals composing the crowd. Such is the case with the air particles. Under the influence of the voice or some sounding body, those immediately near it are first, perhaps, pressed together; presently, by virtue of their elasticity, they spring apart a little more widely than they were before, and thus zones of condensation or rarefaction are produced.

These zones of disturbance are propagated onward at the rate of about eleven hundred and twenty feet a second, very much as sea waves are propagated onward, without any traveling motion of the air or water itself, and are called "sound-waves" or sonorous undulations. But as these zones are produced by and correspond to the slight vibratory motions of the air particles, it is found more convenient to study the motions of the particles themselves.

The Astronomer Royal (On Sound, by Sir George B. Airy, London, 1871) thus defined wave motion in 1871:

"We have states of condensation and states of rarefaction traveling on continually without limit in one direction, while the motion of every individual particle is extremely small, and is alternately backwards and forwards. And this

is the conception of a wave as depending on the motion of particles in the same line as that in which the wave travels. This is the kind of wave which we shall consider as explaining the transmission of sound.

"But in all these there is one general character, that a *state of displacement* travels on continually in one direction without limit, while the motion of each individual particle is or may be small and of oscillatory character. And this is the general conception of a wave. It will be remembered that the special character of the waves of air applying to the problem of sound is that the displacements of the particles are in the same direction (backwards and forwards) as that in which the wave travels.

Such is the case with each air particle between the speaker and the listener, with the drum of the listener's ear, and with the elastic diaphragm of the telephone transmitter. The speaker's voice agitates the air, throws it into to-and-fro vibrations, makes the particles at each spot now to be more closely huddled together and now more widely separated,—that is, the air at each spot to be alternately more dense and less dense than it originally was,—and thus a diaphragm exposed to it is alternately pushed and pulled backward and forward.

"We must free our minds, therefore, from the notion of anything like a *continued onward flow* as a necessary concomitant of sound-waves, or indeed of any 'undulations.'"

"Form" of Vibration.

This phrase has nothing to do with the contour of a wave as a painter draws it. It is a purely technical term, used in a sense borrowed from a peculiar graphic, short-hand way of expressing the *character* of a vibration—the feature to which quality is due. This phrase, used in the patent, was devised and its meaning established long before the patent was drawn.

The following from Helmholtz, "Sensations of Tone," pp. 28, 29, 32 (published in 1862), explains this:

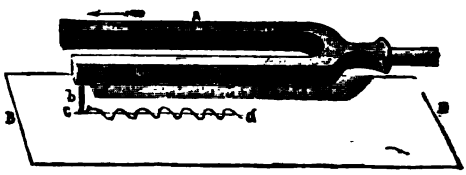
"Human speech employs these very qualitative varieties of tone in order to distinguish different letters. * * *

"On inquiring to what external physical difference in the waves of sound the different qualities of tone correspond, we must remember that the amplitude of the vibration determines the force or loudness, and the period of vibration the pitch. Quality of tone can, therefore, depend upon neither of these. The only possible hypothesis, therefore, is, that the quality of tone should depend upon *the manner in which the motion is performed within the period of each single vibration.*

"Every different quality of tone requires a different form of vibration.

(P. 100.) "To render the law of such motions more comprehensible to the eye than is possible by lengthy verbal descriptions, mathematicians and physicists are in the habit of applying a graphical method, which must be frequently employed in this work, and should, therefore, be well understood.

"To render this method intelligible, suppose a drawing point *b*, fig. 5, to be fastened to the prong A of a tuning fork in such a manner as to mark a surface of paper B B. Let the tuning fork be moved with a uniform velocity in the direction of the upper arrow, or else the paper be drawn under it in the opposite direction, as shown by the lower arrow. When the fork is not sounding, the point will describe the dotted straight line *d c*. But if the prongs have been first set in vibration, the point will describe the undulating line *d c*, for as the prong vibrates, the attached point *b* will constantly move backwards and forwards, and hence be



sometimes on the right and sometimes on the left of the dotted straight line *d c*, as is shown by the wavy line in the figure. This wavy line once drawn, remains as a permanent image of the kind of motion performed by the end of the fork during its musical vibrations. As the point *b* is moved in the direction of the straight line *d c* with a constant velocity, equal sections of the straight line *d c* will correspond to equal sections of the time during which the motion lasts, and the distance of the wavy line on either side of the straight line will show how far the point *b* has moved from its mean position to one side or the other during those sections of time.

"Physicists, then, having in their mind such curvilinear forms, representing the law of the motion of sounding bodies, speak briefly of the *form of vibration*, of a sounding body, and assert that *the quality of tone depends on the form of vibration.*"

Physicists speak of the "form" of a vibration, meaning its character; not because it has "form," but because the curve which represents it has.

The employment of this word "form" in the patent, in the scientific sense, since Helmholtz's work became classic, implies *ex vi termini*, the element of *"quality,"* including articulation, especially when, as in the patent, reference is made to the utterances of the human voice.

It must always be borne in mind that the phrases "form of vibration" and "vibrational curves" do not signify the form of waves in the painter's sense, nor yet any curved line which the vibrating particle describes or follows in the air. Thus the pendulum and the tuning fork simply swing to and fro.

The *form* of the vibration of the curve traced on the paper. The curve is merely a geometrical expression of a mathematical statement of the successive changes in velocity and direction at each successive instant, however minute. The sounding air particle simply moves to and fro in a straight line. The curves are in the geometrical statement of the changes in its motion.

In the sonorous vibrations of the air there are three characteristics which are so far independent of each other that each can be varied or altered without changing the other. They are, *period*, or frequency of vibration, signifying the time occupied in performing the whole

complete vibration, starting from one end of the path, going to the other and returning to the starting point; *amplitude of vibration*, signifying the distance between the two extreme limits which the vibrating particle attains to; *character*, or technically "form" of vibration, signifying the way or manner in which the particle performs its vibrations. As expressed, and correctly expressed, in the quotations from Helmholtz, Donkin, Taylor and Dr. Seiler, the *period* of vibration corresponds to and determines the *pitch* of the sound; the *amplitude* of vibration corresponds to and determines the *loudness* of the sound; the "*form*" of vibration corresponds to and determines the *quality* of the sound, and "quality" includes articulate character.

It is true that any of the complex vibrations that constitute articulate speech and most sounds can be mathematically, and by special apparatus experimentally, resolved into the equivalent of one dominant fundamental sound or vibration, with which other sounds lesser and of higher pitch, or more rapid vibrations, are *blended*, so that the unaided ear does not distinguish them. But such a sound is, in the language of scientific acoustics, as in the ordinary habit of speech, considered a single sound. When we speak of it on the side of sensation we mean by its pitch, the pitch which the ear recognizes, and which is given to it by its fundamental or dominant constituent; when we speak of it on the mechanical side, we refer to it as a sound consisting of a number of vibrations per second which corresponds to what the ear so recognizes as the pitch; that is, the pitch of the fundamental tone,—in the case of a man's voice in ordinary speech about one hundred per second. And the other peculiarities, due to what are called the blended *overtones*, are referred to in the language of science, not as separate vibrations, but as elements which *modify the form of the vibrations* first spoken of. When, therefore, we speak of copying the number of vibrations, or reproducing the pitch of a sound, we refer, according to the established use of language at the time when Helmholtz wrote in 1862, and also at the time of the Bell patent, to the number of complete vibrations per second corresponding to what the ear recognizes as the pitch of the sound. When we say that a vibration has received, either from the vocal organs or from the telephone, the special *form* of a particular uttered sound, we mean that the resulting sound copies, not in pitch or intensity necessarily or merely, but in *quality*, the character of the sound whose vibrations are thus copied, including the characteristics of articulate words. Such was the established significance of the terms.

Electrical Undulations.

It is also one of the usages of science—and, indeed, of daily life—to represent graphically by curves successive values or intensities, like successive values at successive times of cotton, or gold, or other commodities, or the height of the thermometer or barometer on different days; and in this way, the same language which the science of acoustics adopted from the graphic method of representing sonorous vibrations by curves is applied to all other reciprocating changes. The rise and fall of electric intensity at any particular point may thus be represented by a curve which will exhibit the precise *character* of the rise and fall, and, quite in accordance with the established use of the phrases, this rise and fall, if of a certain character, may be spoken of as an *electrical undulation*, the *precise* character of which will be expressed by the "*form*" of a curve actually drawn on paper, or which, if drawn, would represent it. Such electrical changes may thus be spoken of as *undulations* having particular *forms*.

The Molecular and Overland Companies introduced in evidence as anticipating Bell's 5th claim the following:

"TRANSLATION FROM WORK ENTITLED "DER ELECTROMAGNETISCHE TELEGRAPH," BY DR. H. SCHELLEN, 1867, PAGES 539–542."

"Figure 375 represents the action of the electro-magnet E upon the printing mechanism of the apparatus, and also the device for coupling together the two parts b and b' of the printing axis.

"The cores of the electro-magnet are not connected together at the back by a yoke, as in the case of an ordinary electro-magnet, but as shown in Fig. 376, they are attached to the N and S poles of a powerful steel magnet. The action of this magnet upon the cores is regulated by means of an armature of soft iron placed on the legs N and S which can be moved up or down. The nearer it is placed to the end of the poles the less will be the magnetic effect upon the cores of the electro-magnet.

"By this arrangement the cores are constantly magnetic, and attract the armature n (Fig. 375), as long as no current passes through the coils. A strong steel spring r operating on the arm F serves by its attractive power to withdraw the armature when, by the passage of a current through the coils, the magnetic power derived from the steel magnet is neutralized. In order to avoid too strong an attraction, the armature does not touch the surface of the poles, but is separated by a space equal to about the thickness of an ordinary sheet of paper.

"When a current whose polarity is opposite to the polarity of the steel magnet is passed through the coils E E, the magnetism is weakened or neutralized, and it no longer holds the armature against the retractile force of the spring r, which immediately draws the armature upward with considerable power. This movement is communicated to the lever $d\,d'$ which has its center of motion at the axis H. One end of the lever rests, with an adjusting screw, on the top of the armature; therefore, when, under the action of the current, the armature is released and flies upward, one extremity d is raised with it, while the other goes downward, and it is by this movement that the coupling of the two portions of the printing axis b_1 b' (Figs. 369 and 370) is effected, and the motion of the wheel work transmitted from the pinion 5 to the front part of the printing axis b' and its four cams.

"The transmission of this motion is effected in the following manner: On the back part of the printing axis b_1, a wheel g (Fig. 375), with very fine and strong teeth, is fixed. On the front part of the axis b' is a circular sector $l\,l'$, on one side of which is a flyer c', to which is attached a detent c''. This detent has three

teeth which gear into the teeth of wheel g. On the other side of the sector is a spring b which presses down the toothed detent, which with its flyer c' is allowed to rise and fall a little. When it is free as represented in Fig. 375, the spring v presses the detent c'', into the teeth of wheel g, and it revolves with the wheel in the direction indicated by the arrow, and thus the rotation of printing axis b_1 at once effects the revolution of the circuit $l\ l'$ and the axis b_1. When, however, $c'\ c''$ is raised, its teeth leave the wheel g; the latter continues to turn while the motion of the sector and the axis b' is arrested.

"The sector $l\ l'$ also carries an eccentric cam u, which raises the end d' of the lever, when by the action of the armature n it has fallen. This movement presses the armature against the poles of the magnet, where it remains attracted by the permanent magnetism of the cores so long as no current passes through the coils. When in the position shown in the engraving, the sector $l\ l'$ turns in the direction of the arrow, and after making half of a revolution the front part (in Fig. 375 the lowest part) of the cam u slides under the extreme end of lever d'. As the following end of the cam is more distant from the axis b' than the front end, the extreme end of lever d' is raised by the cam, the other end d consequently falls and the adjusting screw returns the armature to the poles of the electro-magnet.

"In the figure the front end of the cam u has not reached the end of the lever d, therefore this end is depressed, and the toothed detent is still engaged with the teeth of wheel g. When the axis b' is turned a little farther d' will have reached its highest position, and d will be resting against the armature of the magnet. The axis b', sector $l\ l'$, and flyer c' continue to revolve; but when the revolution of the axis b' is nearly completed the flyer c', to which c'' is attached, reaches the inclined end of the arm d', which is now firmly held, and moves upward, lifting c'' out of the teeth of wheel g. By this the printing axis b' is disconnected from b, and the revolving wheel work and its motion arrested, in which position of rest it remains until the arm d' again falls, owing to the release of the armature by a current passing through the coils, when the flyer c' is set free; c'' again catches into the wheel g, and thus both b' and b are again coupled together. It will be seen that the printing axis b' makes a complete revolution at each action of the electro-magnet, and that the movement of armature n and the release and action of the printing mechanism is effected exclusively by mechanical power, and not by the power of an electric current. The current, during its very short duration, merely weakens or destroys the permanent magnetism of the cores of the magnet, at which the spring r raises the armature n and through the lever $d\ d'$ regulates the motion of the printing mechanism."

In the Molecular Case and in the Overland Case, the defendants alleged that Claim 5 of Bell's second patent, No. 186,787, of January 30, 1877, is bad.

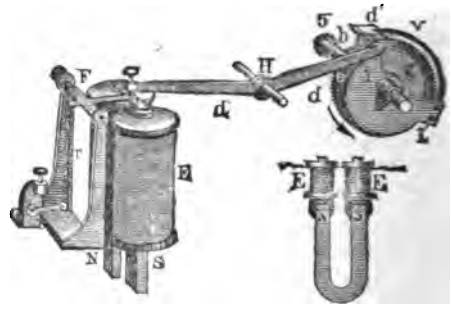
That it was a claim for a new kind of magnet, in which case it would clearly be bad, because the magnet had long been known. Such a magnet formed a part of the Hughes printing telegraph described by Schellen.

Judge Wallace, in the Molecular Case, stating that the claim had not been argued, held that the Hughes magnet was a clear anticipation. This decision was in June, 1885, and is here appealed from.

Subsequently, in December, 1885, on the hearing of the Overland Case, it was pointed out to *Judge* Wallace that the claim was not for the magnet *per se* but for an improved form of telephone, made by taking out the magnet shown in Bell's first patent, and putting in this one. He at once perceived the misconception he had fallen into and sustained the claim, as appears from his decree.

Hughes, many years ago, invented a very ingenious printing telegraph. The plan was to have synchronously working clockwork at each end. When the key corresponding to a particular letter was pressed at the sending end, and the circuit closed, the current was used either to start or stop the clockwork, and consequently, the letter which was at the proper place in the moving machine just at that instant was caused to operate and make a mark. The whole work at the receiving station was done by clockwork, driven by a weight, and the function of the electrical current was merely to pull a trigger, and start or stop that clock work at the proper time. This is the apparatus which is described and shown in the Schellen book.

In it Hughes employed the following device:



The horseshoe steel permanent magnet N S has mounted on each of its poles, N and S, a soft iron core, with a coil around it. The soft iron cores are not naturally magnetized, that is, they are neutral; but by being placed in metallic contact with the poles of the permanent steel magnet which is permanently magnetized, these soft iron cores become for the time being, magnetic by induction; and if a piece of soft iron, that is to say, an armature n, be placed in contact with the two upper ends of the cores of the coils E E, it will be held there by them by that magnetism. The soft iron armature n was laid by Hughes on top of the cores E E, with a retractile straining spring, shown as F and r in the drawing, tending to lift it away; but the strength of the spring was so graduated, by means of an adjusting screw, that it would not quite overcome the strength of the magnet. The armature was thus held, though with a nearly counterbalanced force, in contact with the poles of the two cores.

In the Dolbear Case the final decree in the court below was that the patent, granted to Alexander Graham Bell, by letters patent, No. 174,465, for improvement in telegraphy, dated March 7, 1876, is a good and valid patent and that said Bell was the original and first inventor of the improvement described and claimed therein and that the defendants had infringed the said patent; and a perpetual injunction was ordered. From this decree the defendants appealed. See 15 Fed. Rep. 488, for the opinion of *Mr. Justice* Gray, and 17 Fed. Rep. 604, for the opinion of *Judge* Lowell on final hearing.

In the case of the Molecular Telephone Company the final decree in the court below was that the several letters patent granted to Alexander Graham Bell for an improvement in telegraphy, No. 174,465, dated March 7, 1876, and for an improvement in electric telegraphy, No. 186,787, dated January 30, 1877, are good and valid; that said Bell was the original and first inventor of the inventions described in said several letters patent; that the defendants have infringed the fifth claim of said Letters Patent No. 174,465, and the sixth, seventh, and eighth claims of said Letters Patent No. 186,787. The defendants appealed from the decree; and the complainants also appealed from it "in so far as it fails to adjudge that the fifth claim of Letters Patent No. 186,787 is good and valid in law, and that the defendants have infringed the same." See 28 Blatchf. 253.

In the case of the Clay Commercial Telephone Company, it was decreed in the court below that the said patents were valid; and that the defendants had infringed the fifth claim of said Letters Patent No. 174,465, and the third, fifth, sixth, seventh and eighth claims of said Letters Patent No. 186,787, and a perpetual injunction was ordered. The defendants appealed from this decree.

In the case of the Overland Telephone Company, the decree of the court below was that the patents were valid; that said Bell was the original and first inventor of the inventions described therein and that defendants have infringed the fifth claim of said Letters Patent No. 174,465, and the third, fifth, sixth, seventh and eighth claims of said Letters Patent No. 186,787, and a perpetual injunction was ordered. The defendants appealed from this decree.

In the case of the People's Telephone Company (Drawbaugh Case), the decree was that the said letters patent are good and valid; that said Bell was the original and first inventor of the inventions described in them; and that defendants have infringed the fifth claim of said Letters Patent No. 174,465, and the fifth, sixth, and eighth claims of said Letters Patent No. 186,787, and a perpetual injunction was ordered. The defendants appealed from this decree.

[For further facts see the opinion.]

Counsel argued these cases orally in the following order:

(1) *Mr.* **James E. Maynadier** for Dolbear *et al.*; (2) *Mr.* **Grosvenor P. Lowrey** for the Molecular Telephone Company; (3) *Mr.* **Lysander Hill** for the People's Telephone Company (Drawbaugh Case) and for the Overland Telephone Company; (4) *Mr.* **James J. Storrow** for the American Bell Telephone Company; (5) *Mr.* **William W. Ker** for the Clay Commercial Telephone Company; (6) *Mr.* **Don M. Dickinson** for the People's Telephone Company (Drawbaugh Case) and for the Overland Telephone Company; (7) *Mr.* **George F. Edmunds** for the People's Telephone Company (Drawbaugh Case) and Overland Telephone Company; (8) *Mr.* **James J. Storrow** for the American Bell Telephone Company (2d argument); (9) *Mr.* **E. N. Dickerson** for the American Bell Telephone Company; (10) *Mr.* **Causten Browne** for Dolbear *et al.*; (11) *Mr.* **Wheeler H. Peckham** for the Molecular Telephone Company; (12) *Mr.* **Charles P. Crosby** for the Overland Telephone Company; (13) *Mr.* **Lysander Hill** for the People's Telephone Company (Drawbaugh Case) and the Overland Company (closing argument).

Messrs. **James E. Maynadier,** and *Causten Browne,* for Dolbear *et al.*, appellants, filed a brief from which the following is taken:

Bell's fifth claim should be construed, in view of the state of the art, to cover only that method of transmitting vocal or other sounds telegraphically which is described in his patent and illustrated in figure 7 of his drawings, that is, first, by causing the sound-waves to produce magnetic variations and thereby electrical currents, alternately positive and negative, similar in form to the vibrations of the air accompanying the said vocal or other sounds, by reason of the fact that the positive currents represent condensations and the negative currents rarefactions of the air, or *vice versa;* that the rate of change from positive currents to negative currents represents the rate of the air vibrations, and the intensity of each positive or negative current represents the intensity of each condensation or rarefaction. Secondly, after thus causing these peculiar alternately positive and negative currents, transmitting them to the receiver and there converting them into magnetic variations similar in form to these varying alternately plus and minus currents, and finally, by means of these magnetic variations, setting up vibrations in a distant air body, like the vibrations caused in the air body in contact with the vocal organs or other source of sound.

"The art or process" of transmitting articulate sounds by means of undulatory vibrations of electricity is not, and cannot possibly be, either an invention or discovery, for the reason that transmitting such sounds by means of such vibrations is a mere problem, not an art, or a process.

Certainly, it is not invention, or discovery, to perceive that articulate sounds can be transmitted by vibrations of electricity, adapted in some way to do that work; and no man has shown any art or process of transmitting such sounds who has simply announced,—what is entirely obvious,—that electricity will do it, if adapted to do it; or simply announced the electrical and other conditions necessary to its being done.

Is not the 5th claim plainly void, under the authority of *O'Reilly* v. *Morse,* 56 U. S. 15 How. 62 (14: 601)? It has always been held that the patent embraces nothing more than an

improvement (*invention*) described and claimed as new, and that anyone who afterwards discovered a method of accomplishing the same object, substantially and essentially differing from the one described, had a right to use it. And anyone may lawfully accomplish the same end, without infringing the patent, if he uses means substantially different from those described.

The transmitting apparatus used by the appellants is the Reis transmitter, and the Reis circuit, and the Reis coil and core, except that the Reis circuit is very much shortened, and the electrodes are carbon, and not platinum; these changes are mere changes in details of construction, and the Reis apparatus taken as a whole, that is, transmitter, line and receiver, does not differ from the primary circuit of appellants' apparatus, except as an ill made machine differs from a well made one.

The coil and its core of the Reis circuit, as used in the defendants' apparatus, operate precisely as do the like parts in the Reis apparatus, with one exception, viz.: that the variations of magnetic energy induced in the core by the flowing of the varying current spirally around the core are converted into electric variations of a kind wholly unknown until they were discovered by Dolbear. These electric variations of Dolbear are produced by variations of magnetic energy in the core of a secondary coil; and, inasmuch as secondary coils containing a core whose magnetism is varied are old and well-known, it is clear that, speaking generally, the Dolbear variations are like the variations in other secondary coils; but there are, nevertheless, such marked and striking differences as make them radically new, and entitle them to rank as an invention second to none in question in this case.

Dolbear's method and apparatus are substantially unlike Bell's in all particulars. His method and apparatus are substantially like Reis's method and apparatus, except as to the secondary coil, the line-wire, and the receiver, and also the Dolbear secondary coil, line-wire and receiver are radically unlike anything in Bell's '76 patent, and radically unlike anything in any other telephone, and radically new with Dolbear.

The appellants earnestly urge this proposition: That a secondary coil, one end of which is connected to a wire, which wire is insulated, and has its free end enlarged, or, what is the same thing, electrically connected to an insulated plate or disc, is radically unlike a secondary coil and its core forming a part of a closed circuit.

The greater the variation of magnetic energy, the greater the number and better the arrangement of the convolutions, and the greater the external resistance between the positive and negative ends of the secondary coil, the greater will be the electric tension, pressure or head; and where the external resistance between the positive and negative ends of the coil is infinite, as it is in Dolbear's secondary coil, the maximum pressure possible is produced; whereas, in Fig. 7 of the Bell patent, and in the commercial telephone of the Bell Company the resistance of the line and the helix of the receiver is slight and must be slight, and, therefore, the electric tension, pressure or head never approaches the maximum. The secondary coils best adapted for use in the Bell Commercial Telephone, are useless with the Dolbear receiver. There is a radical difference between the Dolbear coil, line and receiver, and the coil, line and receiver of the Bell 1876 patent.

Bell shows a generator capable of developing an electric condensation at one end, and an electric rarefaction at the other end; but these two ends are connected by an electrical conduit which prevents that electric condensation or rarefaction rising to anywhere near its maximum because of the electric current which starts to flow through the conduit on the instant that any electric condensation or rarefaction commences.

In the Dolbear apparatus the generator is capable of developing electrical condensations and rarefactions measured by thousands, instead of hundreds, and there is no electrical conduit joining the ends of the generator.

In Dolbear there is an electrical chamber of high pressure, and an electrical chamber of low pressure, and the line-wire and the plate or diaphragm electrically connected with it always forms a part of one of these chambers, and never performs the function of the line-wire and helix of the Bell line and receiver; that is, never serves as a conduit connecting the high-pressure chamber of the generator with the low-pressure chamber of the generator; nor does the line-wire and its plate or diaphragm perform any function at all like the function performed by the line-wire and helix of the Bell receiver. Moreover no one knew, until taught by Dolbear, that the electric pressure chamber, made up of the line-wire and plate of his receiver, could perform the function which it performs in his apparatus.

It is incapable of dispute that Dolbear is the first who ever made any practical application of static electricity; that is, who ever used electric tension, pressure or head, practically, for any purpose whatever, except only in the familiar way, to cause a current through an electrical conduit.

It is contended on behalf of the appellants:

I. That the Bell patent of 1876 describes and claims but one method of transmitting vocal and other sounds, which method is: (1) convert the energy of sound-waves into (2) magnetic energy; convert that into (3) vibratory currents of electricity; convert those into (4) magnetic energy; and with that cause (5) sound-waves; or briefly (1) sound; (2) magnet; (3) currents; (4) magnet; (5) sound.

II. That Bell never invented, so far as appears from the record, any other method of transmitting vocal or like sounds.

III. That there is no hint or suggestion in Bell's patent of 1876 as to the employment of sound-waves to vary an electric current, nor any hint or suggestion that a current of unvarying polarity can be made capable of use to transmit vocal or like sounds; but, on the contrary, that Bell in his '76 patent takes the utmost pains to teach (what he, in fact, discovered) that, in order to produce currents in a closed circuit, like in form to sound-waves, the currents must be alternately negative and positive; that is, to-and-fro currents, so as thereby to copy the to-and-fro motions of the air particles constituting the sound-waves.

IV. That Bell's apparatus is, in essence, (1) magnet; (2) coil; (3) closed circuit; (4) coil; (5) magnet; one magnet being supplied with the proper devices for causing the energy of sound-waves to vary the energy of the magnet, and the other magnet being supplied with the proper devices to cause its varying energy to produce sound-waves.

V. That Bell's patent of '76 does not cover either the Reis method or the Reis apparatus, but that the Reis method,—that is, (1) sound; (2) current; (3) magnet; (4) sound,—and the Reis apparatus—that is, (1) a battery; (2) its circuit; (3) a transmitter-diaphragm, and the electrodes governed by it; (4) a helix; (5) its magnet,—are both public property: 1, because of the printed publications, so fully describing that apparatus that the Reis method will necessarily become familiar to any skilled person carefully studying the operation of that apparatus; and 2, because Mr. Bell carefully refrained from putting a single word in the specification of either of his patents which tended to show that the Reis current of unvarying polarity, but varying only in strength, was capable of being made similar in form to air-waves accompanying vocal or like sounds; and, by the very strongest implication, asserted in the '76 patent that rapidly varying polarity was essential in order that the to-and-fro motions of the air particles of a sound-wave should be copied.

VI. That the battery, primary circuit, transmitter-diaphragm, its electrodes, and the helix and magnet in the primary or transmitter circuit of the defendants' apparatus, do not involve the method described and claimed in Bell's '76 patent, nor is the apparatus substantially the same as any apparatus described and claimed in Bell's '76 patent, but that this transmitter circuit and its parts are copied directly from Reis.

VII. That the Dolbear secondary coil, line and receiver is radically unlike anything described or suggested in Bell's '76 patent, and that the Dolbear method involved in its use with the Reis apparatus as a transmitter is radically unlike any method described or suggested in Bell's '76 patent, and is also radically unlike any method of utilizing electricity ever known before Dolbear discovered his method and apparatus.

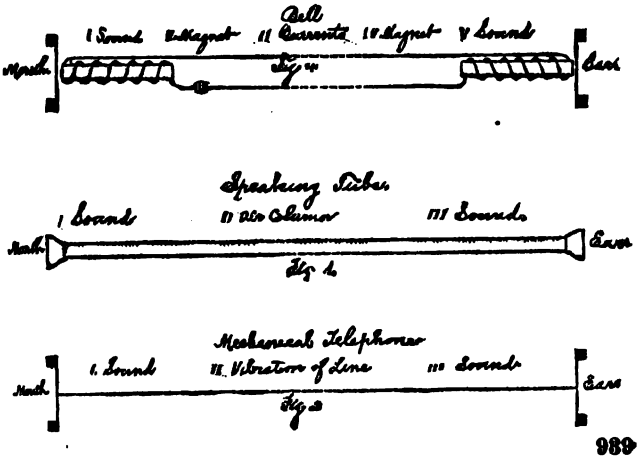
VIII. That the fact that in both the commercial telephone and the Dolbear telephone the Reis apparatus is used as a transmitter circuit, in connection with a secondary coil which forms part of the line-wire, although, at first sight it may seem to make the Dolbear telephone substantially like the Bell commercial telephone in one important particular, yet it cannot have any weight whatever in view of the radical difference between the secondary coil and line of the Dolbear telephone and the secondary coil and line of the Bell commercial telephone, or the transmitting coil and line of Fig. 7 of Bell's patent; that is to say, Dolbear's secondary coil must be a generator of enormous electro-motive force, or electric tension, pressure or head, while the generator of the Bell produces relatively trifling electro-motive force or tension, pressure or head. An electrical conduit, joining the positive and negative poles, is essential to Bell, and fatal to Dolbear, and Dolbear's line and its connected plate are charged to a very high potential, tension, pressure or head, alternately positive and negative; and there are no currents, properly speaking, in the Dolbear line, but only such flow as is necessary to charge the line and the plate or disc connected with it.

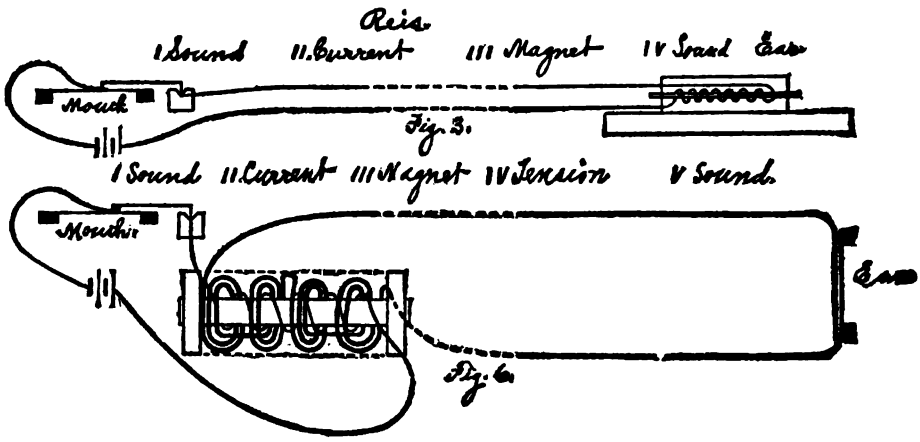
IX. That wholly disregarding Reis, and assuming that Bell is the first in the field, yet the Dolbear method and apparatus are substantially unlike any method or apparatus described or claimed in the Bell patent of '76, for the reason that Dolbear does not utilize electrical undulations substantially the same as those described and claimed in the Bell patent of '76, but utilizes electrical undulations radically unlike any ever known until Dolbear discovered his method and apparatus; and for the reason that there is nothing in either the Dolbear method or apparatus copied from anything described or suggested in the Bell patent of 1876.

In the oral argument *Mr.* **Maynadier** further says:

I have prepared diagrams, in order that I may be more readily followed. The first diagram under the word "speaking tube" represents probably the first improved method of transmitting vocal and other sounds to a distance; and the method there consists *first*, of sound; *second*, an air column separated from the rest of the air; and *third*, sound. Those dots in the middle are a draughtsman's device for showing a long tube in a short space.

The second improvement over the natural method, and a very striking invention or discovery, is that shown in the mechanical telephone. There the method is *first*, sound; *second*, vibration of line; *third*, sound. The genius who invented that saw that he could set in vibration a diaphragm in one place (on the left of that in figure 2), and that that diaphragm would take up all the vibrations of the speech-waves.





His device was first, sound; by sound, I mean speech-waves or sound-waves of any sort; first, sound, which sound should, by its vibratory energy, its alternate condensations and rarefactions, set in motion a diaphragm, every condensation moving that diaphragm in one direction, and every rarefaction allowing it to move in the opposite direction, and thereby produce in that diaphragm a copy exactly of the vibrations of the air body, which vibrations were caused by his own vocal organs.

He said: "Now, how shall I make the vibrations of my first diaphragm cause like vibrations in a second diaphragm?" He said: "If I connect the two by a strained cord or wire, then the molecular vibrations of that strained cord or wire must cause the second diaphragm to vibrate just as the first vibrates." And he tried it, and behold it was so.

The essential thing is that the two diaphragms must be connected by a strained cord or wire without break of any sort in it. The main interest of that figure 2 (the mechanical telephone in this case) is that here is an air body which is set in vibration by the vocal organs of the speaker, and yonder, far off, is another air body to be set in motion. The vibrations of the first air body act upon a human contrivance which is so designed, so cunningly adapted for its work, that the vibrations of the first air body are caused to set up like vibrations in a distant air body. There is an invention or discovery—it is immaterial which, so far as I understand those terms—of a method of and apparatus for transmitting vocal and other sounds telegraphically, which is admitted to be very many years prior to any other now known.

The next attempt to transmit vocal or other sounds telegraphically or to transmit speech was made by Philip Reis of Germany; and he devised the apparatus shown in figure 3 of my diagram. He adopted the general plan set forth in figure 2, namely: "I will set in motion by my vocal organs an air body in contact with my vocal organs, and I will endeavor to make those vibrations set up like vibrations in a distant air body." So his plan at base was the same as the plan of the mechanical telephone.

Reis clearly perceived this fact, that *every condensation and every rarefaction of the air-waves must be transmitted by a representative on the line, on his line-wire.*

The number of vibrations per second means pitch. Degree, amplitude of vibration, means loudness, and the quality so much spoken of in this case is nothing but a series of different degrees of pitch and loudness.

Reis did conceive the brilliant idea of controlling a voltaic current by the energy of air-waves. He was the first man in the world who ever spoke to an electric current, expecting to influence that current. That is a noble, magnificent invention; and when we consider that every telephone that was ever seen by any one has that precise feature in it, am I wrong in saying that Reis is entitled to as high praise certainly as Alexander Graham Bell or any other man who ever made any claim—because there is no telephone known at this day, of any commercial value, which has not that feature copied servilely from Reis.

The transmitter of the Reis apparatus consisted of a chamber in the form of a box, which chamber of course contained air, just as the chamber of the ear contains air. The transmitter is shown in the diagram, on the left. The diagram represents a box which contains air, just as the chamber of the ear contains air. Mr. Reis thought, properly enough, that by speaking he would set in vibration the air within that box, and would thereby produce condensations and rarefactions of the air in that box, just as those same condensations and rarefactions are produced in the ear of the person who hears. On the upper part of the box there was a diaphragm mounted over a hole, so that whenever the air pressure inside of the box varied, the diaphram would either bulge in or bulge out. That diaphragm carried a piece of platinum, and that piece of platinum was connected to one pole of a battery, as is shown in the diagram. The battery is shown on the diagram by two thin lines and two thick lines, which is the conventional or agreed way of showing a battery. Those are the perpendicular lines at the left hand lower side of the diagram. That line leading from the black line is supposed to be a wire which leads around in a curve to the left, and then goes to the right, to the middle of the diaphragm. The diaphragm is the line directly above the word "mouth" between the two square black blocks.

That is a diagram of a diaphragm. The wire leads to the middle of that diaphragm; and on the middle of that diaphragm there is a small piece of platinum. Then the other line leading from the middle of the diaphragm represents a carrier, an electrode carrier, which means a carrier of another piece of platinum, which other piece of platinum is connected to another wire by means of the block in white, directly underneath the word "sound."

That represents a solid block of say wood or metal, with a drop of mercury in a depression in the block; and one leg of that electrode carrier rests in that drop of mercury, and the other end of that leg rests by its own weight upon the platinum carried by the diaphragm. Then, to follow the line from that drop of mercury, it goes to what electricians call "line," —meaning the line-wire—to a coil at the right of the diagram. It goes over to that coil of wire. That coil of wire surrounds the core of metal; and the free end of that coil comes back to the battery, as the diagram illustrates.

The battery has two poles, which are commonly spoken of as the north pole and the south pole; just like a magnet, or the plus and minus ends of the battery. Whenever those two poles are joined by an unbroken wire a current flows from pole to pole. In the case of the Reis, the poles of the battery are joined by that wire when the apparatus is in action, and there is a current flowing from pole to pole of the battery. That current is a constant voltaic current, or battery current. That is a voltaic battery and the current is commonly called a voltaic current, or a battery current. That current is practically a constant current.

Mr. Reis reasoned that every condensation in the cubical box of his apparatus would bulge out of the diaphragm, and every rarefaction would allow the diaphragm to move back. That is when the speaker spoke, the column of air next his vocal organs would be pushed, and allowed to vibrate; and consequently the other end of that column which rests in that cubical box would push upon the diaphragm and relax its pressure, and thereby vibrate the diaphragm, just exactly as the air vibrated in the column.

The Reis diaphragm will follow and copy exactly the vibrations of the air particles. The appellants maintain that Reis intended to produce a variation in the current for every variation in the pressure of the air within the cubical box. They also maintain that anybody who succeeds in doing that will transmit speech electrically, to that extent.

Then the two pieces of platinum are what are called electrodes, which means simply a gate, or way, or door, for the current to pass through.

One piece of platinum is fast to the diaphragm, and the other piece of platinum is fast to that electrode carrier, one end of which is in the drop of mercury.

The electric current flows through the wire and especially flows through those two pieces of platinum, which are in contact before you begin to talk. When you begin to talk the vibration of the diaphragm so affects the contact of those two pieces of platinum, that Reis supposed that the current would be varied as the condensations and rarefactions of the air took place. He intended to transmit a current, for instance, for every condensation, and to break the current for every rarefaction of the air. For every forward motion caused by pressure under the diaphragm he intended to make or break (it is immaterial which) the current; and for every backward motion he intended to make or break (it is immaterial which) the current; and the current was to do the work. If, therefore, there were one thousand motions of the diaphragm up, and one thousand motions of the diaphragm down, per second, he was to have one thousand electrical impulses going over the line-wire, and one thousand cessations of electrical impulses over the line-wire, per second.

It was the first attempt at any method for the transmission of speech telegraphically, by the electric current. Reis made many forms of apparatus, and achieved more or less success in his efforts. What degree of success he achieved it is not important for me now to inquire, because that matter is left to other gentlemen. All that I care to say about Reis is that he showed a method of and an apparatus for transmitting sounds, which method consisted in, *first*, sound; *second*, a current,—a varied current; *third*, a magnet to utilize the varying energy of the current; and *fourth*, sound reproduced by the varying energy of that magnet.

An apparatus made by Reis, and fully described in many printed publications, and in several different languages, was thoroughly well known among scientific men long before 1874, when Mr. Bell dates his invention I believe, and long before 1876, certainly, when he got his patent.

The Reis apparatus does not differ in any way whatsoever from the present transmitting apparatus in the commercial telephone, save and except only as an ill made sewing machine, for example, differs from a well made sewing machine on the same principle.

Figure 5 of the diagram shows the commercial telephone as now in use. The diagram is a facsimile of the left hand side of the diagram figure 8, which shows the Reis apparatus. There is a short Reis circuit shown in figure 5. Reis used two pieces of platinum; on the left of figure 5, a black mark above the middle of the diaphragm indicates a piece of carbon. Carbon turns out to be far better adapted for that use than platinum.

The transmitting apparatus used by this defendant Dolbear is a facsimile of the Reis apparatus, excepting only that a piece of carbon is substituted for one piece of platinum.

Figure 6 is the Reis-Dolbear apparatus. The transmitting apparatus of the Bell telephone is a servile copy of the Reis apparatus; it is simply an improvement, a mechanical improvement, of the Reis apparatus.

When used in a certain, particular manner, the apparatus as made by Reis, without change of any kind, will transmit speech. If you modulated your voice properly you could transmit words and sentences through the Reis apparatus, just exactly as Reis left it, without change of any sort.

The Bell patent is shown in the diagram, marked figure 4. There is on the left a magnet, and on the right a magnet, each magnet

being in a coil of wire, and that coil of wire having its ends joined together so as to make a complete metallic circuit for the battery current which flows from the battery. When a current flows from the battery it flows spirally around those two pieces of iron, commonly called cores, and that makes them magnets. So, there are two magnets, one on the left and the other on the right, and each magnet has a coil of wire surrounding it, and those coils are joined electrically together so as to make one circuit.

One coil is a transmitter, and the other is a receiver coil. But either coil is a transmitter, and either is a receiver, as it may be. Opposite each magnet there is a diaphragm, which diaphragm is made of iron in the diagram. It was known long before Bell's time that if you move a piece of iron towards a magnet, which magnet had a coil of wire around it, you would thereby induce an electrical current in that coil of wire. If you moved it away from that magnet, you would thereby induce a contrary current in that coil of wire.

Bell's method, in his patent of 1876, is: *first*, sound; *second*, magnet; *third*, currents (in the plural) vibrating alternately from left to right and from right to left; *fourth*, magnet; *fifth*, sound.

That is the full length and breadth of this claim, and nobody can infringe the Bell patent unless you find in the alleged infringing method: *first*, sound; converted into, *second*, magnetic energy; that converted into electric currents; those currents converted again into magnetic energy; and that second magnetic energy converted into sound-waves.

When the Reis-Bell is operated, what happens is that the energy of the sound-waves, acting upon the Reis diaphragm, varies the energy of the left hand magnet, just exactly, in substance, as the energy of the sound-waves acting upon the diaphragm, in figure 4 (Bell), varies the energy of the left hand magnet. That varying energy of that magnet sets up those precise currents of Bell in the line-wire. Those currents traverse the circuit just as in Bell. Those currents influence the right hand magnet just as in Bell; and that right hand magnet causes the second diaphragm to vibrate just as in Bell. So, the Reis-Bell method is: *first*, sound; and then, *second*, the Reis current; but that current is used to vary the energy of a magnet merely, which magnet induces these vibrating plus and minus currents which are precise facsimiles of Bell, differing solely in degree. They are stronger and better adapted for the purpose; otherwise they resemble Bell's currents exactly. The interposition of a magnet, or of a half dozen magnets, does not alter the principle. It does not alter the method in any way.

An induction-coil is shown in the diagram in figure 5 and figure 6. The induction-coil is a core of soft iron, with a coil of wire around it; and that coil of wire is connnected to a battery, so that the current will pass through that coil —that primary coil. There is another coil of wire around the first coil, and that secondary coil is the induction-coil, because, whenever the magnetism of the core varies a current is induced in that secondary coil. In practice the secondary coil is larger, a good deal, than the primary coil.

In figure 5, one of the coils goes to line, and is in circuit with the right hand magnet, while the smaller coil goes to battery, so that the current from the battery flows through the electrodes, governed by the diaphragm, through a short circuit, and through the small coil back to the battery again.

All that the electricity does is to vary the magnet in the secondary coil, and as the magnet in the secondary coil varies, currents are induced in that coil by the variation. Professor Wright took a Reis instrument, and prepared it as shown in figure 5, except that he had no magnet on the right hand end of figure 5, but he had what is called a condenser.

Mr. Elisha Gray and Mr. Varley also transmitted the pitch of a tuning fork and other sounds; but they did not attempt apparently, or succeed if they did, in using the energy of the speech-waves to set the apparatus in motion.

The defendant's apparatus I have called the Reis-Dolbear; that is figure 6 of the diagram. It will be seen by the diagram that the energy of the air-waves acts upon the diaphragm which we say is a facsimile of the Reis diaphragm; that the vibrations of the air-wave move that diaphragm just exactly as they do in Reis; that the diaphragm controls the voltaic or battery current just exactly as in Reis; and that variations in that current, caused by the varying pressure of the electrodes one upon the other, vary the magnetic energy of a magnet, just exactly as in the commercial telephone.

The first step in the Bell method is the varying, by force of the air-waves, or of the sound-waves, of the energy of a magnet. Dolbear's first step is much the same. But here the resemblance ends. That is the only likeness, the sole likeness, between the Bell method, as I have described it, and the Dolbear method. That is, that the energy of the air-waves in both may properly and fairly be said to vary the energy of the magnet. Now, how to utilize that varying magnetic energy. Bell utilized it by producing plus and minus currents. Dolbear produces no currents whatever, on the line. He produces simply variations of electric pressure, or in electric tension, or electric condensations and rarefactions.

The Dolbear line is an open circuit of necessity. The Bell line is a closed circuit of necessity. That is a radical difference. The electric condition of the Dolbear line is radically unlike that of Bell; and the Dolbear receiver is radically unlike that of Bell and is not a known substitute for Bell's receiver, but wholly unknown, and not in use for any purpose whatever until Dolbear's discovery that that contrivance would produce speech.

In figure 6 the secondary coil is very much larger than in figure 5. That secondary coil is the generator of the electro-motive force. Electro-motive force means electrical pressure, tension, or head.

To that plus end of the coil a wire is attached; to that minus end of the coil a wire is attached. So far it is exactly like Bell's. But those wires do not join anywhere, do not touch, are not in electrical contact anywhere. They must join, they must touch, they must be in electrical contact in Bell. In Bell they must be joined by a coil. Why? Because the cur-

rent must flow spirally around the soft-iron core. In order to do Bell's work they must flow from left to right, and again from right to left, rapidly alternating.

Dolbear relies upon electrical attraction pure and simple. That feature of what is called electricity is what Dolbear has utilized, and utilized for the first time in the world for any purpose whatever, excepting only in the laboratory. It is therefore not a known substitute, or any thing like a known substitute for the way in which Bell used electrical currents. This condenser differs from any other condenser ever used for purposes of sound, in that way.

If it be true that the Bell method is, *first*, sound; *second*, magnet; *third*, currents; *fourth*, magnet; *fifth*, sound—then it seems to follow, without need of any other or further argument, that the Dolbear method does not infringe.

It is true that in the Dolbear method a voltaic current is made similar in form to sound-waves, by the energy of the air vibrations in the transmitter, but that voltaic current is not utilized to transmit speech, but only to vary the magnetic energy of a magnet; and that varying magnetic energy is utilized in Dolbear in a way radically unlike any way ever known before; and especially unlike anything ever pointed out by Bell.

All that Dolbear uses in his secondary coil and line are variations of electric pressure; and those variations of electric pressure do not produce currents, as in Bell; they are not for the purpose of producing currents, but they are simply variations in electrical pressure. And it is undisputed, practically, in this case that no man before Dolbear ever had any conception whatever of any such electrical variations, or of any way of using them.

Dolbear had just as good a right as Bell, to find out a method of transmitting speech telegraphically by electricity. Dolbear has made an independent invention and discovery radically unlike anything shown to him by Bell, radically different from anything suggested or hinted at in Bell, and like Bell only in the ultimate result.

The electric pressure in the Bell line is meant to do nothing but make a current.

A conduit connecting the two ends of the generator is the very essence of Bell; but there is no conduit, or anything resembling a conduit in Dolbear.

In the speaking tube the mouth vibrates one end of the air column, and the ear is at the other end of the air column. There is no motion of the air from the mouth to the ear, but only a vibration of the entire column. Therefore there is a pressure, and a less pressure, and a greater pressure, and a constantly varying pressure, in the chamber of the ear. And absolutely all that speech consists of are those vibrations of pressure upon the drum of the ear.

The commercial value of Bell's invention was trifling, because of the weakness of the currents. In the course of time other inventors added to that the Reis apparatus; and ninety-seven per cent of all the modern telephones of today, now in use, are in fact the Reis-Bell telephones and are not the Bell telephones. That is figure 5. That is to say, the transmitting portion of every commercial telephone has been a servile copy of the Reis apparatus, and the rest of it a copy of the Bell apparatus.

The Dolbear telephone is not the Reis-Bell, but is the Reis-Dolbear.

Messrs. **Grosvenor P. Lowrey,** *Wheeler H. Peckham* and *H. D. Donnelly,* for the Molecular Company;

"Vocal sounds" and "articulate speech" were not convertible terms in the telegraphic art at the date of Bell's patents.

The "vocal sound" of multiple telegraphy was understood to be a mere musical note, sounded at an agreed pitch, and had no reference to articulate sounds.

Vocal sound is the utterance of a sound of voice, and is common to all animals who possess the organ of voice.

Articulate speech is the *series of sounds and notes uttered in arbitrary sequence to express ideas.*

The art of reproducing, in any manner, vocal or other sounds and articulate speech is one art.

When the reproduction of either class of sounds employs the electric current, the natural *modus operandi* is that changes in the strength of the current occur, which in degree and rapidity of succession correspond substantially to the air vibrations of the specific sound or sounds being transmitted. These changes are now commonly called undulations.

There are only two ways or "methods," so far as is yet known, for producing the changes of current needed in the practice of the art of reproducing or—as it is erroneously called—transmitting sounds telegraphically, viz:

1. By varying the initial or electro-motive force of a current.

2. By varying the resistance to the flow of a current, without varying its initial or electromotive force.

These two ways of producing the needed changes constitute two *distinct and different methods* of practicing the art of "transmitting vocal or other sounds" (and also articulate speech) "telegraphically," by causing electrical undulations similar in form to the vibrations of the air accompanying the sounds.

The first method is that figured in Mr. Bell's patent by a drawing. By this method the efficient current—that is, the particular current which affects the receiver—is generated *in* the transmitter by magnetic action; and is efficient by reason of variations in its *initial* force, called electro-motive force.

This is called the *magneto method.*

When, instead of a permanent magnet, a battery is employed to magnetise the magnet it is called a *magneto-electric method.* The second method is that employed by the defendants, and by the complainants.

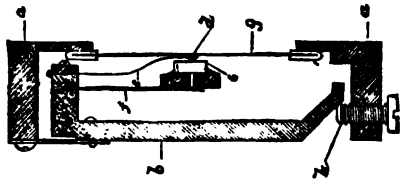
By this method a current of constant electromotive force is generated in a chemical battery, and is made effective for work in telephony by the introduction of a varying degree of resistance to its flow through the circuit; which variation of resistance may meet it anywhere between the battery and the receiver.

This is the variable resistance method.

1. The variable resistance method requires, like the magneto-electric method, but one circuit, although two circuits, called primary and secondary, are used in commercial business

where places, more than say one-half mile from each other, are to be connected. The explanation now to be given will, for greater simplicity, describe the transmitter as an element in one single circuit consisting of battery, transmitter, receiver and the necessary connecting wires.

The Blake transmitter, being the one chiefly used by the defendants, and therefore more commonly known than any other, will be adopted as the example by which to illustrate the mechanism and method of operation of the class of transmitters to which it belongs, and which are popularly called microphones.



The function performed by this transmitter is to interpose a resistance to the flow of current from the battery through the circuit above described, which may be made to vary. This it does by means of a piece of carbon *c* and a piece of platinum *d* which are held in normal contact by two springs *f* and *e*, and from one to the other of which, through the platinum and carbon contact, the current must pass. The pressure of the springs is subject to be disturbed by many causes,—even by the jar of a sound made in the neighborhood; and the resistance between the contact-points, *c*, *d*, is varied as this pressure is varied.

The Blake transmitter consists essentially: (1) of a flat piece of thin board *aa* with a small round hole in the middle; (2) a ring of cast iron screwed to one side of the board, carrying a cross bar or spring lever *b*, to which near its upper end is fastened a square block of non-conducting material; (3) a thin light spring *e* one end of which is inserted into the block of non-conducting material, and the other end of which hangs down opposite to the hole in the centre of the board, and carries on each of its faces a small point of platinum *d*; (4) another but stiffer spring *f*, the upper end of which is in like manner inserted into the block of non-conducting material, carrying upon its lower end—which hangs parallel to the first mentioned spring,— a piece of carbon *c* on the face next to the other spring; (5) a piece of thin metal called a diaphragm *g* which is fastened at its edges to the iron ring—though insulated from it—so as to close the small hole in the board on the side next the springs. The cross bar or spring lever is subject to adjustment by a screw *h* which bears against its lower end so that that end may be pressed in towards the stiff spring which is parallel to and next it. The tension of the two springs above described is such that they press lightly against each other,—bring the piece of carbon *c* on the stiff spring into contact with the platinum point *d* on one face of the lighter spring,—and also press the platinum point on its other face against the diaphragm. A battery is connected by a wire to the upper part of the stiff spring; another wire is connected to the upper part of the light spring, and is led thence to the required distance where it is connected to a telephone receiver (assuming that no secondary circuit is used), and is carried thence to the ground or back to the battery, thus making a complete circuit over which an electric current may flow. The course of the current is: (1) from the battery to to the stiff spring *r*; (2) down that spring to its lower end; (3) through the carbon *c* block of that spring, to the platinum point *d* of the other spring; (4) through that platinum point to the light spring *e*, and (5) up that spring to the place where the other wire is attached; (6) thence through that wire—called the line, or line-wire—to the receiver; (7) and through the receiver to the earth or by another wire back to the battery. The contact of the platinum points with the diaphragm on one side and the carbon point on the other is such that even the slightest jar will cause the platinum and carbon to be pressed more closely together, or driven measurably apart. A strong jar (such as results from too loud speech in front of the diaphragm for instance) may, when they are properly adjusted for transmission of sound, cause them to be for a very brief period, say for the $\frac{1}{100}$ part of a second, and for a brief space say for the $\frac{1}{1000}$ to $\frac{1}{10000}$ of an inch, to be separated. Such a separation, being regarded prejudicial to the transmission of speech, is sought to be guarded against by an adjustment of the screw and cross-bar; and also by an avoidance of too loud speaking.

The apparatus being set up, a current is permitted to flow from the battery through the circuit. This it does by reason of what may be considered as a force behind it, resulting from the interaction of the elements of the battery. This is called electro-motive force. It is not a force of the current, but of its generating source; something which compels the production—at places distant from the battery, but connected with it by a conductor—of phenomena which are attributed to a force originating in the battery. In ignorance of what does actually occur, the supposed transference has been likened to the flow of water, and, for want of any better term, the electrification of the conductor has been called a current. The only thing known is, that when the elements of the battery are permitted to act, certain phenomena occur throughout the entire circuit—however long it may be—at almost the same instant; so that, if the battery be in New York, the phenomena of electrification can be made to appear in San Francisco in about three tenths of a second.

This flow meets a resistance in the circuit which can be definitely measured and stated; and which can be increased or decreased in various ways. One way is to increase or decrease the cross-section of the conductor at some point, thus narrowing the path for the current; as if a flexible tube, through which water is flowing, should be compressed by the hand. If now we suppose the diaphragm of a telephone transmitter to be vibrated by speaking before it, it will press inwards, thus driving the light spring back and pressing the platinum more against the carbon. This pressure brings many molecules—perhaps many millions—into actual contact, which were not in contact before. This increase of contact enlarges the cross-section of the conductor at that point; widens the path

of the current, and the resistance to its flow is proportionally *diminished*. When the diaphragm reacts it relieves this pressure; there is a diminution of contact, the cross-section is diminished; the path is again narrowed and the resistance *increased*. If this variable contact is made correspondingly to the rarefaction and condensation of air constituting sound-waves, the current is said to be "moulded" into the form of the sound-waves; and, by help of other arrangements in the receiver, speech is reproduced.

This way of reproducing sounds is called *the variable resistance method*, and a transmitter thus operating is called a variable resistance, or variable contact, transmitter.

Such a transmitter is *incapable of acting by the magneto method;* as a magneto transmitter is incapable of acting by this method.

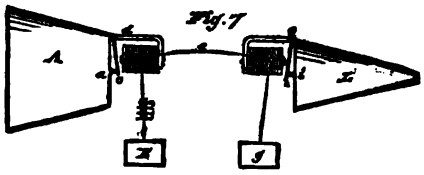
The changes in current strength being called undulations, the current in which they occur is called an undulatory current.

The essential characteristics which distinguish this method are, that the constant is a voltaic current originating in a battery, disturbed by variation of resistance,—thus creating an undulatory current of electricity,—and that the source of efficiency is the battery.

Bell's Magneto-Telephone and its Methods.

The instrument figured and in part described by Mr. Bell in his patent of 1876, No. 174,465, is shown in the following drawing:

Fig. 7



It will be seen that a battery is represented, which is the source of voltaic electricity flowing freely from the battery through a wire which leads to the transmitting apparatus, which it enters by winding about a short piece of soft irón *b*, the convoluted parts being insulated from each other and from the iron core by a silk covering. The wire, *e*, having been sufficiently wound around the soft-iron core is led away to the distant receiver, where it is wound about a similar soft-iron core *f*, and thence to the earth—thus completing the circuit with the battery. This core and single coil constitute, when a current is flowing, an electro-magnet, which is not, however, to be confounded with an *induction-coil*. There is but one circuit; and that extends from battery to receiver—however great the distance. In its course the current meets normally no changeable resistance.

The figure shows a cone, A, one end of which is covered by a membrane *a*, to the centre of which, on the side next the coil, is attached a metal armature *c*, which is an inductive body when itself magnetic, or when the core of the adjacent coil is magnetic. At the other and receiving end of the line is seen a similar arrangement of armature, membrane and cone, *h*, *i*, L, except that the end of the receiving cone is made smaller for convenience in hearing. If, now, the battery current begins to flow, it passes through the wire wound around the soft-iron core *b*, and over the line *e*, on, to the second series of convolutions around the second soft-iron core *f*, and thence to the earth. In obedience to well-known laws of electro-magnetism, in passing around them it causes each of the soft-iron cores to become magnetic, and so remain, so long as the current is flowing. If now a sound or concussion happens in front of the membrane *a* in the transmitter, it will produce upon the membrane and its armature *c*, an inward motion toward the magnet *b*, to be followed by an outward motion away from it. These motions of the inductive armature, by a well-known law of what is called magnetic induction, produce new and artificial currents in the coil of the electro-magnet, which add themselves to the current there flowing, causing it to be of a lesser or greater strength according to the movement of the armature to and from the magnet, and to the violence of such movement. Thus, if the normally constant strength of the current from the battery be taken at a unit of 100, one movement of the armature will set up an extra current, which being added, or as the technical phrase is, superposed, upon the constant battery current, will cause it to be 99; and again upon the opposite movement of the armature will increase it through various degrees to 101.

The increase and reduction, according to these well-known laws, will be in exact proportion to the violence and extent of the armature movement. These changes in the intensity of the battery current are also called undulations; and doubtless for the same reason, viz; that the customary graphical representation of them will show a wavy line, as will also any graphic chart of rise and fall in the price of wheat. The constant battery current as will be perceived is not the efficient cause of work, and has theoretically no part in that work. Its sole function is to keep the soft-iron core magnetic. This is proved by *withdrawing the battery altogether and substituting permanent steel magnets* in place of the soft-iron electro-magnets, when *no difference will be found;* from which it is apparent that whereas, in the variable resistance method the battery is essential and the induction-coil (used only where a secondary circuit is desired) non-essential, in the magneto method the battery is non-essential and a coil is essential,—for transmission.

In Bell's invention, the novelty consisted in the use of the energy of air-waves to mechanically actuate a dynamo machine, and to cause it, not to mould,—as is sometimes claimed—but to create the electrical currents which are to do the work.

The essential characteristic which distinguishes this method is: *A magnetic field disturbed by the shifting presence of an inducing body;* which thereby creates *electrical undulations in the wire.* The efficient, is the magnetic force; its source is the magnetic field; and the battery current is not in any sense the cause of work.

In the variable resistance method, the operative current has its source in a battery, and flows thence with a constant energy and direction; and the needed changes in it are caused by a variation of the resistance to its flow.

This is known in the arts as the "loose contact" "variable contact" or "variable resistance"

method. In every apparatus ever devised to work by this method—beginning with that of Reis in 1861—the necessity to keep the contact loose introduces a possibility that it will be *broken* by *too great loudness* in the tones which are sought to be transmitted. In fact, the Blake transmitter frequently breaks contact in this way, and for this cause. The circuit of which a loose contact of electrodes is a part can never be spoken of as a "closed circuit" (within the sense of this patent, which shows only closed circuits, incapable of being ever open), any more than any Morse circuit, which like the former may sometimes be open and sometimes closed.

In the magneto method the battery current is not effective for reproducing speech, its sole function being, as above stated, to render the soft-iron core magnetic. If for that a steel core, permanently magnetic, be substituted, the battery may be abandoned altogether.

In this, the magneto method, the circuit was properly designated by Mr. Bell in his patent as a "closed circuit"—because there is *no possibility of opening it.*

The terms "continuous current" and "closed circuit," when used in the patent, or in any remark with reference to Mr. Bell's claims, are to be construed in harmony with, and in subordination to, his drawings and delineations, *i. e.*, as being, by reasons of the mechanical structure and connections shown, incapable of being other than "closed," or "continuous."

No circuit which is capable of being either open or closed, according as accident or design may determine, is the "closed circuit" of the patent; and no current flowing in a circuit where it may be continuous or discontinuous, as accident or design may determine, is the "continuous current" of the patent.

These two ways of producing current changes by the energy of sound-waves are two different methods in the arts and in the law.

A patent for the last is not infringed by the practice of the first method.

The judgment of the circuit sustains the allegations of infringement under the fifth claim, and no other claims of the patent of 1876; and the opinion of the court shows that it is the so-called "method" portion of the fifth claim which is decmed to have been infringed.

The apparatus portion could not be considered infringed, since the two (transmitter) machines are essentially different, neither being capable of use in the place of the other. The one is adapted to vary the forces of a current flowing through it by interposing opposition to its flow. The other is adapted to the introduction in the current flowing, not through it, but in its neighborhood.

As to the parts of Bell's device, the limits of novelty will be seen when we know that Reis used the mouthpiece membrane (Reis-Bourseul Pub. p. 83); Pickering (Overland Rec. p. 208), and Bourseul, the metallic diaphragm; Schellen, the permanent magnet with the coil on the end encircling an electro-magnet exactly as figured in the Bell Patent of 1877 (Mol. Rec. p. 748); Reis-Legat, the electro-magnet (Reis-Bourseul Pub. p. 29); and Wright, the induction-coil (Ferguson, Electricity, p. 258).

Bell's patented methods are, first, a method for producing electrical undulations in a closed magneto circuit, as set forth in his Claim 3.

The second is a method for producing electrical undulations in variable resistance circuits, as set forth in his Claim 4.

The third is for transmitting sounds telegraphically, as set forth in his Claim 5.

The third and fifth claims are illustrated by an apparatus, figure 7, which, long after the date of the patent, is said to have proved operative, though it has never been in use.

This is an apparatus for *transmitting* sounds by the method of causing undulations in the magneto method.

No apparatus for *transmitting*, etc., by causing undulations in the variable resistance method is shown, or even hinted at in the patent.

A way of creating undulations in a voltaic current, through a circuit capable of being open or closed, is stated.

But how—that is, by what method or apparatus—these undulations can be put into a form similar to any sound, or can be used in vocal or other sound transmission, we are not told.

Further invention was required for this. Such invention had been previously made by Elisha Gray, and a caveat therefor filed in the Patent Office previous to the granting of Mr. Bell's patent.

If the device was Bell's invention, it was either made before the granting of the patent, and was therefore abandoned, by not being described; or was made after, and therefore cannot sustain a previous broad claim for a process.

Figure 7 is incapable of application as an alternate or substitute for the liquid, or any other variable resistance transmitter. Figure 7, or its equivalents, cannot therefore be relied upon to satisfy the requirement of the law, that a patent for a process must contain a description of some apparatus by which the process can be applied with beneficial result.

Tilghman v. *Proctor*, 102 U. S. 729 (26: 288).

The contention of the complainants begins with a confounding of patented methods, and results in monopolizing a law of nature.

Sound, considered in the physical sense, is a particular vibratory motion in ordinary matter.

When sound comes to be appreciated *physiologically*, the ear recognizes in it a variety of things.

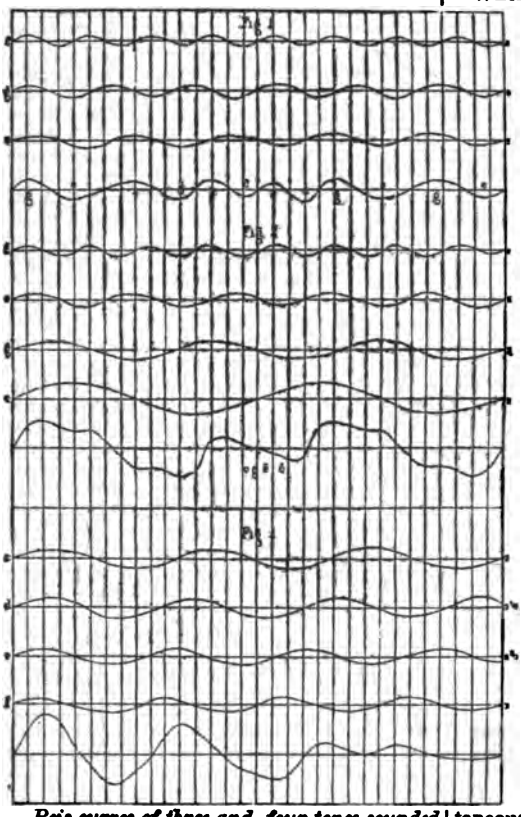
First, it recognizes pitch; the sounds may be high or low. Second, the sounds may be loud or soft. Third, they may be of an infinite variety. These differences arise from differences in (1) the extent, (2) the number, (3) the character of vibrations made by the air particle in obedience to the sound-producing cause; that is, whether they be of pendular or irregular form.

The *pitch* of the sound will depend solely upon the number of vibrations which the air particle makes to and fro in a given time.

The *loudness* or *intensity* of the sound will be determined by the extent (called amplitude) of the vibration.

Quality, or *timbre*, is the third effect by which the ear perceives the difference between different sounding bodies. This sensation is hypothetically imputed by physicists to the

manner in which the compounded vibrations have been performed.



Reis curves of three and four tones sounded simultaneously, and the combination or resultant curve in each case.

Helmholtz, Sensations of Tone, second English edition, by Alex. J. Ellis, London, 1885, p. 19, says:

"On inquiring to what external physical difference in the waves of sound the different qualities of tone correspond, we must remember that the amplitude of the vibration determines the force or loudness, and the period of vibration, the pitch. Quality of tone can, therefore, depend upon neither of these.

The only possible hypothesis, therefore, is that the quality of tone should depend upon the manner in which the motion is performed within the period of each single vibration."

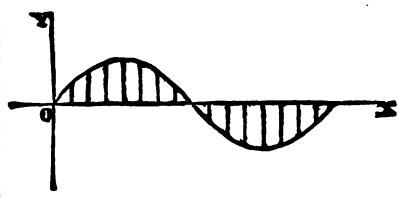
Upon this hypothesis rests, therefore, the assumption at present universally made and accepted in the scientific world for purposes of scientific reasoning, that the quality or *timbre* of sound, or that which enables distinction between different sound-producing causes to be recognized by the ear, arises from, is dependent upon, and truly represents, certain assumed or postulated eccentricities of conduct by the air particle while engaged in performing a certain number of journeys, of a certain length, within a certain time. Upon this Mr. Bell forms a similar *hypothesis* as to electrical action, and draws a conclusion that the electrical current undulates. And this conclusion—built up, hypothesis upon hypothesis—he has patented.

When more than one simultaneous tone or sound acts upon an air particle it produces a compromise in the vibration. This is called a resultant vibration, and is the algebraical equivalent of all the others. Mathematicians represent it as well as the movement of the vibrations which compose it, by curves.

Quality is that peculiarity in sound which allows us to distinguish between sounds of the same pitch and the same intensity. Thus the sound produced by the flute and clarionet are at once distinguishable.

A simple sound is one which generates an air particle motion of strictly pendular vibration.

The following is a graphical representation of the vibration due to a simple sound:

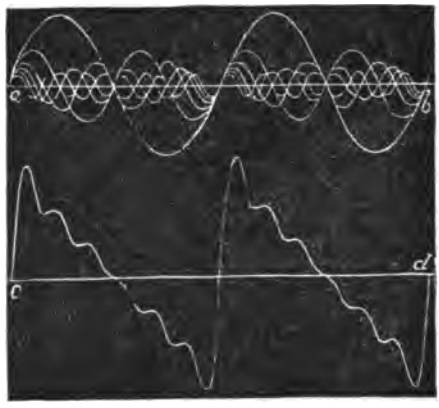


Whenever a sound is composed of more than one tone it begins to have *quality*. The expression of that quality is in the form.

Compound Tones.

When several fundamental tones with their related harmonics are simultaneously sounded, we have what is called a "chord" in music. The increased complexity resulting from such simultaneously sounding tones makes the quality of the compound sound more marked than the quality of any simple fundamental tone.

The following plate of curves known as Mayer's Harmonic Curves represent at *a b* the separate curves of six simple sound-waves, be-



ing the sound-waves of a fundamental and its overtones. The motion which an air particle

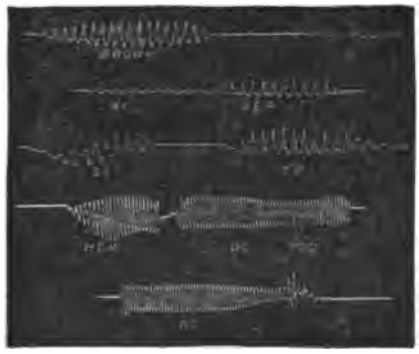
will actually take up under these differing influences is represented by what is called the "resultant curve," shown in the same plate at *c d*.

The most complex and variable of all sounds is that of articulate speech. Articulate speech is a combination of vowels and consonants following each other in a certain order or system prescribed by the law of language.

Speech consists in the first place of the emission of sounds having different characters, peculiar timbre, to wit, vowels. The second element of human speech consists of consonants, which are not persistent tones, but modes of beginning or finishing the vowel tones by a sort of explosion; that is, by a movement of the air comprising at the most a very small number of vibrations, of different form from those of the vowels which they modify. When a consonant begins a word, such explosion precedes the musical sound of the vowel and ceases as soon as the vowel sound has taken place, as in ba, be, bi, etc.; or, it terminates the vowel sound by a final motion of the lips as in ab, at, ar, etc. The consonants in no way depend upon or are affected by the pitch of the vowel sound which they introduce and terminate.

The method by which each kind of sound will be transmitted *telegraphically*, will be "causing electrical" variations, oscillations or "undulations, similar in form to the vibrations of the air accompanying the sounds."

The curves due to certain articulate sound vibrations are shown by the well known "Brown-University Curve" of Professor Blake.



Any variable resistance instrument, in transmitting telegraphically a simple sound composed of a fundamental and its overtones,—or, simultaneous musical tones with their respective overtones,—will necessarily operate by the same process or method as the same or another instrument, when transmitting telegraphically the higher complexities of human speech. This method will necessarily be that which has been patented by Mr. Bell under the terms "by causing electrical undulations similar in form to the vibrations of the air accompanying the sounds,"—whether the hypothesis expressed and patented in those terms be correct or not. Between these different uses and the operations required to accomplish each, will be found no new law, and no new art, but only degrees of mechanical adaptation or development in apparatus.

Reis and Bourseul possessed knowledge that the transmission or reproduction of any sound, simple or compound, *in or through any of the media to which nature has given capacity to transmit sound vibrations*, must be by means of vibrations similar in amplitude, rate and form to the vibrations immediately accompanying the sound; and this, too, whether the vibrations be to-and-fro motions of matter, or plus (+) and minus (—) *changes in the strength of an electric current;* and whether the energy of the air-waves themselves is the actuating cause (thus in a sense propagating itself), or is imitated by some other mechanical action.

The knowledge of this law is claimed to have been given to the world by Mr. Bell; and that erroneous idea is the sole foundation for the broad patent claim under which the rest of the world has heretofore been excluded from practicing an art, all the principles and conditions of which were known and published to the world before the year 1864, and the complete commercial realization of which awaited only a good mechanic to make a suitable apparatus, and a Boston syndicate to give it a favorable introduction to the world.

In 1854–1864, the state of knowledge in acoustics, electricity and magnetism included certain fundamental laws.

In Acoustics.

1. That sounds are propagated by vibrations of matter.

2. That the loudness of any sound is determined by the amplitude of the vibration, or the distance through which the air particle moves to and fro.

3. That the pitch of a sound is determined by the number of times in which an air particle will traverse this amplitude in a given time.

4. That simple sounds give simple periodic and regular vibrations.

5. That all sounds are compound whose vibrations are the result of simultaneous action of several simple tones, whether resulting from one or from a number of sounding bodies.

6. That "quality" pertains to and is predicable of all compound sounds,—of which articulate speech is one class; and that the air particle, in obeying the impulses of the compound-sound-producing causes, no longer makes the motion due to any one of them, but another motion, which is a compromise upon and the algebraic sum of all their varying and perhaps conflicting impulses.

7. That quality is expressed and represented by something in the manner in which the vibration is made, different from the amplitude and rate, but included within the amplitude.

8. That air vibrations can be taken up and reproduced by a plate or diaphragm.

In Electricity and Magnetism.

As will appear by the references to the writings of Bourseul and Reis, it was also known before 1864, and substantially published to the world:

9. That plate or membrane vibrations, de-

rived from air vibrations, can be made to produce in a conductor electrical changes corresponding to the air vibrations.

10. That by the use of an electro-magnet and a second plate, the electrical vibration can produce another air vibration in another place corresponding to that which accompanied the original sound; or, in other words, that vocal and other sounds can be transmitted "telegraphically, by causing electrical undulations similar in form to the vibrations of the air accompanying the sounds." (Bell's 5th claim.)

11. That apparatus capable to perform this work was devised, publicly used, and descriptions thereof, sufficient in law to establish an anticipation, were made prior to the year 1874, when Bell claims to have conceived the idea of his magneto telephone.

With these observations upon the state of knowledge and the arts before 1861, we may next give attention to,

First, conception of the art of transmitting speech by electricity.

The first published conception of any plan by which speech might be transmitted over an electric conductor and reproduced occurs in "*L'Illustration Journal Universel*," Paris, 1854, in a communication by Charles Bourseul, in which he says:

"I have asked myself, for example, if the spoken word itself could not be transmitted by electricity; in a word, if what was spoken in Vienna may not be heard in Paris? The thing is practicable in this way:

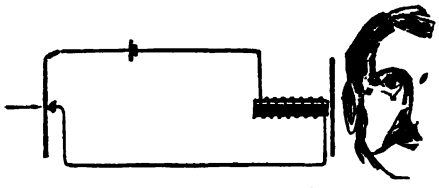
"We know that sounds are made by vibrations, and are made sensible to the ear by the same vibrations, which are reproduced by the intervening medium." * * *

"Syllables can only reproduce upon the sense of hearing the vibrations of the *intervening medium*. Reproduce precisely these vibrations, and you will reproduce precisely these syllables. * * * I have made some experiments in this direction. They are delicate and demand time and patience; but the approximations obtained promise a favorable result."

In this paper, unpreceded by publication in any scientific or other work, or by any discovery or suggestion, Charles Bourseul suggested not only an apparatus applicable for the conveyance of sounds, but a principle of operation which constitutes a necessary condition of the telegraphic transmission of speech.

Both he and, afterwards, Bell had in view the reproduction, by means of the electric current, of the vibrations which cause the sensation of sound.

The following is an ideal suggestion of Bourseul's plan, without working parts:



Bourseul had expressly in view the reproduction of such specific sounds as constituted articulate speech. He declared that spoken syllables could have their due and desired effect, only when the vibrations of the entire intervening media were substantially like the vibrations accompanying the spoken syllable.

The subject under discussion was the doing this with an electric current and wire. That a transmutation of mechanical into electrical forms of action and back again would happen, was, therefore, a fundamental condition of every argument and statement.

In other words, it was recognized and announced as a law, that the syllables could not produce their effect unless their vibrations were *reproduced* throughout *all* the intervening media, including, of course, the electrical conductor and current.

The telephone of today could not be better described than, in the terms of Bourseul, *as an instrument by means of which spoken syllables can reproduce, through correspondent vibrations of various intervening media*, a distant effect upon the sense of hearing, *equivalent to themselves*.

It is of no practical or legal consequence that Reis was mistaken in his *theory* of the operation of his apparatus. It is sufficient that he gave such description thereof as would enable one skilled in the art to accomplish the result pointed out—that of transmitting speech.

Treadwell v. *Parrott*, 3 Fish. Pat. Cas. 124; *Hamilton* v. *Ives*, 6 Fish. Pat. Cas. 244, 253; *S. C.* 92 U. S. 426 (23:494).

In 1861 Reis says: "With the above principles as a foundation, I have succeeded in constructing an apparatus with which I am enabled to reproduce the sounds of various instruments, and even to a certain degree the human voice."

Reis and Bourseul Publications, p. 15.

Reis's telephone was sufficiently operative, according to the statement in the Legat and Reis papers, and the proofs in the case, to have sustained a patent, and to anticipate a subsequent invention.

Pickering v. *McCullough*, 104 U. S. 319 (26: 752); *Woodman* v. *Stimpson*, 3 Fish. Pat. Cas. 98.

If Reis and Legat, with Bourseul, had in 1864 applied for a United States patent with broad claims for the art of transmitting vocal and other sounds telegraphically by electricity, in the manner and with the apparatus shown in the Reis-Legat paper, can it be doubted that they would have obtained it? Or that Bell, coming after them, would have obtained more than a patent *limited* to his magneto apparatus and method?

Had they taken out such a broad patent for the discovery of the "art" of "transmitting," etc., "vocal and other sounds," can it be supposed that any errors of opinion as to the automatic or natural function of the machine would have impaired the validity of the patent?

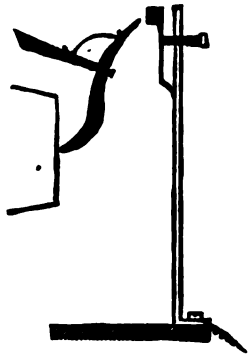
Saint Louis Stamping Co. v. *Quinby*, 4 Ban. & Ard. 192.

The microphone consists, physically, of two electrodes placed normally in contact, with a slight pressure, and forming part of a circuit supplied with a current from a battery. The principle of the microphone is the principle of a loose joint.

The following outline of the operative parts of the principal variable resistance transmitters may be referred to:

The modern receiver, by its perfection, likewise reveals the perfection of the ancient Reis

transmitter. That transmitter crossed with a good receiver always produces speech.

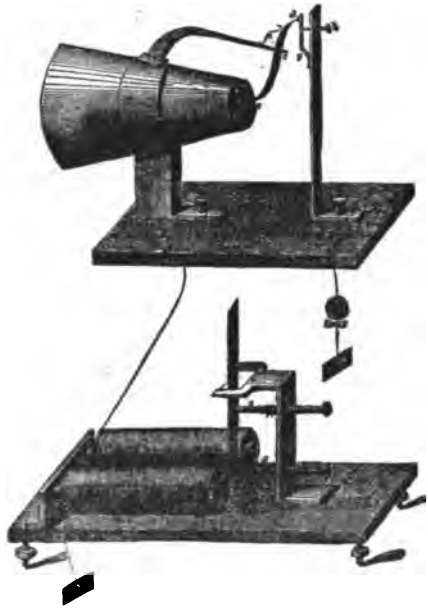


Reis-Legat Transmitter.

Blake Transmitter.

The microphone transmitter originated in two places: in Germany at the hands of Reis, and in England at the hands of Professor Hughes.

We have here pictures of the Reis-Legat instruments.



1. The tone transmitter consists of a conical tube about fifteen centimetres in length, having a front opening of about ten centimetres and a rear opening of about four centimetres.

2. The narrow end of the conical tube is covered with a collodion membrane.

3. A curved lever *c d* is suspended in such a way that one end of the lever rests on the collodion membrane and the other rests against the spring *g*, and is to be "*kept in electrical connection*" with the metallic conductor.

4. The proper lengths of the respective arms of the lever *c e* and *e d* are not given, but it is said that they are to be regulated by the laws of the lever.

5. The object to be attained is named. It is "in order that the least motion at *c*" (the membrane) "may operate with greatest effect at *d*" (contact-point).

6. "It is also desirable that the lever itself be made as light as possible *that it may follow* the movements of the membrane." "Any inaccuracy in the operation of the lever *c d* in this respect will produce false tones at the receiving station."

7. When in a state of rest the contact at *d g* is closed, and a delicate spring *n* maintains the lever in this position. With slight changes in construction the Reis-Legat instruments will successfully transmit speech.

The proofs concerning the Reis instruments may be summed up as follows:

1. Any instrument capable to transmit tones having quality is theoretically capable to transmit articulate speech

2. The Reis instruments are capable to transmit tones having quality; to wit, musical tones of the voice, tones of various musical instruments, and chords consisting of two or more simultaneously sounded notes.

3. The Reis instruments were devised for the transmission of articulate speech.

4. The Reis instruments did transmit words and sentences in the hands of Reis and of others in his time.

5. The Reis instruments will now, using his transmitter and receiver together, "talk," though with uncertainty.

6. The Reis transmitter will transmit clearly and well when united to a good receiver, such as the McDonough, or Bell magneto receiver.

7. The Reis apparatus entire will "talk" well, when modified in mechanical construction, without the addition of any element not already there.

8. Whenever and wherever the Reis instrument has talked, or can be made to talk, it avails of a natural method being the same which Mr. Bell has, under a name and description, the fitness of which appears as yet incapable of verification, claimed and patented.

Upon this state of facts, concerning the art of transmitting speech, before 1874, it becomes material to inquire, When is an art discovered?

To conceive that a new thing can be done; to indicate in a correct though general way the laws of nature which must be availed of; to create suitable apparatus—although suitable only in a limited degree; to use the apparatus, and succeed in the avowed purpose—though only in a limited degree; to publish the result with sufficient specification to reveal the whole purpose, and put the world fairly upon further inquiry,—appears to take the doing of that special thing out of the category of the undiscovered arts.

From that stage, in the development of that art, it would seem that invention and discovery must be deemed limited (by the state of the art) to the improvement and perfecting of old or the invention of new modes and mechanism.

This difference between the discovery of an art and the perfected practice thereof is what the court is called on in this case to clearly distinguish.

Bourseul had in 1854, by pure force of reason, predicated the capacity of electricity to transmit speech; had formulated a general expression of the law of such transmission, which

is now found to include and be harmonious with all the particulars of our present state of knowledge; and had suggested an apparatus.

Reis had in 1861 pursued the law of acoustical action and effects to a fuller extent; had made an electrical machine; had challenged and solicited nature to act within the electrical and hidden part of the operation (according to her own laws whatever they might be); had received a favorable, though grudging and capricious response; and had published to the world that: "With the above principles as a foundation, I have succeeded in constructing an apparatus with which I am enabled to reproduce the tones of various instruments, and even to a certain extent the human voice."

From this time it was not open to Mr. Bell to discover speech transmission as a new art.

The fifth claim is a claim for the electrical transmission of speech under the form of a description of how nature does it.

This may be likened to a claim for raising wheat by the germination of the seed of the plant, leaving mankind free to produce wheat by all other methods.

In fact, what Mr. Bell has discovered is, not that electrical undulations *can*, but that they *do*, transmit sounds by conforming themselves to the characteristics of the energy which creates the sound, and that they will do this in no other way. This is a scientific fact.

Thus considered *he has been able to monopolize a natural force and patent a scientific fact.*

Considering that the process rests upon the existence of electrical undulations which are similar in form, etc., it is now and without argument, at this place, submitted that no one of the famous process cases has decided anything which will justify a patent upon a process or condition, the existence of which is incapable of proof.

That speech cannot be transmitted when the current is not continuous is not proved.

That undulations in continuous electric currents occur when speech is transmitted is also not proved.

Proof thus qualified and doubted is not adequate to support a judicial judgment (affecting important property rights), that the electric current used in a microphonic telephone transmitter is either continuous or undulatory.

Previous to 1867 Doctor Horace S. Wright, of Edinburgh, Scotland, used an induction-coil as an adjunct to a sound-transmitting apparatus in connection with a Reis transmitter.

A Wright condenser will transform electrical variations, or undulations, similar in form to the sound-waves, into corresponding sonorous vibrations, and thereby produce sounds and articulate speech.

Dr. Van der Weyde at an early date constructed a number of instruments, which he exhibited at a meeting of the Polytechnic Club of the American Institute, in Cooper Union January 7, 1869. On that occasion the experiments were confined to the reproduction of the human voice.

Thus we have the modern microphone in *actual use* in this country, according to the modern method, long prior to the Bell patent and to any pretense of Bell's invention or conception.

On the 8th day of April, 1870, British Letters Patent were granted to Varley. The Varley condenser, *constructed as in Mr. Varley's patent, is capable of reproducing speech.*

His undulations are just what Bell's are, since they *will transmit speech.*

There is no substantial difference between an undulatory current such as produced by the apparatus of Mr. Varley, and an undulatory current created or generated by an apparatus constructed in accordance with figure 7 of said Bell patent.

The art of creating such undulations is one generic art; which in its specific branches demands no new principle, but only greater mechanical adaptation.

The instruments constructed by Mr. James W. McDonough and used by him *in the year 1875, for the transmission and reproduction of articulate speech, contained all the vital and essential elements of the telephonic apparatus now in commercial use.*

Prior to Bell, McDonough constructed *an apparatus capable of transmitting and reproducing articulate speech,* and set forth in his application for letters patent, that that was the object of his invention.

In the winter of 1866 and 1867, Elisha Gray constructed an instrument for transmitting tones. Apparatus shown and described in British Letters Patent No. 2646, dated July 29, 1874.

The apparatus shown in figure 4 of Gray's British Patent contains a common or universal receiver capable of responding to all kinds of tones, and *consequently of reproducing articulate speech. This receiver is essentially a Magneto Telephone.*

Gray's American patents 166,095 and 166,096, dated July 27, 1875, described a method of producing *electrical vibrations in a closed circuit and reproducing them upon a common or universal receiver.*

Professor Geo. F. Barker, an eminent physicist, says: "Gray, therefore, seems to have been *the first to formulate distinctly the conditions necessary to transmit the form of the sound-wave electrically through a wire, and to devise a practical manner of accomplishing it.*"

Gray's invention anticipated Bell's first patent. Bell's patent is for a multiple telegraph or for a singing telegraph or telephone for multiple telegraph.

If, however, it can be claimed that the first patent is a patent for anything beyond the multiple telegraph, we submit that it cannot be construed as a patent for anything but a magneto-electric telephone, and that the *"method"* of the fifth claim is the method of a magneto-electric telephone.

If the claim is given the broad construction asked for it by the complainant, it would be void, as a patent for a theory.

There is another aspect of this patent, pursuant to which we submit it must be held void as a patent for the new art or process of transmitting speech. That art or process is not described in the patent.

In *Wakeman* v. *Corcoran*, L. R. 18 Ch. Div. 65, the familiar rule of law is stated that "the specification of a patent is bad if a skilled mechanic would not, without performing a series of experiments, be able to construct the machine from the description." And on page 72, *Justice*

Fry says: "The patentee must state not merely the problem which is to be solved, but the mode of solving it."

Tyler v. *Boston*, 74 U. S. 7 Wall. 327 (19:98); *Wood* v. *Underhill*, 46 U. S. 5 How. 1 (12:23).

In the case of *Downton* v. *Yaeger Milling Co.* 1 McCrary, 30, 81, affd. 108 U. S. 466 (27:789), the court says:

"On the other hand, irrespective of the question of estoppel, if the patent is for a process to be effected without any known means of accomplishing the result, but requiring inventive faculty, whereby rolls to accomplish the purposes and their modes of operation were to be determined by new inventions or discoveries, then the patent does not furnish to any one, as then skilled in the art, means whereby the beneficial end could be accomplished. No one in the then existing state of the art could, by the use of any rolls known, or by any modes of operating the same, have effected the designed end; consequently, to uphold this patent for a process, which would have been ineffective without some inventions thereafter had, would be to block the path to all future progress in the art of milling."

Defendant's instrument is called a microphone, an invention of the highest character. Professor Bell, in the Preece discussion says: "No one can more heartily congratulate Professor Hughes upon his *great discovery* than I do." This court regarded discovery as the basis of and antedating a process.

Corning v. *Burden*, 56 U. S. 15 How. 252 (14:683).

The decree is also erroneous in that it finds that the defendant infringed the 6th, 7th and 8th claims of patent No. 186,787. That patent is not for an invention. It is not for a combination.

We submit that, in view of the state of the art, Bell's Patent No. 174,465 must be limited, either—

1. As a patent for a multiple telegraph, or a musical telephone, or,

2. As a patent for the magneto method of transmitting sounds by the energy of air-waves and electricity.

That in either case the fifth claim is not infringed by the method or apparatus used by the defendants.

That neither the fifth, sixth, seventh or eighth claims of the patent No. 186,787 are infringed by the receiver used by the defendants.

That the judgment of the court below should be reversed, and the cause remanded to the court below, with instructions to dismiss the bill, with costs.

Messrs. George F. Edmunds, Don M. Dickinson, Charles P. Crosby, **Lysander Hill,** *T. S. E. Dixon, Henry C. Andrews* and *Melville Church* for the People's Telephone Company (Drawbaugh Case), and the Overland Telephone Company:

From Bell's sworn preliminary statement in the "Speaking Telephone Interferences" (Complainant's Record, p. 1695) the following facts clearly appear, viz:

That prior to the summer of 1874 Bell had formed no conception of any means for the transmission of speech. In the summer of 1874, stimulated by Helmholtz' experiments in the electrical transmission of vowel sounds by means of a series of tuning forks of different pitch, Bell conceived the possibility of accomplishing "the same results" by substituting a series of vibrating reeds armatures in place of Helmholtz' tuning forks. But he never, then or at any subsequent time, made or attempted to make or test such apparatus.

In the summer or fall of 1874, he also formed an inchoate mental conception of the possible production of a similar result by means of a "membrane similar in shape and structure to that in the human ear," but, although he spoke of the plan to Dr. Blake in October, 1874, he did not devise any method of combining the membrane with an armature, or attempt to construct any apparatus upon the plan.

In March, 1875, he explained his "harp apparatus" to Professor Henry, and it was of this apparatus, and not of the membrane apparatus, that Professor Henry spoke as containing "the germ of a great invention."

About May 4, 1875, he made an experiment to test the transmission of an electric current through piano strings in vibration. The experiment was a failure.

On June 2, 1875, Bell accidentally discovered that with two multiple-telegraph instruments arranged in circuit as shown in figure 5 of his subsequent patent of March 7, 1876, he could, upon plucking one of the reeds with his finger, hear an audible response from the other, of the same pitch as the normal pitch of the transmitting reed, and with something of the timbre of that reed.

Thereupon Bell, for the first time in his life, conceived the practical possibility of transmitting articulate speech by a membrane instrument, and set about to construct one.

One was completed on July 1, 1875, and another a few days after, and with these two instruments Bell and Watson experimented in July, and, at the end of that month, discontinued their experiments without having heard a word of speech through the device, and even without Bell's having been able to hear a sound.

No further experiments were made till March 10, 1876, after the date of the first patent here in suit; but then the experiments were resumed, not with the instruments of July, 1875, but with a liquid transmitter and one of the old multiple-telegraph instruments as a receiver, and then, for the first time was obtained, to use Bell's words, "*intelligible articulation.*"

Prior to June 2, 1875, Mr. Bell never made a telephone instrument or experiment, his work being confined exclusively to his multiple and autograph telegraph inventions, and to his professional work as a teacher of the deaf.

Bell obtained his first reproduction of speech electrically through Gray's liquid transmitter, on March 10, 1876, a few days after he had acquired knowledge of Gray's caveat at Washington.

Bell had never made, nor attempted to make, such a transmitter until after he had knowledge of Gray's caveat.

All of Bell's telephonic apparatus and experiments, prior to his knowledge of Gray's caveat, were magneto-electric apparatus and experiments.

After getting speech through Gray's liquid transmitter, on March 10, 1876, he immediately

resumed experiments with his magneto-electric current and apparatus for speech transmission, but reconstructed the apparatus, and in April got speech through it.

This reconstructed apparatus was not like his apparatus of July, 1875, but was exactly like the receivers shown in Gray's caveat.

After the demonstration of electric speech on March 10, 1876, it was too late to amend or change the patent, which had issued three days before But it was not too late to amend the application so as to broaden its possible construction.

A more startling fact appears in the record, to wit, that Pollock & Bailey, Mr. Bell's attorneys, had an underground railroad in operation between their office and Examiner Wilbur's room in the Patent Office, by which they were enabled to have unlawful and guilty knowledge of Gray's papers as soon as they were filed in the Patent Office.

There is indubitable evidence that an important invention, and a claim therefor, were bodily interpolated into Bell's specification, between February 14, 1876, and February 19, 1876, by Pollock, in consequence of the guilty knowledge which the latter already had of the contents of Gray's caveat, before the declaration of interference with Gray on February 19. This interpolated claim was the *fourth* claim.

The interpolated new invention was the passage found on the fifth page of Bell's printed specification, to wit:

"Electrical undulations may also be caused by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery. The internal resistance of a battery is diminished by bringing the voltaic elements nearer together, and increased by placing them farther apart. The reciprocal vibration of the elements of a battery, therefore, occasions an undulatory action in the voltaic current. The external resistance may also be varied. For instance, let mercury or some other liquid form part of a voltaic circuit, then the more deeply the conducting wire is immersed in the mercury or other liquid, the less resistance does the liquid offer to the passage of the current. Hence, the vibration of the conducting wire in mercury, or other liquid included in the circuit, occasions undulations in the current. The vertical vibrations of the elements of a battery in the liquid in which they are immersed, produces an undulatory action in the current by alternately increasing and diminishing the power of the battery."

We have three Patent-Office copies of Bell's specification, all of which ought to agree, But here the remarkable fact appears that, while the specification, printed March 7, 1876, as a part of the patent, and the photographic facsimile of October 30, 1885, agree almost exactly with each other, neither of them agrees with the certified copy of April 10, 1879. Yet each, being a certified copy, imports verity, and proves that the record stood as certified, at the time of its certification.

There are thirty-nine separate statements in the certified copy of April 10, 1879, which disagree with the statements respectively found at the same places in the patent and in the photographic facsimile; and every one of those thirty-nine separate statements in the copy of April 10, 1879, is an exact copy of the language found in the same connection in the George-Brown paper.

The thirty-nine passages correspond so curiously to the George-Brown copy, mistakes and all, that the entire correspondence of the whole original Patent-Office specification with the George-Brown copy can no longer be doubted.

The George-Brown copy, originally written in October, 1875, was revised and corrected before it was handed to Mr. Brown at New York, on or about January 25, 1876. Before revision, the George-Brown copy was not verbatim the same as the American specification —after revision, it was a verbatim duplicate.

It follows, therefore, that it was not revised and corrected until the American specification was completed.

The American specification was not completed till January 1–10, 1876, and was not thereafter changed in any respect till filed. The George-Brown copy, therefore, was not revised and corrected to assume its completed form until as late as January 1–25.

The variable-resistance matter was, therefore, not in the American specification between January 1–10, 1876.

The patent of January 30, 1877, should be strictly limited to the magneto form of instrument.

If Bell in January, 1877, attempted to weave the variable-resistance current or apparatus into his new telephone patent, and to make descriptions and claims to cover it, there was no inadvertence, accident or mistake about the matter; it was deliberately done to defraud and deceive the public and to cover and appropriate the invention of another, and the whole patent is clearly void.

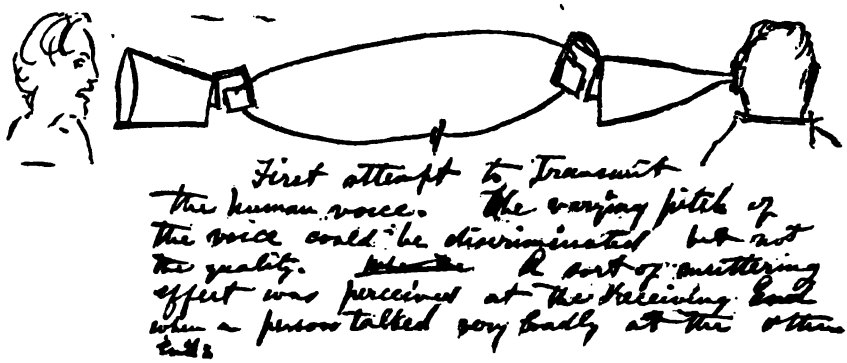
Bell made a sketch at Toronto on the 28th of December, 1875, for the information of Mr. George Brown, which shows the invention and apparatus described in Bell's United States patent, dated March 7, 1876, of which the following is a copy. (See next page.)

The explanatory passage accompanying the sketch which Bell declares was intended to illustrate the form of speaking telephone at which he had then arrived, and written by him, to be shown to Mr. Brown in explanation of the very matter in which he was then endeavoring to induce him to become personally interested, must be regarded as a *bona fide* statement by Bell, in the strongest permissible language, of the actual results that had then been achieved in his first attempt to transmit the human voice.

Bell had found it impossible, as yet, to construct an armature and so combine it in an apparatus that its vibrations should actually correspond to the air vibrations accompanying a sound, or, in the language of his patent, so that it should cause "electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds."

But, notwithstanding this acknowledged failure, Mr. Bell, nevertheless, determined to patent the *principle*, leaving to the future to discover the means of utilizing it.

"In its naked, ordinary sense, a discovery is not patentable. A discovery of a new principle,


First attempt to Transmit
the human voice. The varying pitch of
the voice could be discriminated but not
the quality. A sort of quivering
effect was perceived at the Receiving End
when a person talked very loudly at the other
End.

force or law, operating, or which can be made to operate, on matter, will not entitle the discoverer to a patent. It is only where the explorer has gone beyond the mere domain of discovery and has laid hold of the new principle, force or law, and connected it with some particular medium or mechanical contrivance, by which, or through which, it acts on the material world, that he can secure the exclusive control of it under the Patent Act."

Morton v. *New York Eye Infirmary*, 5 Blatchf. 121; *Burrall* v. *Jewett*, 2 Paige, 148.

He is the inventor and is entitled to the patent who first brought the machine to perfection, and made it capable of useful operation.

Agawam Woolen Co. v. *Jordan*, 74 U. S. 7 Wall. 602 (19:181); *Whiteley* v. *Swayne*, Id. 687 (19: 200.)

Until the invention is perfected and adapted to use, it is not patentable under the patent laws.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 552 (20:41); *O'Reilly* v. *Morse*, 56 U. S. 15 How. 62 (14:601); *Burr* v. *Duryee*, 68 U S. 1 Wall. 581 (17:650).

Granting their validity, what construction shall be given to Letters Patent No. 147,469, granted to Mr. Bell, March 7, 1876, and in particular to the fifth claim?

The whole fabric of Bell's reasoning, by which he has arrived at certain advantageous conclusions, is based directly upon the possession, by the "undulatory" current, of the very qualities which alone characterize the magneto-electric current.

Bell's statement that this "present invention consists in the employment of a vibratory or undulatory current of electricity, in place of a merely intermittent one, and of a method of and an apparatus for producing electrical undulations upon the line-wire," is thus clearly seen to be a statement made directly in the execution of the purpose he had formed to patent "the use of the magneto-electric current."

The newly-described current of varying resistance has not been claimed by Bell, in his patent, for use in the transmission of speech, but for multiple-telegraph purposes alone.

Moreover, the *modus operandi* of the newly-described current of varying resistance when employed in the transmission of speech, is wholly different from that of the magneto-electric current under similar circumstances.

Everything points to the conclusion that Bell appropriated to himself the ideas set forth by Mr. Gray in his caveat. First, by means of the new passage and claim interjected into his patent; and secondly, by embodying in the construction of instruments, both the varying resistance and the magneto, and instruments through which he for the first time transmitted articulate speech.

Messrs. E. N. Dickerson, Chauncey Smith, and **James J. Storrow,** for the American Bell Telephone Company:

The charge of forgery has been made, fully and elaborately in two of the briefs for the Overland and Drawbaugh Companies.

A forgery committed on the paper in the Patent Office, besides an interpolation; and that the papers were twice stolen from the files in the Patent Office, taken away, and new papers put in place of them as and for the originals.

There has never been in this case, up to last week, any hint, any charge, any insinuation, any suspicion of such a crime as is now charged. There is no such issue made in the case; I mean no issue which called upon us to put in any evidence bearing upon such charges. It is a new thing.

Bell, before he went to Washington in February, 1875, knew the substance of Gray's invention, because Gray had been describing it in the newspapers; not the speaking telephone, but the harmonic multiple telegraph.

Bell, in the fall of 1875, made a draft of a specification for his patent. The description which he wrote of that in the fall of 1875 stands to-day in the patent exactly as he then wrote it.

He completed his American application in January, 1876. The production of the certified copy of the application itself from the files of the Office has that clause exactly as it stands in the patent.

That sort of way of producing undulations—*by varying the resistance*—was not new in Mr. Bell's mind at that time. His letter of May 4, 1875, had said that he feared that the magneto mode, that is, by vibrating an armature, would give currents which would be too feeble to be practically useful, and therefore he thought the true way would be to use a battery current, which can be made as strong as is desired.

As early as May 4, 1875, Bell had conceived of the variable-resistance plan as the equivalent of the magneto plan for the transmission of speech. The charges that are made against Bell are, that the paper which he filed on February 14, 1876, as his application, was a copy of the George-Brown specification as written

in 1875; and that the application so filed did not have this variable-resistance idea in it. The application was filed on the morning of February 14, Gray's caveat was filed on the afternoon of February 14.

Bell was not in Washington that week at all. The charge is that Messrs. Pollock & Bailey got a dishonest sight of Gray's caveat, found the liquid transmitter in it, determined to steal the idea for Bell, did so, abstracted from the files of the Office half a dozen sheets, more or less, of Bell's pending application, wrote the stolen idea in, returned the sheets and sewed them up again, and let them stand as if they were the honest original application.

The next charge is an intimation that the examiner in charge of that room was in collusion with them and aiding them.

Now the very first action of that examiner was to say, "Gray's caveat is here, and you cannot have your patent." These men, who owned him body and soul,—that is the insinuation,—were blocked by him at the very first thing he did.

Gray never proceeded. He had never made an instrument in accordance with his caveat. All the acts of the examiner, therefore, were pointedly in favor of Gray. The next part of the charge is, that after Messrs. Pollock & Bailey had committed this theft and interpolation, Bell came to Washington and they then told him what they had done and he ratified it and approved of it. This is all their imagination. There is not a word of any such thing in the testimony, not a suggestion of it anywhere until last week. They say Bell then went to the Patent Office and changed "tone" to "note" etc. There are over thirty, so they pretend, such changes made by him at that time. And he went on to change thirty-eight words in the specification.

They say that the paper, as thus altered in pencil, read as the patent reads, and thus altered, came to be the patent as it was printed and issued. But there is not a word of testimony on this subject. It is all pure conjecture.

The whole charge finally comes down to this keystone, that the paper on the files to-day is (so they say) not the paper which was on the files in 1879; which they say they find from the fact that the paper there to-day is not the paper as printed in the Dowd record and in the Drawbaugh record.

Mr. Storrow here states: "The way it came to be so printed is this: A certified copy was procured by me, or through Mr. Pollock, in 1879, for my own use. That copy was put in evidence in the Dowd Case. Upon that copy I with my own hands, in 1879, interlined words from the George-Brown specification."

"The original exhibit itself shows (it has got the printer's marks on it) that it went to the printer, and the printer in printing it printed in the words which I had written in pencil for my private memoranda."

A letter was here handed to the court written by Mr. Storrow to Mr. Andrews, counsel for the Drawbaugh Company, dated New Orleans, February 18, 1886, as follows:

"I want to make one correction in the original record of the Drawbaugh Case. The file of the Bell patent is in evidence, but the copy of the application is not printed correctly. I believe there are no errors in it which are of any importance, but there were some pencil marks on the copy that went to the printer in the Dowd Case, with brackets, etc., and that got reproduced in your case. There has been lately printed a very careful and accurate copy from a photograph of the original papers, and I directed two copies of this to be sent to you from Boston. I propose to you to substitute that for the print that now exists among our exhibits in the Drawbaugh record, and also to stipulate, as enclosed, that the court on appeal, may, if it desires, refer to a certified copy made by the Patent Office, for greater accuracy."

And a stipulation was here read as follows:

"It is agreed that upon the appeal of this case (*The American Bell Telephone Company* v. *The People's Telephone Company*), the supreme court may, if it desires for greater accuracy, refer to a copy of the Bell patent and file made and certified by the Patent Office." Signed "L. Hill, solicitor for defendants," and enclosed in a letter which read: "Herewith please find enclosed stipulation, that parties may, on the appeal, refer to a copy of the Bell patent on file, certified to by the Patent Office."

A similar letter, requesting the correction, though not stating the reasons so fully, was sent to the Overland Company, September 30, 1886, and they had the new print put into their record.

In the Drawbaugh Case they put the print into their record; they reprinted it themselves, at their own expense, and followed it by the note which you will find there (Drawbaugh, Overland Proofs, p. 764).

The original paper from which the transcript was made which is printed in the Drawbaugh Case was here produced and handed to the court.

A facsimile of the certified copy was here handed to the Chief Justice. All the pencil marks of the exhibit are here printed in blue. The following is a reproduction of one of the altered sentences showing the pencil interlineations made by counsel and erroneously printed.

The various words in blue ink are the words.

The duration of the sound may be made to signify indicate the dot or dash of the Morse alphabet — and thus a telegraphic despatch can be transmitted may be indicated by alternately interrupting and restoring the sounds.

interlined in pencil in the original exhibit. The certified copy read in ink exactly as the patent now does, "dependent for effect upon the variations," etc.

The pencil interlineations in that copy were made by scoring out the syllable "ent" and interlining "but all of them," thus:

The same air vibrations produced by the voice at one end are reproduced by the diaphragm at the other.

The problem for the inventor of the electric speaking telephone was to take away that string, and connect those two diaphragms by electricity.

There are many ways of producing undulatory currents of electricity, dependent for effect upon the vibrations or motion of bodies capable of inductive action

The interlined words were the words of the George-Brown copy, written in in pencil between the lines.

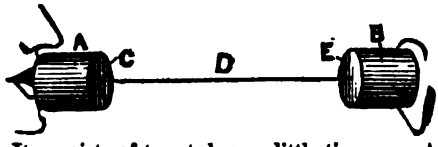
March 26, 1878, interferences were declared in the Patent Office between Bell's patents and the applications of Elisha Gray, J. W. McDonough, T A. Edison, A. G. Holcombe, A. E. Dolbear, and W. L. Voelker. Evidence was then taken, and the interferences were argued before Mr. J. B. Church, Examiner of Interferences.

He thereupon decided in favor of Bell every issue which in his opinion involved the invention of the speaking telephone.

His decision was appealed from by the various parties, and was heard before the Board of Appeals. In the fall of 1884, such Board unanimously decided every issue in favor of Bell.

This decision was appealed from, and the appeal was argued before Mr. Commissioner Butterworth in person. March 3, 1885, he affirmed the decision of the Board in favor of Mr. Bell, on all points.

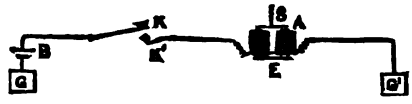
The string telephone has been spoken of by counsel. It is two hundred years old in its various forms. The following is a representation of it:



It consists of two tubes, or little tin cases, A and B with a bladder, C and E, stretched over one end of each. A string (D) has one end passed through the centre of each, and tied with a knot inside. If I speak into it at A, a person listening at B will hear what I have said. I may make this string a hundred feet long, and carry it into the next room; then if I speak into this, a person in the other room will hear what I say.

What produces the sensation of sound on the ear is the vibration of the air, set in motion by the source of sound, and reaching the ear. All you have got to do to make a person hear the sound is to produce sonorous vibrations of the appropriate kind next to the ear, and the way in which this string telephone does that is, that when you speak into this at A you set its diaphragm in vibration, and it copies the vibrations which the voice produces in the air.

The following is a representation of the Morse instrument: B is the battery; K is the key. The current comes from the battery B to the key K.



When the key is in the position represented in the cut the two parts K and K' are not in contact, and no current can pass. When I press down the key K so that it touches the "anvil" K' they come in contact, and a current can pass; and when it passes it converts the pieces of soft iron inside of those coils at E into magnets for the moment; and that magnet pulls down the armature A (normally held back by the spring S), and that makes the click which you hear. By that instrument I can produce motion at a distant place. I can produce a sound at a distant place; and I can produce just as many motions as I want. But that is all that I can do. That will not accomplish the transmission of speech.

The sound in the air is due to the vibrations in the particles of air.

More vibrations per second give a higher pitch of sound. Vibrations have, in the language of acoustics, a greater or less amplitude which determines the loudness of the sound.

There is a characteristic of sound which distinguishes one sound from another, which is neither loudness nor pitch. The characteristic which distinguishes the sound of a violin from that of the human voice or of a flute, which distinguishes one word from another, and which technically is called "quality," depends upon the way in which it performs its journey within its allotted time and over its allotted path.

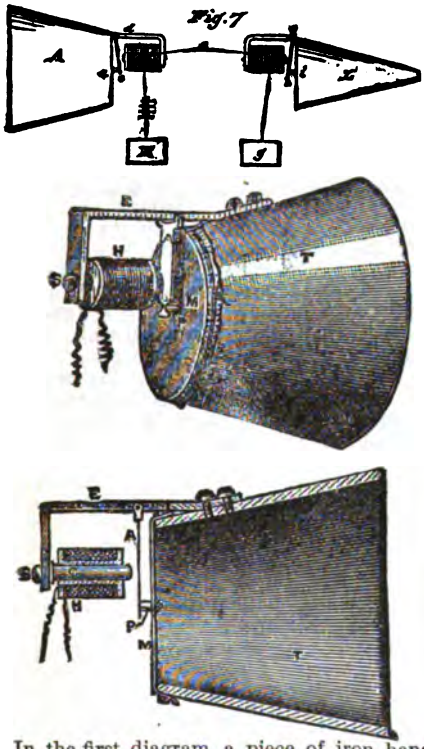
(Counsel here explains the phrase "form of vibration," by reference to cut given at page 948, *ante*.)

Suppose I attach a pencil to an air particle, while it is vibrating; then if I place a piece of paper under the point of the pencil, I shall get a wavy line. That waviness is due to the vibration. If it vibrates in a different way it will make a different wavy line; each difference of waviness depends upon the way in which this vibrates. The character of its vibration is expressed by the waviness of the curve. From exhibiting to the mind a conception of the motion of an air particle, by means of wavy lines

drawn, or supposed to be drawn, by an air particle with a pencil fastened to it, people came to speak of the "form of vibration"; by which they do not mean that the particle moves in a sinuous or crooked line, for it moves in a perfectly straight line to and fro. They mean, by that phrase, to signify the curve which the particle would draw if a pencil were fastened to it while vibrating, and a piece of paper were drawn under it.

THE BELL TELEPHONE.

The first diagram here given is a drawing of figure 7 of Bell's patent. The other is a telephone transmitter like said figure 7, without adjustment.



In the first diagram, a piece of iron hangs down, marked *c* at the lower end of the cone A. The upper end is hinged so that it is free to move. At the lower end, marked *c*, it is fastened at the centre of the membrane *a*. *b* is an electro-magnet. It consists of a bar of soft iron, one end of which just juts out near *c*, with coils of wire wound round it.

As the armature *c* is hinged at the upper end so that its lower end *c*, fastened to the centre of the stretched membrane at *a*, can move freely, whenever that stretched membrane is vibrated by the voice the armature moves just as the membrane does. When this armature *c* is moved or waved in front of the electro-magnet *b*, it induces electrical disturbances in the coil of that magnet.

One end of that coil is connected with the conductor or line-wire *e*, which goes off to the distant station; and as that line-wire is a conductor of electricity, the flow which the disturbance in the coil, caused by waving the armature, tends to produce finds an outlet in that conductor, and the electricity will rush through the conductor *e* to the other instrument L.

The essential thing in the mechanical part of this particular instrument is: that there shall be a diaphragm, or its mechanical equivalent, capable of vibrating under the influence of the sound-waves produced by the voice or by any other source of sound; that an armature shall be fastened to that so that it will move just as the diaphragm does; then that the armature shall be thus moved close in front of the electro-magnet.

Currents generated in the transmitter A pass to the electro-magnet *f*, of the receiving instrument L, and as they go around that electro-magnet they cause its core to become more or less magnetic, and cause its magnetic strength at each particular instant to correspond to the motion that is going on in the transmitter at that instant. That electro-magnet pulls this armature *h*.

The varying pull of the magnet is just in accordance with the variations of the current.

The diaphragm of this receiving instrument, not only in the fact of motion, but in every variation in the sequence of its successive motions, to the minutest degree, copies the variations in the movements of this transmitter-diaphragm. The result is that we have got now, by means of electricity, what the string-telephone man had with his string. We have got the receiving diaphragm to copy by electricity the motions of the transmitting diaphragm. That is the Bell telephone.

The motions at the receiver are a copy of the electrical changes; the electrical changes are copies of the motions at the transmitter. If that holds true, then the thing will talk. Then the same character of vibrations—not only the same number, but the same character of vibrations—which takes place here at the transmitter will take place there at the receiver.

The particular novelty of Bell's contrivance, the novelty of principle, which he first introduced into science and the arts, was not that he was the first who wanted to transmit speech by electricity; it was not that he was the first who saw that to reproduce speech by electricity or by any other way you must have some distant diaphragm—or it need not be a diaphragm, it may be a piece of board, or anything else—copy the vibrations at the receiving end, for the string telephone had done that; he was the first man who conceived of, or who embodied in any description or machine, the conception that in order to do that you must have the electrical disturbances in the wire and in the circuit to be copies of the sonorous disturbances at the transmitter end.

People had been trying to make electrical speaking telephones for many years, but it never occurred to any of them that the electrical disturbance which would accomplish the result was to be one which itself should be a copy of the sonorous vibrations at the transmitting end. That was Bell's conception, and he worked it out.

That made his thing to be a speaking telephone, and the fact that no such conception had been reached or was embodied in any previous man's instrument prevented any previous man's instrument from being a speaking telephone.

These electrical changes are not a manufactured product. You can't take them out of the machine; they are made in the machine, to be used in the machine. The *result* is the transmission of speech. That is what was aimed at.

But these electrical changes are not results. They are made to be used at the instant of their creation.

One of the gentlemen told you that Bell and the owners of the patent wanted to monopolize the transmission of speech, by whatever means. Nothing of the sort. We want to monopolize this particular means which Bell has introduced into electrical science. If anybody can do it any other way, he has a perfect right to do it.

It would be impossible to extend this patent to cover means other than those which come within what he first introduced into the art.

This kind of electrical changes is not a thing that exists in nature like coal and iron and wood.

Bell didn't discover something that existed in nature, and undertake to patent that. He *created* something. These undulations are something "created by the hand of man;" or perhaps I should rather say, by the voice of man. They did not exist before he created them.

He has told you how to create a set of electrical disturbances, and he has told you that when you create those electrical disturbances *you can get speech* by means of them. "You can't get it without them," says Mr. Dolbear. Those electrical disturbances are the *essential novelty* of his apparatus.

The patent law, in express terms, says that you are to describe your machine, and "the principle" thereof, " by which it may be distinguished from other inventions." That is not all you are to do. You are to describe, says the patent law, "the best mode in which you have contemplated applying that principle."

The patent is to be in terms for the "invention or discovery," and not for any particular mode of application.

The Patent Act, by its terms, as the courts have always done, intends, expects and perceives that a man even may himself contemplate many modes, not only many machines for applying his invention, but many *modes* for its application. It intends that his patent shall be for his *whole invention*, and he has only to describe one mode of applying it. He has to describe one, because until he has done that he has not entered into the improvement of the useful arts, and has not brought himself within the domain of the patent law. When he has done that his patent is for his whole invention.

Bell v. *Gray*, 15 Off. Gaz. 778; *Household Co.* v. *Neilson*, Web. Pat. Cas. 688, 715; *Evans* v. *Eaton*, 20 U. S. 7 Wheat. 356 (5:472); *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 (11: 102); *Le Roy* v. *Tatham*, 55 U. S. 14 How. 156 (14: 367); *O'Reilly* v. *Morse*, 56 U. S. 15 How. 62 (14:601); *Winans* v. *Denmead*, Id. 330 (14:717); *Parker* v. *Hulme*, 1 Fish. Pat. Cas. 44; *Corning* v. *Troy, I. & N. Factory*, 56 U. S. 15 How. 451 (14: 768); *Burr* v. *Duryee*, 68 U. S. 1 Wall. 567 (17: 656); *Jacobs* v. *Baker*, 74 U. S. 7 Wall. 295 (19: 200); *Haworth* v. *Hardcastle*, Web. Pat. Cas. 484.

Specifications are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their own use, not anything which is matter of common right, but what they themselves have created.

Grant v. *Raymond*, 31 U. S. 6 Pet. 218 (8: 376); *Ames* v. *Howard*, 1 Sumn. 482, 485; *Blanchard* v. *Sprague*, 3 Sumn. 535, 539; *Davoll* v. *Brown*, 1 Woodb. & M. 53, 57; *Parker* v. *Haworth*, 4 McLean, 372; *Neilson* v. *Harford*, Web. Pat. Cas. 341; *Russell* v. *Cowley*, Id. 470; *Corning* v. *Burden*, 56 U. S. 15 How. 252 (14: 683); *Mitchell* v. *Tilghman*, 86 U. S. 19 Wall. 287 (22:125); *Tilghman* v. *Proctor*, 102 U. S. 708 (26: 279); *Cochrane* v. *Deener*, 94 U. S. 787 (24:141); *James* v. *Campbell*, 104 U. S. 377 (26: 794); *McCormick* v. *Talcott*, 61 U. S. 20 How. 402 (15:930.)

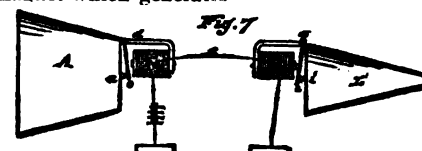
A patentable invention is a mental result. The intellectual element is recognized as the test of identity, for anticipation and infringement.

Waterbury Brass Co. v. *Miller*, 9 Blatchf. 77; *Smith* v. *Nichols*, 88 U. S. 21 Wall. 118 (22:567); *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 812 (19: 829); *Clough* v. *Barker*, 106 U. S. 166 (27:134); *Blake* v. *Robertson*, 94 U. S. 728 (24:245); *Pennsylvania R. Co.* v. *Locomotive E. S. Truck Co.* 110 U. S. 490 (28:222); *Consolidated S. Valve Co.* v. *Crosby S. G. & Valve Co.* 113 U. S. 157 (28: 939); *Blake* v. *San Francisco*, Id. 679 (28:1070); *Miller* v. *Foree*, 116 U. S. 22 (29:552).

Bell made one speaking telephone. He described one speaking telephone. Let me assume that he made only one. But the merit of that specification was that he laid down the rule for all future speaking telephones. He said, "get into the operation of that machine this which never was in any machine before, and get it in accordance with a particular rule," which he stated. Now, every man who has endeavored to improve this speaking telephone since that time has endeavored not only to avail himself of the fact that Bell found, but has endeavored to conform more and more perfectly to the rule which Bell laid down.

I have described the operation of that particular machine, but I have not described the whole of it. If Your Honors will look again at figure 7, you will find that beside the electromagnet which generates

Fig. 7



the currents I spoke of, there is a battery in the circuit, shown conventionally by the cross lines, just above E. Now, what happens? The battery sends along a big strong current, which I will represent by a big space between those two lines. The magneto machine (which is the transmitter) is adding to or substracting from that current, according to the direction of the motions of its armature. It is doing that, and in doing that it is adding a little or is taking away a little of the electric energy from that great stream. Now it adds a little, and now subtracts a little. It makes it a little stronger, or a little weaker. Those changes are very small

as compared with the whole. It cannot take away enough to stop it entirely. It makes it a little stronger and a little weaker. The result is that in figure 7 of the patent, according to the description of the patent, you get a great, strong stream, always fairly strong, sometimes a little stronger, and sometimes a little weaker. It is that stream or rather the variations of its strength, which work the receiver. Sometimes it pulls it a little stronger, and sometimes it pulls it a little less.

THE MICROPHONE.

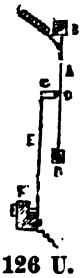
I have here a battery, and a wire from each pole or plate of the battery. If those two wires join so that they make one wire, the current flows through them around the circuit. If I separate them, the current ceases to flow. That is what is called "opening" the circuit. Opening the circuit is opening the wire. When I put them together again the current flows. When I put them together again I cannot make so good a union as there was between the particles of the uncut wire. The current does not flow so strongly.

Suppose I have one of the wires beaten out into the form of a diaphragm *d*, and bring the other *c* up to it so that they touch; the current will pass; and if I press them more strongly together the current will pass more strongly; if I press them together weakly the current will be enfeebled. The changes in the current will correspond to the variations of pressure at this point of contact. Suppose now, holding that wire-end *c* there, I speak to the back of this diaphragm *d*, and make it vibrate gently, not enough to part contact between the diaphragm *d* and the wire-end *c*, but enough to make it vary this pressure, as when I press my thumb with a slight pressure, or a greater pressure, on the table. Thus variations of pressure will be caused by the voice; and not only will they be *caused* by the voice, but the variations of pressure will *correspond* to the vibration which this diaphragm *d* performs under the influence of the voice.

That is the principle of the microphone. It was invented, in the United States, by Mr. Berliner and by Mr. Edison in 1877, independently of each other. It was invented independently, by Hughes, in England, in 1878.

When coupled with a receiver it constituted an improved form of the Bell apparatus.

The essential mechanical features of the microphone are: (1) that the parts should be so constructed that one electrode can be vibrated by the voice while in contact with the other, and that the other shall be so arranged as to mechanically so resist that motion that it shall result in variations of pressure; and (2) that the parts should be so constructed and arranged that the vibrations given to one electrode by the ordinary action of the voice shall not break the contact under ordinary circumstances.



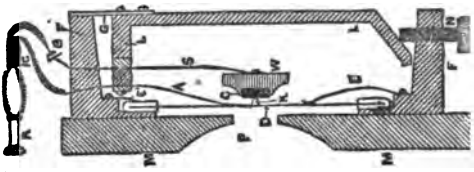
In the diagram, which is taken from an application filed by Edison in July, 1877, the carbon electrode C is mounted on the end of a spring E, strained by a screw F towards the diaphragm electrode D to prevent breaks of contact.

The problem which the microphone solves is this: to introduce into an electrical circuit an electrical resistance, *which resistance shall be in exact accord with sonorous vibrations.*

It is a law of electricity that the strength of the current in the circuit depends upon the amount of electrical energy used to create it, and it also depends upon the resistance.

Hughes' microphone is a contrivance which will produce the same changes in the electric current—the same sequence of successive strengths in the current—by varying the resistance that Bell had in figure 7.

The form in which that is commercially used is shown in the Blake transmitter.



Here is a long cast-iron lever L, hinged at the upper end. At the lower end is a screw N, which enables that lever to be moved a little. Down inside you will find a very slender spring A that comes from the upper end. It goes down to the centre of the diaphragm, and carries a little knob of platinum K, about as big as the head of a pin. The steel spring S is clothed with india rubber, with a brass knob W at the end. If you draw that back against the large lever, you can separate it from the platinum knob. The electric current comes down through the inner slender spring to the platinum point K, thence passes to C, a little piece of carbon; thence through W, up the spring S, and around to the battery B again. The mouthpiece P is a hole in M. Inside of that, fastened to this rim F is a disk or diaphragm D of sheet iron. There is a little packing or fold of rubber around its edges. Plate D can come out, and is free to vibrate. When I speak into it through mouthpiece P, I vibrate it like the diaphragm of the string telephone. The thrust which the diaphragm makes against K bears against the carbon C.

The trick in the microphone is to get those parts arranged so as to develop the increase and diminution of pressure as much as possible, but to still keep them always in contact, and that is the end of the business.

The function of spring E is to hold that diaphragm in place. If you take that spring away, and this little clip E', away, the diaphragm would fall out.

There are nearly five hundred thousand of those telephones in this country. I suppose that there are as many more in other parts of the world. Who originated them? Every speaking telephone at work in the world traces its origin right up to Bell. There were no speaking telephones used before Bell made one. Bell is the inventor of it. It was not known before.

And yet the defendants set up that the Reis apparatus was known to the whole world as a speaking telephone, and that nobody of any sense or intelligence ever supposed that Bell was the first inventor.

That the Reis publications, though well

known, never in fact taught men how to make a speaking telephone, is *conclusive proof* of their insufficiency.

He never advertised it or sold it as a speech transmitter. He never offered it to any man as such. Nobody ever sought for it for the purpose of transmitting speech. He never hinted in any of his advertisements that speech was the thing to be transmitted by it, and that it would yield speech.

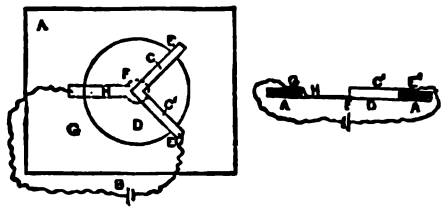
In every case where anybody has testified that in his own laboratory he got speech with the Reis apparatus, we have said to him by way of cross-examination, "Won't you be good enough to repeat that operation in the presence of witnesses, as was done in the Dolbear Case?" And they never have done it—never complied with the demand.

Reis *hoped* to make a speaking telephone, but after he had worked for many years with no success, after he had made first one form and then another, and finally got into this hollow box form which was made by the apparatus makers and sold, he never intended *that* for speech. He never asserted it would talk.

I will show you Reis's receiver. This C is Reis's receiver. Its operation is this: That (indicating) is a coiled wire through which the current is passed or stopped, whichever it may be. That (indicating) is a knitting needle run through its centre. The ends of this needle stick out a couple of inches, and rest on the bridge pieces on the box.

This is the final box form of 1863.

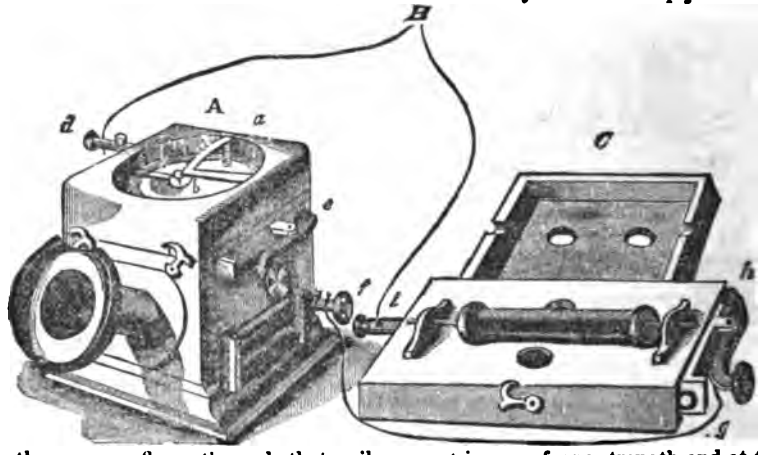
On that rests a little three-cornered piece of metal C C′, the two legs of which are hinged



or set in little sockets E E′, in the framework A, while the middle leg of it projects over and rests—is not fastened, but just rests by its own weight—on a piece of platinum foil on the centre of the diaphragm at F. From the other side of the top at G comes a strip of platinum foil F H, which extends down over the diaphragm to its centre F, where it is glued, so that it moves with the diaphragm. The leg at the angle of the piece C C′ rests on this foil at F. The electrical connections are made in such a way that the wires from the battery B come, one to that platinum foil at G, while the other is fastened at E to one leg of the three-cornered piece C C′.

There is no such thing as an "intermittent current." You can have a succession of flows and starts, and flows and stops, and for convenience that is spoken of as an "intermittent current."

"Undulatory current" simply means that the



When the current flows through that coil and around that core, it elongates the core a very little, and when the current stops it contracts again. Every starting and stopping of the current magnetizes and demagnetizes the needle, as an electro-magnet becomes magnetized and demagnetized by starting and stopping the current. Every time that needle becomes magnetized by the passage of the current it expands a little, and when it becomes demagnetized by the cessation of the current it contracts. That produces in the needle itself a slight vibratory motion, which is imparted to the air and produces the sound.

Here is a dummy which will show the particular working parts. Here is a board A with a three-inch hole in it over which is nailed a piece of pasteboard D to represent a diaphragm.

current is now of one strength and at the next instant is of a different strength.

The curves do not represent waves like those of the sea. "Undulatory current," like "intermittent current," is merely a phrase which expresses a conception of the successive conditions of the current.

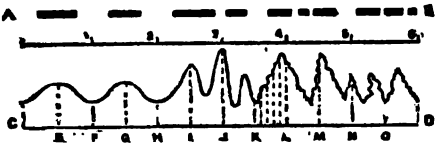
All sonorous vibrations are "undulatory" in their character, in the technical sense in which that word is used.

The intermittent current is represented by a series of blocks.

This does not mean that there are on the line at any one instant a succession of spurts of electricity—electricity at some parts of the line, and none at others. It means that for a period of time represented by the length of the block, there is, all over the line, a current whose

strength is represented by the height of the block; and that after that, for a period of time represented by the blank space, there is no current at all anywhere. That phenomenon is called an intermittent current.

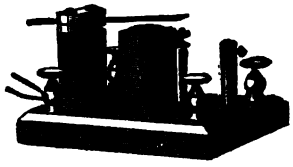
If now a current varies, so that at one instant it is of a strength represented by the height of the line E, and at the next instant of a strength represented by the length of the perpendicular line F, and so on, and the variations of strength,



or the curve which represents those variations by joining the tops of those lines, are undulatory in its character, then we speak of that current as undulatory, because of that variation in its strength at successive instants; and those are the symbols that are used in the patent.

Bell was possessed with the likeness between the current which he proposed to use and sound-waves themselves. And that is the substance of his patent; that is the cardinal key and idea of his whole patent.

Bell says in the patent: "In illustration of the method of creating electrical undulation, I shall show and describe one form of apparatus for producing the effect."



It is figure 5 of the patent which he is now describing. Here is a view of one. He puts a number of those on the circuit for a multiple telegraph, and he says when one of them, A, vibrates, it produces a note of a pitch corresponding to the length of that free arm *c*, and it produces electrical undulations on the wire which correspond to that pitch. When another is on, it produces electrical undulations corresponding to its pitch; and those two electrical undulations going into the wire do not obliterate each other, but they manifest themselves by the composition and by the peculiar form of curve which will express the combined result of the two. It is true of harmonic multiple telegraphy that a receiving instrument can be devised, and it was well known (Bell had described it in a previous patent) which could analyze out those two sets, so that one instrument would respond to one note, or set of notes or pitches, and the other would respond to the other.

The patent says: "Hence, by these instruments two or more telegraph signals or messages may be sent simultaneously over the same circuit without interfering with one another." That is the harmonic multiple telegraph.

And the way in which that is done is described in the last four lines of the preceding paragraph: "The duration of the sound may be used to indicate the dot or dash of the Morse alphabet, and thus a telegraphic dispatch may be indicated by alternately interrupting and renewing the sound." And in that way, by those instruments (fig. 5 of the patent), several telegraphic signals may be sent simultaneously over the same circuit without interfering with one another.

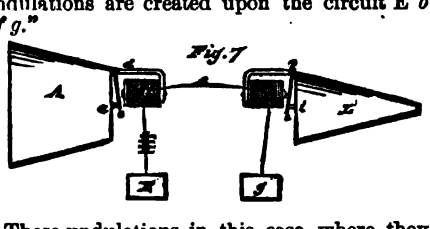
The patent proceeds to describe that these electrical undulations, generally like sound-waves, can be used for other special results, when they copy *special sound-waves*. The patent says: "I desire here to remark that there are many other uses to which these instruments may be put, such as the simultaneous transmission of musical notes, differing in loudness, as well as in pitch, and the telegraphic transmission of noises or sounds of any kind.

The first statement was that he could transmit harmonic multiple telegraph messages by variations of pitch; and he has described that. Nothing more is to be added about that. That is finished. Now he says, "I desire here to remark that there are other uses." I don't see how it would be possible to find more explicit language in which to state that what he is going to say now is not harmonic multiple telegraphy, but it is "another" use.

He goes on and describes: "When the armature *c*, Fig. 5, is set in vibration, the armature *h* responds not only in pitch, but in loudness." When the armature *c* of one of these instruments is set in vibration, the armature *h* of the corresponding instrument just like it at the other end responds, not only in pitch but in loudness. Thus, when this armature *c* vibrates with little amplitude, a soft sound will proceed from the corresponding armature *h* of the corresponding instrument. When this armature *c* vibrates violently, a violent sound will be produced by the armature *h* of the transmitter corresponding to it at the other end.

The patent continues: "The armature *c*, Fig. 7, is fastened loosely by one extremity to the uncovered leg *d* of the electro-magnet *b*, and its other extremity is attached to the centre of a stretched membrane *a*. A cone A is used to converge sound vibrations upon the membrane. When a sound is uttered in the cone, the membrane *a* is set in vibration, the armature *c* is forced to partake of the motion." That necessarily follows: "and thus electrical undulations are created upon the circuit E *b e f g*."

Fig. 7



These undulations in this case, where they are caused by the voice, are stated by the pa-

tent to be "similar in form to the air vibrations caused by the sound; that is, they are represented graphically by similar curves."

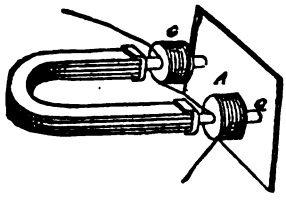
When you speak, when you make any sound in there, the sound-waves vibrate the diaphragm of this instrument, and this armature takes up those vibrations and copies them because it is fastened to the diaphragm. These motions of the armature produce electrical undulations in the circuit; not only undulations, but undulations *similar in form* to the motions of the diaphragm and attached armature; and those undulations when they reach the other end, by reason of their similarity in form, influence that armature *h* of the receiver to copy the movements of this transmitter armature *c*. What is the result? A similar sound to that uttered in there at A is heard to come out here at L., as claimed by Bell in the 5th claim.

The patentee describes in Claim 3 that you may produce the undulations by the inductive mode; next, in Claim 4, that you may produce the undulations by the variable resistance mode; and finally we come to Claim 5. That is not a claim for producing undulations; it is, as my brother Lowrey very well stated and he has got it in his brief, for transmitting speech by means of them, when they are of the particular form specified.

The second Bell patent No. 186,787 of January 30, 1877, is for mere improvements in the mechanical details of figure 7, of the first patent, without altering the nature of the operation in any way.

Mr. Bell subsequently found that instead of employing a battery to magnetize those cores, as the first instrument did, he could employ a permanent magnet.

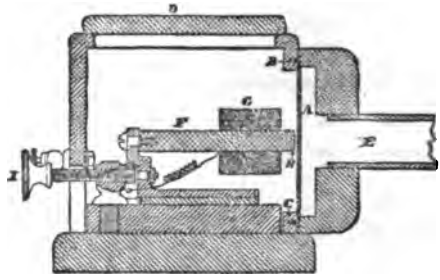
He made such an instrument in July, 1876, and in the fall of 1876 he talked from Boston to Cambridge, without any battery, by means of a permanent magnet. That is one of the improvements that is contained in this second patent. The drawing shows a horseshoe permanent magnet with a soft-iron core fastened to each end or pole, and a short, large coil of wire, wound around that core.



Those soft iron cores being screwed into the ends of this permanent steel magnet, become themselves, for the time being, magnetic. We therefore have these cores magnetized without the expense and trouble of a battery. There is no change in the principle, but this particular contrivance was found cheaper and better than the form of the first patent.

There was a third improvement.

This instrument marked "Fig. 2" of Bell's second patent consists of a box. At the front end of it there is an iron diaphragm A. Behind that is the electro-magnet consisting of the bar or core F, surrounded by the coil G. There is a little difference of form, which I will explain by and by. There are two forms.



Instrument of Bell's patent No. 186,787, Jan. 30, 1877.

In front of the diaphragm A you see a space of about two inches up and down, a white space about a quarter of an inch wide, an air space, an air chamber. In front of the diaphragm and from the centre of that space a tube E comes out.

The wood behind this diaphragm is hollowed out so as to make a cavity about two inches in diameter and about one eighth or one sixteenth of an inch in thickness, so that there is an air chamber behind—rather I should say in front of—that diaphragm. The air chamber communicates with the exterior air by a central opening through the tube E.

Bell found that that particular form of mouthpiece, a narrow air space in front of the diaphragm communicating with the external air by a circular opening at the centre,—is the best form, both for speaking and for listening at. It gives less reverberation and communicates the sound better than any other.

The commercial instruments have always taken that shape, very pronounced in these instruments.

The speaking tube was a convenience for these instruments.

Bell's Early Instruments.

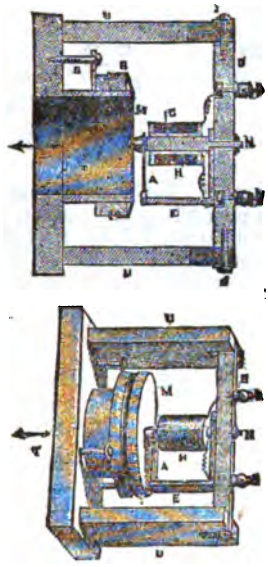
We know now why Bell did not obtain better results in June and July, 1875. All the important parts of the pair of telephones then used remain, and the apparatus has been reconstructed in exact accordance with them. The reconstructions cannot differ from the originals, unless in mere workmanship. In 1879, the reconstructed instruments were taken by a number of witnesses to the precise place in the noisy workshop where Bell tried the originals in 1875, and no words could be made out. They were immediately taken to a quiet place and conversation was carried on with them.

In the Drawbaugh Case two sets of them were made in scrupulous accord with the originals, and, in a quiet place, newspaper paragraphs were read through them in the presence of the defendants' counsel and expert witnesses.

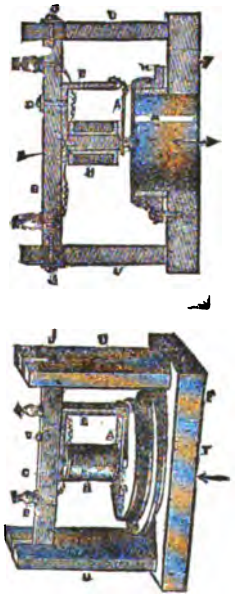
The following are views and sections of the instruments:

Introduction of the Electric Speaking Telephone to the public.

Bell's patent, No. 174,465, was applied for

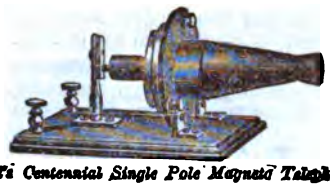


Nos. 49 and 50, Bell's First Telephone of 1875.

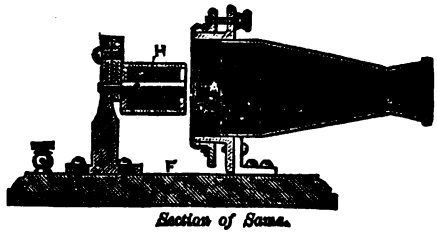


Nos. 51 and 52, Bell's Second Telephone of 1875.

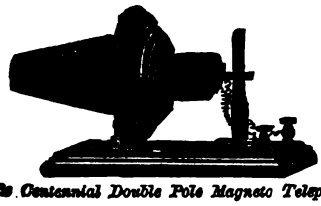
February 14, 1876, and granted March 7, 1876. His first public exhibition of his apparatus was made before the American Academy of Arts and Sciences at Boston, May 10, 1876, and published in their proceedings. Sets of his apparatus, shown in view and in section in the following cuts, were exhibited at the Centennial Exhibition, in June, 1876:



Bell's Centennial Single Pole Magnet Telephone.

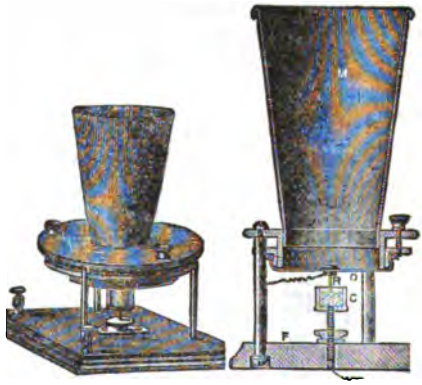


Section of Same.

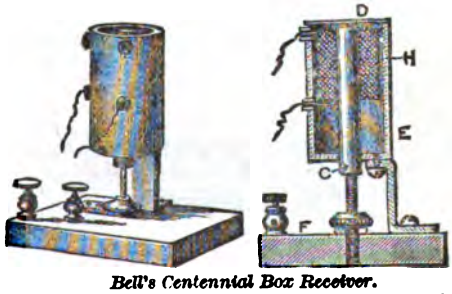


Bell's Centennial Double Pole Magneto Telephone.

The particular instruments actually used were the "membrane telephones," as transmitters, and the "membrane telephone" and "iron box magnet receiver" as receivers.



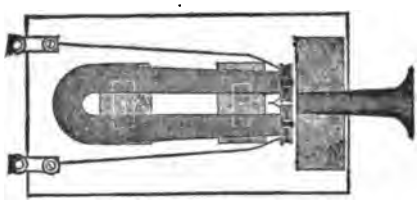
Bell's Centennial Liquid Transmitter.



Bell's Centennial Box Receiver.

The following was the first instrument that was put out for commercial use in 1877.

Box Telephone, in use before April 5, 1877.



Box Telephone in commercial use in June, 1877 (cover removed).

It was convenient in that to have a tube, because it was a heavy instrument and you could not get your mouth to it very closely. When you come to a hand instrument, there is no longer any need of that tube, because the instrument itself can be applied to the mouth or ear.

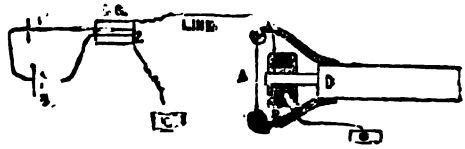
If you will look at the inside of the mouthpiece, the cap piece that unscrews and takes off, you will see a little ledge about a sixteenth of an inch long, running around near the edge on the hard rubber. Take the other piece, the small piece you have in your hand, the cap piece you have just unscrewed, and see the ledge running around inside there near the edge. Now, if you put this black diaphragm on there you have got a little air space below the diaphragm, the size of which is the diameter of that inside space, and the depth of which is the height of that little ledge.

Hand Telephone in use August, 1877.

Box Telephone in use May, 1877.

Hand Telephone in use since December, 1877.

Those two diagrams are "the Bell telephone as usually made with a microphone transmitter" and "the Bell telephone as used by Dolbear."



The above is the Bell telephone as usually made with a microphone transmitter.

In the last diagram, T is the microphone, B the battery connected with a wire which forms the inside helix of the induction-coil IC. The outside helix of the induction-coil goes to line and to the distant station.

The claims of Dolbear's patent are mere claims for mechanical construction, details of construction, particularly in rearranging the plates of an old condenser receiver, so as to vibrate more powerfully and do a little better than they had done before.

What makes the Dolbear to be a speaking telephone is not what he invented. It is not what he got from Reis. It is what he got from Bell.

The various defendants allege, in their answers, that the speaking telephone had been described, and the art of transmitting speech by electricity fully disclosed, in more than ninety patents and printed publications, before the Bell patent,—many of them a dozen years before.

Yet it is a part of the personal experience of every member of this court, and is a fact in the history of our times, which is undisputed, that speaking telephones were unknown before 1876.

There is not a pretense that any man ever applied to any useful purpose any of the contrivances which are now alleged to have been speech transmitters.

Yet the public were so ready for the speaking telephone that ten years of Bell's patent have put more than half a million of them into use.

The Reis instruments were well known as instruments which could *not* transmit speech, and the Reis publications never taught any one how to make an instrument that could. Bell's invention is brought within the authorities on the subject.

Howe v. *Underwood*, 1 Fish. Pat. Cas. 162; *Howe* v. *Morton*, Id. 594; *Penn* v. *Bibby*, L. R. 2 Ch. App. Cas. 127; *Tilghman* v. *Proctor*, 102 U. S. 708 (26:279).

The method, and not the form of the apparatus which embodied it, constituted the substance of the invention.

In *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 815 (19:880), this court, by *Mr. Justice* Bradley, said: "The whole subject matter of a patent is an embodied conception."

In *Winans* v. *Denmead*, 56 U. S. 15 How. 330 (14:717), (Curtis, *J.*), it is said that the inventor before the court might justly assert; "My improvement did not consist in a change of form, but in the employment of principles or powers in a new mode of operation, embodied in a form by means of which a new or

better result is produced; it was this which constituted my invention."

The rule of law about Prior Publications. That the Reis publications were known for many years without leading to the use of speaking telephones, in the case of a machine so much wanted that the public took it at once the instant Bell offered it, is a proof from experience that the publications were not sufficient under the rule of law.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Cohn* v. *U. S. Corset Co.* 98 U. S. 366 (23: 907); *Cahill* v. *Brown*, 15 Off. Gaz. 697; *Atlantic Giant Powder Co.* v. *Parker*, 16 Off. Gaz. 495; *Hood* v. *Boston Car-Spring Co.* 21 Fed. Rep. 67; *Betts* v. *Menzies*, 10 H. L. Cas. 154; *S. C.* Goodeve's Pat. Cas. 51; *Neilson* v. *Betts*, L. R. 5 H. L. 15; *S. C.* Goodeve's Pat. Cas. 56.

Can any swearing of professional experts now make this court believe that the Reis was a speaking telephone? Such testimony, and the men who give it, have been characterized by the courts.

Neilson v. *Betts*, *supra*.

In *McCormick* v. *Talcott*, 61 U. S. 20 How. 409 (15: 933) this court spoke of such depositions as "The opinions (the reveries they may often be called) of a class of men styled experts; men as often skillful and effective in producing obscurity and error as in the elucidation of truth."

It would not be material if, to-day, by applying to Reis' contrivance the knowledge disclosed by Bell and his successors, making it perform a new operation and cause the undulations of the Bell patent, it would produce the new result of the Bell patent.

Morris v. *McMillin*, 112 U. S. 248 (28: 704); *Pennsylvania R. Co.* v. *Locomotive E. S. Truck Co.* 110 U. S. 490 (28: 222); *Blake* v. *San Francisco*, 113 U. S. 682 (28: 1071); *Consolidated S. Valve Co.* v. *Crosby S. G. & Valve Co.* Id. 170 (28: 943); *Clough* v. *Barker*, 106 U. S. 176 (27: 137).

In *Smith* v. *Nichols*, 88 U. S. 21 Wall. 118 (22: 567), it is said "A patentable invention is a mental result."

Winans v. *Denmead*, 56 U. S. 15 How. 330 (14: 717).

Criticisms on the form of the patent are simply attempts to pick a flaw in Bell's paper title to that which he has earned. They are attempts to recall the grant on behalf of that community which has received and enjoyed the consideration he gave for it. The courts have often expressed their views on this subject.

Howe v. *Underwood*, 1 Fish. Pat. Cas. 162; *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218 (8: 376); *Hinks* v. *Safety Lighting Co.* L. R. 4 Ch. Div. 607; *S. C.* Goodeve's Pat. Cas. 254; *United Telephone Co.* v. *Harrison*, Goodeve's Pat. Cas. 484.

The Patent Office found at the time that the language of the Bell patent was intelligible, and conveyed some definite idea. This, we submit, is conclusive on that question.

It is in accordance with all the rules of law, that an objection is considered of no avail, if not taken when it could be corrected.

Roemer v. *Simon*, 95 U. S. 220 (24: 386); *Webster Loom Co.* v. *Higgins*, 105 U. S. 596 (26: 1183).

The description is sufficient in law in the patent.

Pickering v. *McCullough*, 104 U. S. 318 (26: 751); *Webster Loom Co.* v. *Higgins*, 105 U. S. 586 (26: 1179); *Gibson* v. *Harris*, 1 Blatchf. 171.

The presentation of such a patent proves in law a completed invention from the date of filing.

Dane v. *Chicago Mfg. Co.* 2 Off. Gaz. 677; *S. C.* 8 Biss. 380; *S. C.* 6 Fish. Pat. Cas. 130; *Wing* v. *Richardson*, 2 Cliff. 449; *S. C.* 2 Fish. Pat. Cas. 535; *Wheeler* v. *Chipper M. & R. Co.* 6 Fish. Pat. Cas. 1; *S. C.* 10 Blatchf. 181; *Johnsen* v. *Fassman*, 1 Woods, 188; *Kelleher* v. *Darling*, 4 Cliff. 426.

A specification prepared, executed, shown to others, promptly filed, and resulting in a patent, carries the invention back to its date of execution.

Webster Loom Co. v. *Higgins*, 105 U. S. 594 (26: 1182); *Colgate* v. *Western U. Tel. Co.* 15 Blatchf. 365; *Colgate* v. *Gold & S. Tel. Co.* 16 Blatchf. 505.

What constitutes infringement and how to ascertain it, has never been stated better, or with more freedom from confusing refinements, than in the *Sewing Machine Case*.

Howe v. *Morton*, 1 Fish. Pat. Cas. 588.

Bell first accomplished a great result, entirely new in kind, by the use of a means entirely new in kind.

Tilghman v. *Proctor*, 102 U. S. 708 (26: 279); *Corning* v. *Burden*, 56 U. S. 15 How. 267 (14: 690).

It is well settled that if the experiments do not result in a useful machine, particular features of it "cannot be dug up in after years and produced to defeat the patent of an independent and successful inventor."

Aultman v. *Holley*, 6 Fish. Pat. Cas. 534; 11 Blatchf. 317 (Woodruff, *J.*); *Whiteley* v. *Swayne*, 74 U. S. 7 Wall. 685 (19: 199); *Johnson* v. *Root*, 1 Fish. Pat. Cas. 366 (Sprague, *J.*) Same case on a second trial, 2 Cliff. 643 (Clifford, *J.*)

Mr. **William W. Ker,** for the Clay Commercial Telephone Company:

It is alleged in the complaint that the American Bell Telephone is "a corporation duly established under the laws of the Commonwealth of Massachusetts." This is a descriptive allegation, not proved as laid, which is a fatal variance.

1 Greenl. Ev. 82, § 64.

The name of the proposed corporation is not mentioned in the body of the Act. "When a corporation is erected, a name must be given to it, and by that name alone it must sue and be sued, and do all legal acts."

1 Bl. Com. chap. 18, p. 476; Ang. & Ames, Corp. 10th ed. § 1; *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 636 (4: 659).

The title cannot confer the name American Bell Telephone Company upon the corporation. "The title of a statute, it has been repeatedly held, is no part or parcel of the statute."

Potter's Dwarr. Stat. & Const. 102; Sedg. Const. Stat. 2d ed. 39, 40; *Mills* v. *Wilkins*, 6 Mod. 62; *Hadden* v. *Barney*, 72 U. S. 5 Wall. 107 (18: 518); *Commonwealth* v. *Slifer*, 53 Pa. 71; *Union Pass. R. Co's. Appeal*, 81* Pa. 94.

The special Act does not give the persons named in it power to assume a name. It gives them power to *organize* a corporation. The

Act is to be taken most beneficially for the sovereign, and against the grantee.

2 Bl. Com. 347; Potter's Dwarr. Stat. 146, 215; *Dartmouth College v. Woodward, supra; Commonwealth* v. *Erie & N.E. R. Co.* 27 Pa. 351.

The special Act refers to chapter 224, by enacting that Bell and his associates might "organize a corporation according to the provisions of chapter 224." The powers conferred by the special Act are limited to the precise language used. The language confers no authority upon the Secretary of the Commonwealth to issue such a certificate as has been offered in evidence.

Commonwealth v. *Central Pass. R. Co.* 52 Pa. 520; *Bowling Green & M. R. Co.* v. *Warren County Court*, 10 Bush, 711; *Ellis* v. *Paige*, 1 Pick. 43; *Farmers' L. & Trust Co.* v. *Carroll*, 5 Barb. 613; Ang. & Ames, Corp. §§ 81, 111.

The Bell Telephone Company of Philadelphia is one of the complainants mentioned in the bill of complaint. No Act, law, charter, or evidence was offered to prove that such a corporation ever did exist.

The assignment from the Bell Telephone Company recites other agreements that are a part of the chain of title. The counsel for defendants objected to the reception of the evidence, and, as a part of the objection, called for the agreements mentioned in the assignment. The evidence should have been produced with the agreements mentioned therein, and proper proof made of the execution thereof.

The Bell Telephone Company is alleged to have been incorporated under the laws of Massachusetts "to carry on business for the whole United States outside of New England," and was thus prohibited from carrying on business in Massachusetts, under whose laws it was incorporated. Therefore, the company should be regarded not as a corporation, but merely as a partnership.

"No rule of comity will allow one State to spawn corporations and send them forth in other States to be nurtured and do business there, when said first-mentioned State will not allow them to do business within its own boundaries."

Land Grant R. & Trust Co. v. *Coffee County*, 6 Kan. 245; *Hill* v. *Beach*, 12 N. J. Eq. 31.

This judgment and decree are erroneous, because the complainants' proofs show that the American Bell Telephone Company owned but two thirds of the patent dated March 7, 1876, and but one third of the patent dated January 30, 1877.

The evidence shows that Bell was not the original and first inventor of the inventions described in the patent. His apparatus is inherently unfit for telephonic purposes in the transmission of articulate speech.

The court below erred in entering a decree against the appellants, Scott and others, who were officers or directors of the Clay Commercial Telephone Company, and not jointly carrying on the business of telephony.

The court below erred in entering a decree against the appellant, Henry Clay, who had conveyed to the Clay Commercial Telephone Company the letters patent that had been granted to him, and had no further interest in the patents.

The bill of complaint is defective for want of sufficient parties.

The complainants failed to prove the material allegations set forth in the bill of complaint.

Bell's letters patent are not good and valid in law.

The evidence shows that the instruments used by the Clay Commercial Telephone Company are not arranged or constructed according to the specifications and claims set forth in the Bell patents; and that the defendants had not infringed said patents.

Messrs. Lysander Hill, George F. Edmunds, **Don M. Dickinson,** *T. S. E. Dixon, Charles P. Crosby, H. C. Andrews* and *Melville Church,* for the People's Telephone Company (the Drawbaugh Case) and the Overland Telephone Company:

It is conceded that the machines conceived and constructed by Daniel Drawbaugh, which did transmit articulate speech, operated on the principle which has been applied under the Bell patents.

The principle is that of transmitting articulate speech upon wires by a continuous electric current, with the addition of means to cause incidental undulations of the current corresponding with the incidental tones of the human voice.

When applied in the electric speaking telephone the practical result is, that the same air vibrations set in motion by the human voice, and producing sound by their impact upon the tympanum of the ear, are repeated with comparative exactness upon the tympanum or diaphragm of the transmitting instrument, are then by the process carried to a distance, and there with equal exactness repeated upon the tympanum or diaphragm of the receiver, and thence again repeated upon the tympanum of the listening ear.

The issue is simply, Did Alexander Graham Bell or Daniel Drawbaugh first conceive and apply this principle, and clothe the conception in substantial forms which demonstrated at once its practical efficacy and utility?

This court has clearly laid down the lines within which legal evidence can solve the question in favor of Drawbaugh.

Gayler v. *Wilder*, 51 U. S. 10 How. 477 (13: 504); *Coffin* v. *Ogden*, 85 U. S. 18 Wall. 120 (21: 821).

When the Drawbaugh defense is tested by these cases, no attack can reach it.

The policy of the law is to give the utmost possible encouragement and protection to the inventor, not to the patentee.

The vast amounts invested under the Bell patents and in perfecting them, the hosts of people who have their "all" invested, the reflections upon "unscrupulous speculators," said to be behind Drawbaugh, cannot add a feather in weighing the matter of priority of invention.

The date of Bell's alleged invention can be fixed no earlier than March 10, 1876; certainly no earlier than February 14, 1876.

But for the purposes of the Drawbaugh defense, we may safely set the date of the conception by Bell at June 2, 1875.

Previous to this he had abandoned experiments with the diaphragm, and it was not until December 28, 1875, in his interview with

Mr. George Brown, of Toronto, Canada, that he drew a sketch of his July, 1875, instrument, predicated upon his experiments subsequent to June 2, 1875, and placed upon it these words in his own handwriting: "*First attempt to transmit the human voice.*"

And so, though the evidence permits us to place it later, we fix the earliest date of Bell's invention, June 2, 1875.

We present a history from the first idea conceived by Drawbaugh, of transmitting articulate speech over a telegraph wire in 1859-60, through various experiments by which the conception finally took on mechanical, though rude forms, and became of practical use, down to the finished and nicely-adjusted mechanism; all prior to the date of Bell's invention.

This history rests for its general truthfulness, and for the accuracy of its details, upon the direct and positive testimony of an entire community, and of visitors to that community, representing all classes.

Over two hundred persons testify to knowledge of Drawbaugh's telephones as an accomplished invention prior to the date of Bell's. Over seventy talked through the machine. Over one hundred and thirty saw the machines, and most of these identify instruments.

Drawbaugh's shop was a common resort for people and a place to which visitors were frequently taken, while Drawbaugh himself was considered a remarkable man among the people.

The great mass of evidence for the defense is not of illiterate or careless witnesses, but on the contrary is that kind which is admitted to be even superior to that of the mere learned or scientific. There is no room for mistake.

So strong and vigorous was this class of testimony that the court below was constrained to hold that "The case made by these witnesses is sufficiently formidable to overcome the legal presumption of the validity of the complainant's patent."

It is doubtless true that strong circumstantial should sometimes overcome direct evidence, as in *Howe* v. *Underwood*, 1 Fish. Pat. Cas. 162.

But the testimony here is far beyond the range of that doctrine. Other rules apply.

In this case we have hundreds of witnesses, each describing either the knowledge of his own senses of a result, or of the hearing of the result, which, if in fact it occurred, or if in fact he heard of it, was the most startling and unheard of thing in all his experience.

It was not merely a wonderful mechanical contrivance, but here was an unseen and mysterious cause, whose processes were not discoverable to the vision, whose force seemed rather of the unnatural, and whose *results alone* impressed the mind and memory.

If the machine *talked*, and the witness *heard* it, there can be no doubt of the accuracy of the impression made.

It is the strongest possible corroboration that the witnesses do not agree in their memories of the, to them, novel parts of the instrument; or are at fault or are mistaken as to the identity of the instruments, or of the difference between the carbon or variable-resistance machines and the magneto machines.

They are agreed in memory of the great, conclusive fact, THAT THIS MACHINE DID TALK.

We find repeated and constantly appearing support of the main facts testified to, in perfectly natural and consistent collateral matters.

We find the unlearned and unskilled remembering well the talking machine, when clothed in the familiar garb of a tin mustard box or common glass tumbler, and forgetting other details; we find others remembering the instruments with any peculiarity about them like the spiral magnet better than they can recall other parts; we find the blacksmith remembering the shape and position of the permanent magnet with which he is familiar, and forgetting all about the electro-magnet, of which he knew nothing. We find a farmer, recalling all the details for applying electricity about the machines, but cease to wonder at his accuracy when we find that he had at some time before greatly interested himself about practical electrical machinery. The very diversity of detail, the absence of concurrence in circumstance, in occasion and in time, presents this mass of testimony impregnable against the complainants' theory, that it is the product of consultation or of prearrangement.

Care has been taken, in summoning witnesses to testify, to call no man whose character or whose word could be successfully impeached by any methods known to the law.

The charges of conspiracy and of gullibility against these witnesses rest only upon the bare statements of counsel. The lives of all the witnesses are clean, their characters for truth and veracity unassailed.

We submit an analysis of the testimony, and call particular attention to the absolute certainty of the dates as fixed by collateral matters in every instance.

Complainants have introduced forty-eight witnesses to show that they never saw the machines and *never heard them spoken of*. Of these but ten stand the test of cross-examination and rebuttal. Among these are Theophilus Weaver, who had been employed by the complainants to get up testimony, and was not on good terms with Drawbaugh, and David A. Hauck, with whom Drawbaugh had a suit and who was adjudged, both by the Examiner of Interferences, and, subsequently upon appeal, by the Board of Chief Examiners, to have sworn falsely.

This case affords striking illustration of the wisdom of those settled legal rules for valuing evidence, which give great weight to positive and little weight to negative testimony.

This court said in *Stitt* v. *Huidekoper*, 84 U. S. 17 Wall. 384, 394 (21: 644, 647): "It is a rule that ordinarily a witness who testifies to an affirmative, is to be preferred to one who testifies to a negative.

See also Collection of Cases, 14 U. S. Dig. 642; Gilb. Ev. 140; 1 Stark. Ev. § 82.

While no person possessing a memory could well forget having talked through one of these machines, yet it may be true, that others who testify that they never heard of it, or did not see it, tell the truth, from lack of opportunity to see or hear it.

The difference in the ability of persons to recall facts is a matter of common observation; and witnesses may be influenced not to remember.

(Counsel here commented on the testimony of complainant's witnesses.)

Negative witnesses cannot stand against the positive testimony of men who saw and talked through the telephone, remember the words, and identify the instruments.

It would be presumable that the three or four witnesses testifying that Drawbaugh did *not* speak to them were omitted to be spoken to by him, because of discouragement, or diffidence, or experience of repeated rebuff, rather than that the positive testimony of himself, and of so many witnesses of character, is wickedly false.

Drawbaugh and his witnesses should have the benefit of the presumption in favor of truth and honesty.

When a man is relating an exceptional experience—an astonishing result, a mystery connected with spoken words—it would be more incredible if he did not remember it.

Resort has been had, not to the testimony, but to the theory of the inherent incredibility of the defense, and especially of the story of Drawbaugh himself.

Drawbaugh's history of himself and of his experiments and labors upon the electric speaking-telephone from 1860 to 1879, inclusive, must be either a truthful statement, or one manufactured by a wicked mind; yet, all the methods known to the profession have been applied for the purpose of breaking down his testimony, *and without success.*

Upon the course and path of his life, and his relations and dealings with all men from his boyhood down to his fifty-eighth year, the complainants have focused a light which has made luminous every detail. But we find that he bore a character, and had a life record, whose honesty and truthfulness could not be assailed. All bear testimony to his steadiness, his industry, his enthusiasm in physics, and especially in electric science.

The record is full of evidence of the employment of "agents" from the community, by the complainants, in a search for matter wherewith to attack him.

It has never been true in the history of jurisprudence that a fabricated story, covering a long period and a series of transactions, could stand the tests applied to it in the courts of justice.

Drawbaugh's testimony covers 332 pages, of which 180 pages are cross-examination, and the complainants commanded every available resource and all the ability and knowledge, both scientific, legal and common, that would by any possibility be put into an attempt to break a witness by cross-examination.

A careful reading of this testimony is convincing of its truth. The very faults of Drawbaugh's memory, the immaterial contradictions and changing of immaterial dates only go to strengthen the conviction that the history as related is genuine and truthful. It is without a trace of the inflexibility which characterizes fabrication. The man that speaks is in harmony with the history of the man's character as related; in harmony with all knowledge of the honest, ingenuous, open-minded genius, as portrayed by the account of his life.

It is said by the complainants that Drawbaugh was not a learned man; that no one but a scientist could have invented the telephone; and the fact of his busying himself with other inventions in mechanical contrivances is used as showing that he could not have conceived or had his mind upon so great a discovery as that of the transmission of articulate speech.

So far as the learning is concerned, it can be shown that successful inventors are not the product of the universities, but of natural conditions and of tendencies common enough in American civilization. Genius is innate, and the man possessing it is the man who must advance in its use.

No mere theory can give the accurate and ready knowledge which practice imparts. Von Humboldt found at Calabozo an electrical machine, the work of a man who had never seen any instrument, who had no person to consult, and who was acquainted with the phenomena of electricity only by reading the treatise of De Lafond and Franklin's Memoirs.

The Royal Society of London once elected to honorary membership a man who first demonstrated that lightning and electricity were one, whose reports as to his experiments with a kite and a key, it had formerly refused to receive and had made sport of. He stands in history and science as among the most eminent of natural philosophers. He was a "Yankee tallow chandler's son, a printer runaway boy," for whom the schools did nothing.

Michael Faraday, the son of a blacksmith, gave his attention to practical experiments with electricity, resulting in the discovery of the induction current.

Hugh Miller's great conceptions took form when, without education, he was working as a laborer at the Cromarty stone yards.

Ampere worked out difficult mathematical problems with sticks and stones before he had learned the names or forms of figures.

But it is said Drawbaugh busied himself with mechanical contrivances of comparative insignificance.

So did Robert Fulton, Guttenberg and Franklin. Again, the attack is made upon the credibility of Drawbaugh's story, upon the ground that such an invention would have been widely known, and would have commanded all the resources necessary to present it to the public.

But the telephone seemed a mystery and a novelty, of no practical utility, to the learned and the rich of the great cities, long after Bell's patents were issued.

Morse, who conceived the electric telegraph, for twelve years thereafter struggled with poverty, to secure any consideration for it.

Elias Howe for years suffered the pangs of poverty and failure to get friends or capital interested in the sewing machine in this country, or in England.

Now, what is there in this case that so distinguishes it in the domain of judicial investigation as to require a reversal of settled rules of evidence?

Direct and positive affirmative evidence, unimpeached and uncontradicted, seems in the court below to have failed of legal virtue when applied to this particular controversy; and the rule as to presumptions is so radically altered that the testimony of four doubtful witnesses that they did not hear of a fact—no, that they did not remember hearing of it—shall be re-

ceived as finally closing the door against the possibility of its existence, and against the recognition of all direct and positive testimony of twenty-seven equally credible men and women, that they actually did see and hear of the thing.

And although he did apply to twenty-seven others, it is conclusively assumed that he did not have a telephone, because he did not apply to these four gentlemen. As well might it have been assumed that Howe did not invent the sewing machine, because, after repeated attempts, he ceased his applications.

Although the greatest inventors and discoverers have died in poverty, or succeeded only after long failure, yet, because Drawbaugh could not at once command recognition and influence, his story is stamped as a fabrication from beginning to end.

The community corroborating him are called knaves or fools. A mind active in the direction of other invention is held evidence that this discovery was beyond his scope.

The learned court below seems to demand a new and a special law of evidence, and a reversal of all the commonly received notions of human nature, to fit this case.

As the complainant's whole theory and the decision of the court below rest upon the basis that Drawbaugh is a fraud, and has had the ingenuity to set up the story and the influence to get it so overwhelmingly corroborated, we submit from the record a brief sketch of "His history, surroundings and testimony."

If a charlatan, unlike his kind, he has not led an itinerant life. All that can be told of him from boyhood to age, all the evil or good that is known of him, all evidences of character, all the impressions, are written of Drawbaugh in one place and upon one community.

The story from his earliest to his latest years is a very simple and homely one. If it be true that he developed into a Machiavelli in his fifty-third year, the incongruity is worth consideration.

He was giving attention to electric science in 1860, and then conceived and talked of "*speaking through a telegraphic wire by electricity.*"

Between 1871 and 1874, Drawbaugh showed Exhibit "C," and said that the *voice* produced "*pulsations*" upon the machine.

At that early time he was experimenting with electricity, which seemed to be his hobby.

He was a person of remarkable ingenuity and skill. At thirteen he made a rifle and at a later period was skillful in wood-working. At twelve, he made a part of a clock. At sixteen he manufactured a small steam engine. In 1857, 1859, he constructed and operated a photographic apparatus, making even the lenses himself. He made a solar transit and a machine for wrapping electric wires. He made his galvanometers. He was applied to by others to invent, and did invent, machines for them—the tack machine for Patton, the paper-bag machine for Sengsier, and other machines for the pump company and for the axle company. He was a great mechanical genius and a "great inventor."

All the witnesses concur as to his sobriety, his truthfulness. and his incessant and tireless industry, and of his labors, extending far into the night. He was generous and kindly, and negligent in money matters. His wife refused to sign the deed when he wished to sell their little home, to put money into the "talking machine."

(The counsel here reviewed the evidences showing Drawbaugh's poverty.)

The able opinion of the circuit judge is exhaustive in its treatment of Drawbaugh as a conspirator, a perjurer and as a general fraud.

(Counsel here discussed the evidence on which this charge rests.)

A brief sketch of the Conception and Progress of Drawbaugh's Telephone.

He early began to study the subject. He experimented with the vocal organs, and had learned the fact that sound set up vibrations in solid substances.

He pursued the principle always, that the current must not be broken, and from the first his conception was of a continuous current.

(Counsel here goes into the evidence on this subject, showing his experiments and the progress of his invention.)

The story of Drawbaugh then, and of the record, overwhelmingly corroborated by the witnesses for the defense, is as follows:

Early conception and experiments with the continuous current, 1862. 1866 and 1867.

Tea-cup transmitter and receiver, 1866 and 1867.

Tumbler and tin cup and mustard can ("F" and "B"), 1867 and 1869.

Improvement upon "B" ("C"), 1869, 1870.

Further improvement upon "C" and the more perfect magneto instrument "I," 1870, 1871.

Mouthpiece changed to centre, and adjusting screw inserted (Exhibit "A"), 1874.

"D" and "E," perfectly adjusted and finished magneto instruments, January and February, 1875.

"L," "M," "G" and "O," from February 1875, to August, 1876.

"H," August, 1876.

"J," "N" and "P," 1878.

The reason why Drawbaugh was seen by some of the witnesses working with the earlier machines, after the perfection of the instruments "D" and "E," on other earlier magneto instruments, was that Drawbaugh, on discovering that the magneto receiver "B," as improved and organized in the improved "C," in 1870, would serve as a transmitter, temporarily abandoned the variable resistance transmitters, "F" and "B," and did not return to experiments and progress on them till 1875. From them, through a series of experiments and improvement, came finally the perfect carbon instruments in 1878.

As to the claim that Drawbaugh was still experimenting, when defendants' evidence shows he had accomplished the invention, the answer is that the instrument in his view "was not loud enough for practical purposes." He wanted it to talk out as a man talks.

The charge that Drawbaugh *did not make known his invention to his associates* in the shops where he worked has nothing to rest upon.

(Counsel reviews the evidence on this point and also the testimony of thirty-seven of defendants' witnesses establishing the invention of Drawbaugh.)

Without continuing an extended analysis we

refer briefly, in addition to the foregoing, and in addition to the witnesses discussed and quoted, to the following equally strong and positive testimony (citing the testimony of about seventy additional witnesses).

Ephraim R. Holsinger, a newspaper man and job printer, was called by the complainants who proved by him that he published a card for Drawbaugh before June, 1874, containing a partial list of inventions and not mentioning the telephone.

This card is as follows:

Dan'l Drawbaugh,

INVENTOR OF

THE FOLLOWING PATENTS.

Stave, Heading & Shingle Cutter.
Barrel Machinery.
STAVE JOINTING MACHINE, Many in use.
Tram & Bed-staff for leveling face of Millstone.
Rine and Driver for running Millstone.
Nail Machinery for Feeding Nail Plates.
PUMPS, ROTARAY & OTHERS.
Hydraulic Ram.
THE DRAWBAUGH Rotary Measuring Faucet, very extensivly used.
CARPET RAG LOOPER—A little device by which rags are looped quick and firm, without Needle or Thread.
ELECTRIC CLOCK.

MAGNETO ELECTRIC MACHINE,

For short line Telegraphing, Fire Alarm, and Propelling Electric Clocks. It can be applied to any form of Electric movement.
Gives entire satisfaction USING NO *GALVANIC BATTERY.*—
☞ For SIMPLICITY it has NO RIVAL.

We say of it:

1. It was prepared by Holsinger, without Drawbaugh's supervision.

2. It purports only to give a list of patented inventions.

3. It purports to give a list of practical and everyday tools used among the people where the card was issued.

4. The advertisement in it of a double machine for telephoning would have been absurd.

5. It was early in 1874, and Drawbaugh had no telephone machines ready for sale, and the card purports to advertise only for sale to the class of people about there, and it omitted the gas governor and wire wrappers and the stamp canceller, for the same reason, *i. e.*, such people did not use them.

6. Drawbaugh would not care to advertise to patent pirates the matter of his greatest work, to no good purpose.

7. His object was to get everyday work without calling attention to his "hobby."

8. Holsinger talked through the, to him, perfect, because finished, machines "D" and "E" (not finished until February 1875), in the summer of 1875, a year after the card: and the "experiments," as he calls them, of 1874 were with the rude and unclosed machines "F," "B" and "C."

Finally, the witness Holsinger distinctly states that his testimony for defendants is correct.

Of the witnesses, all, with the exception of eight, give their testimony as to having seen or talked with the machines prior to June 2, 1875, the date of Bell's invention; and in every case the testimony shows that the date has been fixed accurately by collateral and convincing circumstances.

To corroborate the dates we called a number of witnesses, who testified as to being told of the machines and of the common report of the machines, at the dates which the foregoing witnesses have fixed as the time they saw them; and this latter class of witnesses as accurately fix the dates.

We have in almost every instance called a stranger to the witness giving the direct testimony, to establish the date of such collateral fact.

(Counsel here recites the evidence).

A number of the original parts of these instruments exist and are in evidence, and from the parts and from the testimony of Drawbaugh and other witnesses describing them reproduced instruments were constructed, in order to show the court how they appeared and acted, when completed in all their parts. Of the reproductions "F" was the only one of the four which was a carbon instrument.

The court below lays great stress upon the failure of these instruments to do satisfactory work in the New York tests. The instruments were again reproduced and properly adjusted at Philadelphia, and worked perfectly.

It is difficult to see wherein the essential parts of these machines differ, and it is perfectly plain that the New York tests failed of perfect action from the rough treatment the machines had had, and, from having been shaken out of adjustment.

Mr. **George F. Edmunds,** for the People's Telephone Company (Drawbaugh Case), and the Overland Telephone Company:

The court below was right in its theory that this method of transmitting speech by electrical contrivances actually existed at the time that the defendants' testimony in the court below said that it did, or else that the whole of the defendants' testimony is false.

It was found by the court below that the story that was told by Drawbaugh and his witnesses was untrue.

If the things took place that the testimony tends to show, then Bell's case, as a prior inventor and entitled to prevent the use of these machines invented by Drawbaugh, has no place in this court.

The question that you are now to pronounce upon is not whether Drawbaugh shall have a patent; it is the question of whether he and those who have taken up his cause shall have a right to use their instruments against the intervention of Bell as a prior inventor.

It is of no consequence whether Drawbaugh has an application for a patent now pending, or whether he never made an application or thought of making an application for a patent.

The point is whether Bell is the first and prior inventor of a useful invention and has made a proper application for its exclusive use.

What is to become of the Drawbaugh invention or the Gray invention has nothing to do with this case.

A telephone is a contrivance for transmitting speech; an extremely useful, ingenious and valuable invention.

Are you to say that every man who lived in this neighborhood in Pennsylvania, and that this old unlettered man, Drawbaugh, whose life had been pure from beginning to end, are liars?

I deny it. It is against human experience; it is against human morals; it is against every principle and test.

I want to ask Your Honors to read this testimony both of the complainants and of the defendants, in this People's cause, and the Overland cause, which brings in some later testimony, and see whether you can say, as *Judge* Wallace did, that the statement of this poor old inventor himself is a fabrication, and that every other part of it, as to events that they say took place before this patent of Bell was applied for, was a pure delusion, and that the testimony of scores and scores of men and women, having no common concert, was a fabrication.

Suppose Drawbaugh had applied for a patent before Bell, and the Commissioner of Patents had said "I will not grant you this telephone patent because it is not a useful invention," and we appeal and come here with this testimony, could there be a doubt that you would say that that thing did exist and that Drawbaugh did it? It is impossible to deny it.

I believe you all would have thought, as Orton thought, and as the Stock Exchange thought at New York, and as everybody else thought at that period of time, "We cannot grant this patent because it is a mere toy."

I think the key to the whole of it is, that at the time when this invention was being carried forward by this man, nobody believed it was otherwise than the idea of what is now called a crank. Some people—for people differ in their emotions and their sensibilities and their perceptibilities—said "It is impossible."

Nobody believed it. That would dispose of one class of these witnesses, who said it was impossible. The other class said: "What good will it do that you can speak through this piece of wire and by this contrivance?

It took a year or more before Bell and all his coadjutors, with millions of capital and enterprise and ambition behind to push it forward, and not an over amount of scruples before to retard it, brought his invention to be believed in and invested in and operated by the public as a useful invention. It turns out to be useful.

If Drawbaugh had done the same thing that Bell had, in the same time, you would have believed the whole thing was a conspiracy and a lie and that the thing did not exist now. You would not have believed the evidence of your own senses.

Witnesses are called upon, one by one, to state what they remember; that they saw the thing and heard the voice. How are you going to disbelieve it? Why, *Judge* Wallace says: "It is absolutely incredible that Drawbaugh could have done that thing." That is the honest statement of the judgment of the court below, and it is the best ground on which the complainant's case below and the appellees here can be put.

That is the ground upon which the court below held that the Drawbaugh contrivances, machines, instruments, operations, and facts never existed.

Now, I beg that Your Honors will not commit yourselves to any such theory of the weighing of human testimony as that. But let us see how they treat Drawbaugh alone. I don't mean to leave Mr. Drawbaugh in the category in which *Mr. Justice* Wallace left him.

How are you going to tell whether a man is an honest man or not? All that we can judge by is the life and conversation of the person in question. If a man has been an immoral man, you doubt him.

Suppose a man, whose life from his birth to the day of giving his testimony has been pure, has been upright, has been respected, and that in the whole forty years that he had lived in that community never a shade or a suspicion had touched it; and he tells you a tale of an event that he himself was the doer of, and which is within the range of sanity; would you believe him, although two years, five years, ten years after, a scientist, glorified by capital and by fame, had said: "I have done that thing, and therefore you could not have done it before?" That is a statement of this case as applied to the testimony of Drawbaugh himself, if you took him alone.

And he is surrounded and fortified by scores and scores of honest and respectable people, whose character is not impeached any more than his is, who say that they saw and heard that thing done long before Bell's discovery. So that I submit that you cannot fail to say that it is proved that this old man, in that obscure place, did do the thing that Bell did, in 1876 or 1877.

I am under the impression that it is not really disputed by the gentlemen on the other side that if the things took place at Eberly's Mills, from 1869 to 1875 and '6, that the defendants' witnesses say did, and that Drawbaugh says did, then Drawbaugh used the same principle, employed the same method, the same process, in substance and in effect that were employed by Bell.

If therefore the contrivance is the same in substance, and it existed before, then Drawbaugh and his friends ought to be allowed to use it. If it is not the same, then clearly, of course, they ought to be allowed to use it, because it does not infringe Bell's patent.

Something has been said about Gray's hav-

ng applied for a telephone patent in 1876, the same day that Bell did, but I will not dwell on this. What I have said is, to my mind, the key to the whole thing on the question of priority.

Judge Wallace stood on the idea that it is intrinsically impossible that Drawbaugh could have had such a conception. Why? Because it required what is called scientific training. A force of nature has never been discovered by such logical steps as *Judge* Wallace thought necessary. Bell himself was struggling and struggling to do something which he could not reach. How did he get it at last? Accidentally. It was not logic that did it. It was not logic that led Franklin to put his kite up in the sky. It was not logic that has led anybody to discover anything. It is not training that does it, although training is useful.

Take Arkwright, the great English inventor of the cotton spinning machinery; was he a student, a professor, a teacher, of any kind of science? Not a bit of it. He was a barber.

Watt, another Englishman,—where was his scholasticism, his great accumulation of scientific knowledge?

I can run down through Fulton, and Whitney, the cotton-gin man; and what was he? A man skillful in mechanics? No; he was a lawyer in an obscure country town in Georgia, living on a plantation, and teaching the children.

This lawyer invented the cotton gin. Up start my brothers on the other side and say, as *Judge* Wallace said below, "Why it is utterly impossible."

I could go through, of course, innumerable illustrations which demonstrate that the correlation between what we call scientific knowledge and education and the discovery of these important forces of nature and their application has no connection whatever. And that it is more often than otherwise that the obscure genius whom God made, and whom the schools did not make, and the obscure mechanics have been men who have brought to the knowledge of mankind most of the things which we now consider to be the most useful to us.

I must say that in respect of the topic to which I have called Your Honors' attention, that it is the end of this case, if Your Honors will take this testimony as to what took place in an honest and respectable community in Pennsylvania for years and years, year in and year out, proved by the whole body of the community, of every calling, in support of this honest old man whose career is not questioned as a man of purity of life, of uprightness of character, although poor and sorrowful; there is an end of it, and if you will only read the testimony, I have nothing more to say.

Oral argument of *Mr.* **James J. Storrow,** for the American Bell Telephone Company, on the Drawbaugh defense:

Drawbaugh's story is that he had electric speaking-telephones for eight years before the Bell patent, at his machine shop at Eberly's Mills; and yet these telephones were never used for any useful purposes whatever.

According to his story they were kept in a box, and he took them out once in a while to experiment with, or to entertain visitors. That was the only use he ever made of them.

It is impossible that a practical telephone, successful, operative, could have been there without coming into use.

Not a human being in the world ever transmitted speech by reason of any information derived from Drawbaugh. The telephones which have come into the world are the result of the independent inventions of other persons, and are not due to any information from Drawbaugh.

We know how Bell's instruments astonished the world, how his feeble instrument at the Centennial made him famous.

Such an invention could not help publishing itself. If it exists, it gets published necessarily.

The argument that was made yesterday was that Mr. Orton, the president of the Western Union Company, saw the telephones of Bell, in the spring of 1877; examined them, and pronounced them to be a mere scientific toy.

The facts are that in the summer of 1877 Mr. Orton said that the Western Union *must* have the speaking-telephone, and on September 6, 1877, made a contract with Dolbear to at once put out telephones and about the same time made a similar contract with Gray.

On December 1, 1877, Mr. Orton had organized a new company, the "American Speaking Telephone Company." In the spring of 1878, Mr. Orton's companies were actively engaged in furnishing telephones for commercial use.

Drawbaugh was first set up to anticipate the Bell patent by a statement in the newspapers, in the summer of 1880, that his associates had proposed to obtain a patent for him as the first inventor of the speaking telephone.

That was the first announcement of Drawbaugh to the world. This suit was brought in October, 1880, and resulted in a preliminary injunction.

There was a hearing on a motion against the Overland Company at Philadelphia in which the Drawbaugh defense was set up.

The Drawbaugh Case on its merits has been considered by *Judge* Wallace and by no other judge.

The defendants did not use and never intended to use any telephone made or devised by Drawbaugh. A company formed in the beginning of 1880 had proposed to use telephones devised by Klemm and by Tisdel, and were afraid they would be enjoined, and after they had started in that enterprise, they bought Drawbaugh's pretentions.

Drawbaugh is set up as a prior inventor to destroy the Bell patent. Drawbaugh's telephones were never used practically for any useful purpose. That they were not used is proof that they did not then exist or were not then capable of use.

All the apparatus alleged to have been made before 1875 by Drawbaugh has gone so far into ruins that it is impossible to transmit sound with it, except instrument "A" alleged to have been made in the fall of 1874. That instrument is a good *receiver* for a speaking-telephone, but it is not a speaking-telephone. It takes two instruments to make a telephone.

Of those instruments alleged to have been made in or before 1874, the parts absolutely required to make any sound cannot be restored, or their character learned, except from Drawbaugh's deposition.

After the injunction and the answer and rep-

lication, we put in our usual *prima facie* case, proved our patent and infringement. Then the defendants took testimony about Drawbaugh's story,—one hundred and twenty-five witnesses. Then we took about one hundred witnesses on the Drawbaugh story. Then they took about two hundred, and then we took some more, and so on, until, after about three years and a half of work, in June, 1884, the case was completed and ready for argument.

The case then went to a hearing and was decided by *Judge* Wallace in favor of the Bell patent about the first of December, 1884.

When the Drawbaugh decision was announced the Overland Company had not completed their testimony, and they took more testimony about Drawbaugh.

By agreement that was incorporated in the Drawbaugh Case, and laid before *Judge* Wallace, and argued before him on the last of November, 1875, and upon that hearing he affirmed his former decision.

We are justified in saying that whatever they did not supply at the second hearing does not exist. Mere oral recollections never yet made out a case.

In such cases, the defendant's proofs must remove doubts; every reasonable doubt should be resolved against him.

Coffin v. *Ogden*, 85 U. S. 18 Wall. 120 (21: 821); *Parham* v. *American Buttonhole, O. & S. M. Co.* 4 Fish. Pat. Cas. 468.

Oral recollections cannot prevail against reasonable inferences from conduct.

Wood v. *Cleveland Rolling Mill Co.* 4 Fish. Pat. Cas. 550; *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438).

Such testimony should be weighed with care, and the defense allowed to prevail only where the evidence is such as to leave no room for a reasonable doubt upon the subject.

Howe v. *Underwood*, 1 Fish. Pat. Cas. 162; *Roberts* v. *Reed Torpedo Co.* 3 Fish. Pat. Cas. 630; *Boulton* v. *Bull*, 1 Carpmael, Pat. Cas. 137; *Kendall* v. *Winsor*, 62 U. S. 21 How. 322 (16:165).

Incomplete attempts to construct a machine amount to nothing as evidence to support such a defense.

Kelleher v. *Darling*, 4 Cliff. 424; *Judson* v. *Bradford*, 3 Ban. & Ard. 539; *Ely* v. *Monson & B. Mfg. Co.* 4 Fish. Pat. Cas. 79.

The inoperative character of the machine disposes of the oral testimony.

Johnson v. *Root*, 2 Fish. Pat. Cas. 292; *Cahoon* v. *Ring*, 1 Fish. Pat. Cas. 408; *S. C.* 1 Cliff. 592; *Hayden* v. *Suffolk Mfg. Co.* 4 Fish. Pat. Cas. 94; *Motte* v. *Bennett*, 2 Fish. Pat. Cas. 642; *McCormick* v. *Seymour*, 3 Blatchf. 213; *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Aultman* v. *Holley*, 6 Fish. Pat. Cas. 534; *S. C.* 11 Blatchf. 317; *Colt* v. *Massachusetts Arms Co.* 1 Fish. Pat. Cas. 116; *Parham* v. *American Buttonhole, O. & S. M. Co.* 4 Fish. Pat. Cas. 468; *Smith* v. *Fay*, 6 Fish. Pat. Cas. 450; *Brown* v. *Guild*, 90 U. S. 23 Wall. 181 (23: 161).

The disuse of a machine may be explained.

Hayden v. *Suffolk Mfg. Co. supra; Snow* v. *Tapley*, 18 Off. Gaz. 548; *Goodyear* v. *Day*, 2 Wall. Jr. 283; *Roberts* v. *Reed Torpedo Co.* 3 Fish. Pat. Cas. 630; *Roberts* v. *Schreiber*, 18 Off. Gaz. 125.

This is an attempt to defeat a meritorious patented invention by proof that something similar had been previously known, though it had never been perfected, and had never been any useful contribution to human knowledge or convenience.

Smith v. *Fay*, 6 Fish. Pat. Cas. 446; *LaBaw* v. *Hawkins*, 1 Ban. & Ard. 428; *Ransom* v. *Mayor of N. Y.* 1 Fish. Pat. Cas. 252; *Cahoon* v. *Ring*, Id. 397; *Goodyear* v. *Day, supra; White* v. *Allen*, 2 Fish. Pat. Cas. 453; *Gottfried* v. *Phillip Best Brewing Co.* 5 Ban. & Ard. 4; *Putnam* v. *Hollender*, 19 Blatchf. 48; *S. C.* 6 Fed. Rep. 882.

The defendants' proof must remove all doubts; a bare preponderance is not enough.

Washburn v. *Gould*, 2 Robb. Pat. Cas. 206; *S. C.* 3 Story, 122; *Magic Ruffle Co.* v. *Douglas*, 2 Fish. Pat. Cas. 330; *Roberts* v. *Dickey*, 4 Fish. Pat. Cas. 532; *Smith* v. *Fay, supra; Crouch* v. *Speer*, 1 Ban. & Ard. 145; *Stilwell & B. Mfg. Co.* v. *Cincinnati Gaslight & Coke Co.* Id. 610; *Hawes* v. *Antisdel*, 2 Ban. & Ard. 10; *Wood* v. *Cleveland Rolling Mill Co.* 4 Fish. Pat. Cas. 550; *Parham* v. *American Buttonhole, O. & S. M. Co.* Id. 468; *Comstock* v. *Sandusky Seat Co.* 3 Ban. & Ard. 188; *U. S. Stamping Co.* v. *Jewett*, 18 Blatchf. 469; *Rogers* v. *Beecher*, 18 Off. Gaz. 793; *Doubleday* v. *Beatty*, 11 Fed. Rep. 729; *Thayer* v. *Hart*, 20 Fed. Rep. 698; *Patterson* v. *Duff*, Id. 641; *Worswick Mfg. Co.* v. *Buffalo*, Id. 128; *Gloucester Isinglass & Glue Co.* v. *Brooks*, 19 Fed. Rep. 426; *Lockwood* v. *Cutter Tower Co.* 18 Fed. Rep. 653; *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438); *Woodman* v. *Stimpson*, 3 Fish. Pat. Cas. 98.

Testimony should leave no room for a reasonable doubt upon the subject.

Crouch v. *Speer*, and *Hawes* v. *Antisdel, supra; Judson* v. *Bradford*, 3 Ban. & Ard. 539; *Willett* v. *Fister*, 85 U. S. 18 Wall. 91 (21: 804).

The courts attach great importance to the failure of the party, on whom the burden rests, to produce the best qualified witnesses.

Smith v. *Whitman*, 6 Allen, 564; *Clifton* v. *U. S.* 45 U. S. 4 How. 242 (11: 957); *Gay* v. *Parpart*, 106 U. S. 679 (27: 256); *The James Martin*, 5 Hughes, 448; *National Car-Brake Shoe Co.* v. *Terre Haute Car & Mfg. Co.* 19 Fed. Rep. 514; *Standard Measuring Machine Co.* v. *Teague*, 15 Fed. Rep. 390; *Commonwealth* v. *Webster*, 5 Cush. 316; *McDonough* v. *O'Niel*, 113 Mass. 92; *Cheney* v. *Gleason*, 125 Mass. 166.

The defendants must prove their case, beyond a reasonable doubt, earlier than Bell's conception; and the burden to do this is on them. They must prove a complete invention.

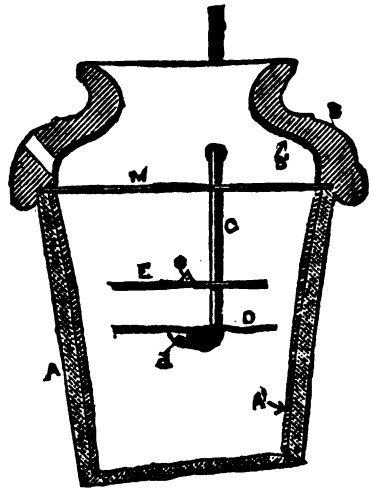
O'Reilly v. *Morse*, 56 U. S. 15 How. 108 (14: 621); *Brodie* v. *Ophir Silver Mining Co.* 4 Fish. Pat. Cas. 137; *Dixon* v. *Moyer*, 1 Robb. Pat. Cas. 324; *Adams* v. *Edwards*, 1 Fish. Pat. Cas. 1; *Woodman* v. *Stimpson*, 3 Fish. Pat. Cas. 98; *Draper* v. *Potomska Mills Corp.* 3 Ban. & Ard. 214; *Reed* v. *Cutter*, 1 Story, 590; *Reeves* v. *Keystone Bridge Co.* 1 Off. Gaz. 466; *Kneeland* v. *Sheriff*, 2 Fed. Rep. 901; *Webster Loom Co.* v. *Higgins*, 105 U. S. 580 (26: 1177); *Roemer* v. *Headley*, 19 Fed. Rep. 205.

Evidence is to be weighed according to that which it is in the power of one party to introduce and the other to contradict.

Clifton v. *U. S.* 45 U. S. 4 How. 242 (11: 957).

If the proof in the record does not come up to what the story would furnish, if true, it is disproof of it.

Of written proof there is none on the side of the defendant. Drawbaugh has got nothing but the recollections of men, except the testimony of these *remains* of his machines. These are said to be the earliest remains. This tumbler F and tin can B were made and used in 1867 or 1868. That tumbler never was of any value. It is no part of an electric speaking-telephone. The story is that that was made in 1867, and that it talked in connection with this, the can receiver B.



Broken Tumbler, F, ½ size

A bladder was tied over its top on the line M; C, E, D were the working parts; the rod C hung down, terminating with the round plate D. The plate E was supported above the plate D by a rod which went from the point *e*, on the upper plate E, to a diaphragm M, which was a bladder tied over the mouth of the tumbler at M. If a metal rod were continued up from *e*, the centre of plate E, to the line where the bladder M is, or where the bladder is said to have been, that would be what Drawbaugh says was the condition.

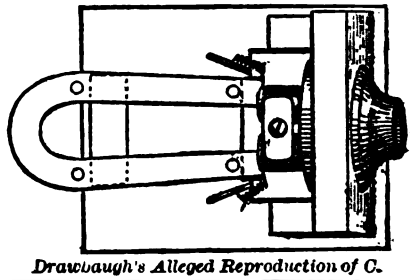
You would get E held by a strut from the under side of the bladder. It must be a stiff rod; a string would not do, because it is necessary the plate should follow the motion of the bladder, and it must be pushed down as well as pulled up.

If you have got a bladder tied over the top of that tumbler and these parts inside, or to be put inside, and you want to change them or alter them, or adjust them or arrange them, the bladder being tied on there cannot be taken off, because the bladder, put on wet, stretches itself on being allowed to dry, and you could not get that off without having to wet it and stretch it all over again.

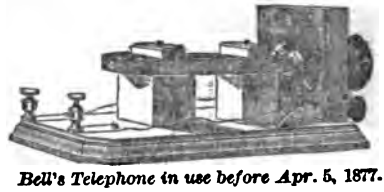
The "reproduction" has an iron diaphragm, and all the parts fastened to that. It is quite a different arrangement. If you throw away the whole tumbler of the "reproduction" it would work just as well; so if there was a bottom to the tumbler and you wanted to put in the working parts or adjust them, you could not do it. If Drawbaugh had that tumbler with a bottom on, he never had such parts inside. He says that at a very early time, if the tumbler ever had a bottom to it, it was broken off; and every witness, with one or two exceptions, swears that when they saw it there was no bottom. That may be true, or it may be merely because they see no bottom on it now. (Counsel here refers to cut given at page 881, *ante*.)

This is the receiver B, which he said he made first out of an old paint can, strapped to a board by a piece of tin laid over it and one tack driven at each end. That tin can is said to have been covered with a bladder across this end, tied on with a string, next the thing in front of it in the drawing; and it is alleged that an armature was fastened to the centre of that diaphragm, and that this thing in front of it was an electro-magnet placed in front of it. He says that was a telephone receiver; it is called the *tin can receiver* B. If his description is true, that would make a receiver on the principle of the receiver of the Bell telephone. The *Scientific American* of September 9, 1876, described Bell's *first* form of telephone as made of "a tin can with an armature glued to it, and an electro-magnet in front of it." (See cut at p. 882, *ante*.)

It is said that C is the remains of the next instrument. The allegation is that that instrument when first made was something like this "reproduction;" that it had a diaphragm, somewhat as now; that it had this magnet on it, like this, an electro-magnet in front of the diaphragm, and this permanent magnet behind it, to magnetize the core of the electro-magnet.

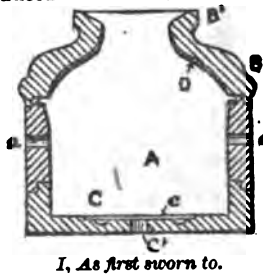


Drawbaugh's Alleged Reproduction of C.



Bell's Telephone in use before Apr. 5, 1877.

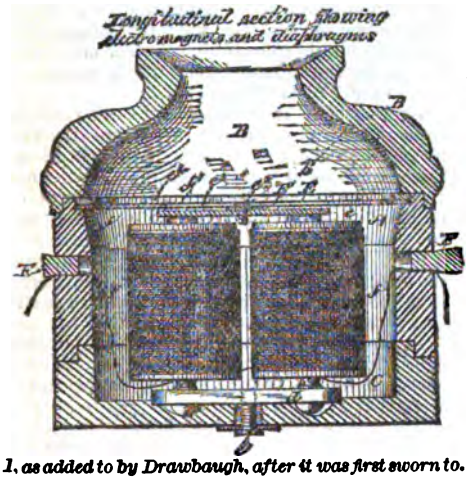
The resemblance between Drawbaugh's alleged second form and Bell's second form is also striking. Then the story is that the next instrument made is this. When this was produced in the case, and sworn to by the first lot of witnesses, it was nothing but a shell without works inside.



I, As first sworn to.

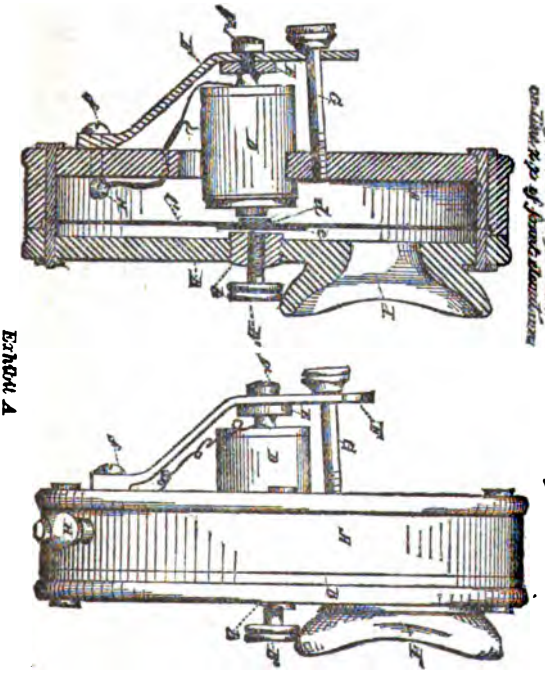
During the taking of the testimony they put in a diaphragm which was made for the purpose. That diaphragm was not made in there when it was first

sworn to. They also put in, during the taking of the testimony, and after several of the witnesses had sworn to it, an electro-magnet which they said had been found in Drawbaugh's garret and he thought might be the original; but when it was first put in and sworn to by the first lot of witnesses, there was nothing in it except a wooden box,—no diaphragm, no magnet. So before they finished taking testimony they got it into this condition. The other parts were found in 1881, while we were taking the testimony.



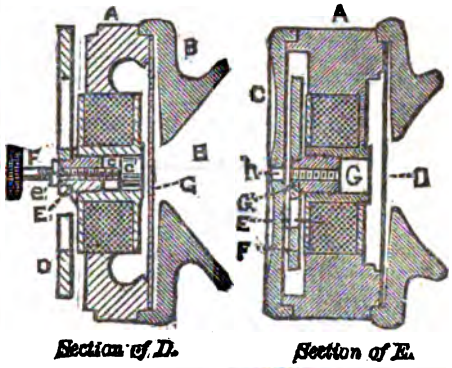
1, as added to by Drawbaugh, after it was first sworn to.

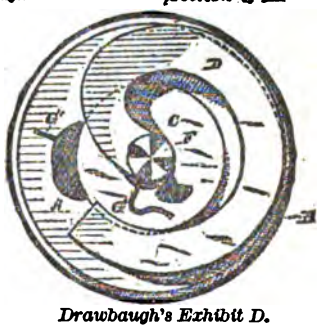
The magnet which they found and brought in was spoken of by Drawbaugh as the magnet which was in use with that instrument.



The next instrument which they speak of is this, called A. Here is a section of it. It contained inside a diaphragm of walnut veneering C. In front of it is the thin air chamber, like the second Bell patent, and then one small opening into it with a mouthpiece I. You can see the diaphragm, the heavy black line C, and this opening I into it. At the centre of the diaphragm, at the back side, is to be seen a piece of soft iron *d* to serve as an armature, and behind that is an electro-magnet D, which you see projecting out at the rear; and there is an adjusting screw *g*, to enable you to regulate the distance between that projecting magnet and the armature.

The next pair of instruments which they say was made was this pair marked D and E.





Drawbaugh's Exhibit D.

E is essentially a copy of D, except that it has a wooden cover over the back to cover in the snail-shaped magnet. Drawbaugh says that D had such a cover, but it got broken or lost. These, whenever they were made, were very good speaking-telephones.

They have got a small core, very short, C'. The heel piece of it (the back end of it) is screwed into a permanent magnet, D, which is coiled up in order to get it into small shape. There is one just like it in E covered by a cover. So that they have got the improvements described in the second Bell patent,—a soft-iron core magnetized by applying a permanent magnet to the back end of it. They have got the metallic diaphragm, an iron diaphragm G (it is common

"tin," I suppose, a plate of iron tinned over), placed close to the pole of the magnet. In front of that they have got the peculiar thin air space of the modern commercial telephone, and the centre opening B.

Every refinement that is in the modern telephone of to-day, every refinement that is in the Bell telephone, is in these magnetos D and E, said to have been made in the spring of 1875.

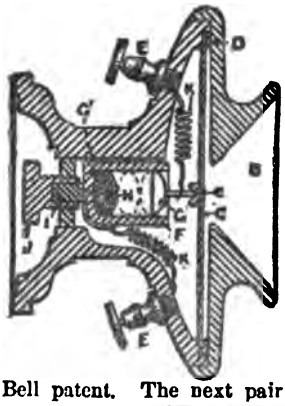
That peculiar air space which Bell got as the result of experiment after experiment is in the most perfect form in D and E.

These were put in evidence in 1881. They are sworn to by various witnesses, as having been made in the spring of 1875.

Drawbaugh says he does not know in what year they were made and the case has got to turn on the question whether those were made the year before the Bell patent or after.

These instruments, D, E, have got a rather large core compared with the permanent magnet, so that they are not as efficient as they ought to be, but it does not prevent them from talking.

The next instruments which are said to have been made are those carbon microphones.



There are four, G, O, L, M. A variable resistance carbon microphone is two pieces of hard carbon in contact, one carried on the diaphragm and the other supported behind it, so that the vibration of the diaphragm will vary the pressure between them. These are said to have been made before the Bell patent. The next pair are two, L, M, which are not different in substance from some of the others.

The next instrument which they produce was H, which they say was made in the summer of 1876, about August, 1876, perhaps improved a little after that. You will see if you open the Blake transmitter the resemblance between them.

This has the mouthpiece like the Blake and the thin air space inside.

The next instrument said to have been made is called J. It does not differ from H, except that it has two sets of contact, each of which is the same as in H, mounted on the same diaphragm. This was not an improvement on H. These instruments are very nicely made; the same is true of G, O, L, M, N.

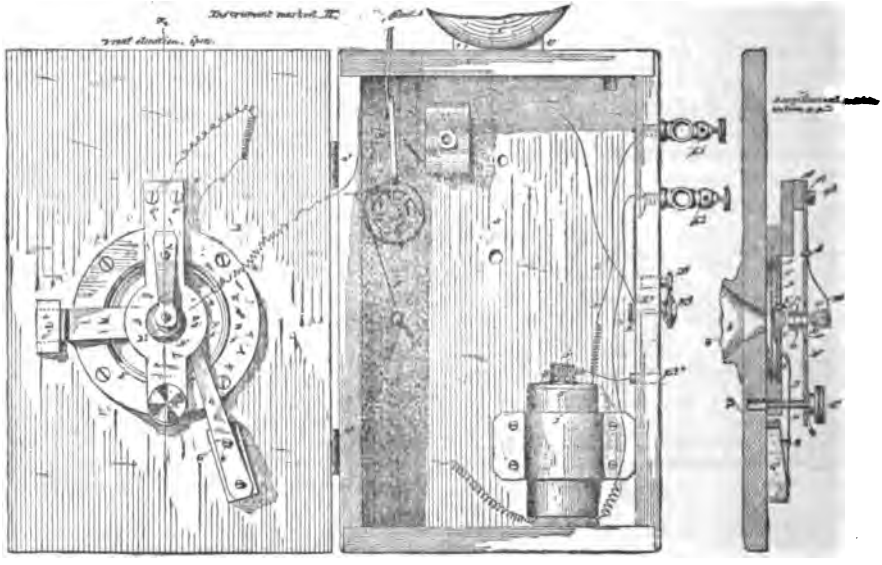
Now it seems to me that a man who had the capacity and the skill, and tools and materials to make these nice instruments, could not have gone eight years with that rude contrivance, the broken tumbler F, as one of the best he had, if he had believed that it contained so precious a thing as a speaking-telephone.

The New York tests were in March, 1882; the Philadelphia tests were three years later, in February, 1885, with a new set of instruments, made in 1884.

In the New York test all that Mr. Benjamin heard from the tumbler and tin can used together was "a sound and now and then a word."

The whole case for the defense rests upon the assumption that when a large number of men have sworn to speech through instruments at Drawbaugh's shop, the fact is proved beyond doubt,—even though the instruments are proved to be incapable of doing what is sworn to. More than half of them swore to speech through instruments which cannot talk.

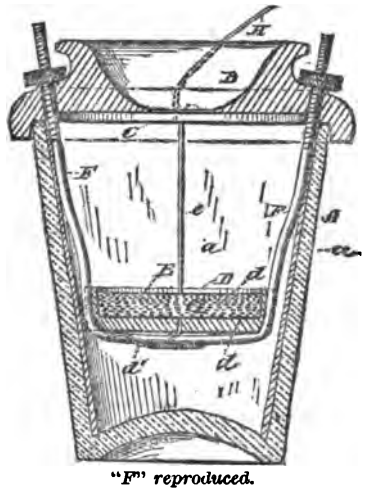
When Mr. Benjamin, after these trials, testified about them, the best he could say of "F reproduced" and "B reproduced" was: "I recognized and repeated *words* and *parts* of series of irregular numbers."



Drawbaugh's Exhibit H.

The test continued through three days, but they never after the first forenoon ventured to repeat any tests with "F reproduced" and "B reproduced."

The inside of this tumbler, in this "reproduced" instrument, consists of two rods F F running down on each side. They support this box *d* which is of wood; a metal plate laid in its bottom inside at *d*; a rivet goes up from the rods at *d'* to the metal lining-plate *d*.



"F" reproduced.

The consequence is, that an electric current, brought in by a wire attached to the upper end of this rod F, will come down the rod, up through the rivet to the metal lining *d* inside of the box, then through the carbon powder, which is placed in a mass on that metal lining, to this upper plate E. Then the current goes up that rod *e* to the diaphragm *c*, which is of metal, and then off from that diaphragm by a wire H around to the battery, and so on.

The work is done by varying the pressure upon the mass of carbon powder in the wooden box, by compressing it more or less by the vibratory movement given to the upper plate E by the diaphragm *c*, when the diaphragm is spoken to. That plate E is loose, in the wooden box of the "reproduction," so it can vibrate.

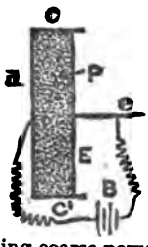
The difference between the reproductions and the originals showed that the originals could not have transmitted anything.

Why did it happen that the instrument which Drawbaugh had sworn to as a reproduction in 1882, and tried in New York, could not talk, and that the one which we tried in 1885 did talk?

In the first place, they didn't call Drawbaugh or a human being to say that this was a true reproduction. They called Professor Barker, and he said that so far as he could see the new one, the Philadelphia one, was like the New York one; but he did not know what was inside of it in certain ways, and he did not know the manner of its use. In New York it was laid down upon a table upon a block of stone.

When we went to Philadelphia to try it, the gentleman who did the talking, Mr. Hill, took this tumbler up in his hand, sat at the table, held it in his hand, moved it around, and shook it as much as was convenient or not, just as it came handy, paid no attention to keeping it still, talked into it in a steady voice, and there was no trouble in transmitting.

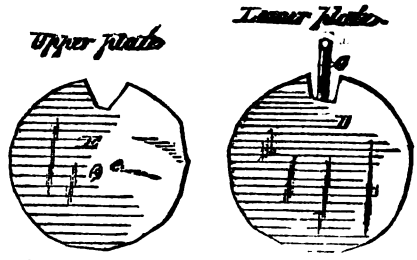
About 1881 Hunnings, in England, invented this improvement in telephone transmitters. He found that it was impossible with the instrument held in the horizontal position to get any speech; but if you hold it perpendicular, and put in granular powder like sand, and, when it gets packed, occasionally tap it with the fingers, you have got a first rate transmitter. And he patented that.



Drawbaugh never conceived of tipping that up so as to make it talk, and shaking it and using coarse powder. He says he kept it horizontal. When we got to Philadelphia, they changed the powder of the New York test into powder which was a little granular, which is of some importance, and then took the instrument and tipped it up and got in substance Hunning's conception,—his idea, inside of that tumbler, and then the thing talked.

If you took the instrument, not as Drawbaugh described it, but altered by putting the Hunning's invention inside, changing it so that it conformed to Hunning's idea, by using coarser powder and tipping it up that way and tapping it, it would make a first rate speaking-telephone. That is what the defendants did in Philadelphia.

Drawbaugh never had that notion, and swears he used his tumbler in a way which excluded that notion.



Original plates of Drawbaugh's "F," ⅛ size.

In his original that he produced he had these rude plates.

He never had a carbon-holding box around it and if he did not, he could not have tipped it up. But even if he did, it is impossible with plates having those rude jagged edges to make a tight box that will not spill out fine granular powder when it tips up edgewise.

But the instrument used in Philadelphia had that plunger piece quite tight, so that when they tipped it up edgewise it wouldn't run out.

The result, then, is that the pair "F" and "B," sworn to by more witnesses than all their other instruments put together, cannot do what the witnesses profess to recollect.

I now come to the instruments "D" and "E." There is no doubt that those are good instruments enough to destroy any telephone patent. They will talk. The only question is their date.

Drawbaugh says he does not know in what year those instruments were made and out of the four hundred witnesses they have called, they only found seven who pretend to have heard speech through that pair of instruments

before the Bell patent. More than half of their witnesses swear to the tumbler and tin can.

The appearance of the tumbler and tin can at Drawbaugh's shop at any time as exhibition instruments is perfect proof that the alleged better instruments did not then exist.

If after the Bell patent he was using the tumbler and tin can habitually in his shop as the best he then had, it is perfectly certain that he did not have those pretty little magneto instruments "D" and "E," did not have those two refined vase-shaped microphones G and O, did not have the Blake transmitter "H."

Defendants' answer says: "That Drawbaugh for more than ten years prior to the year 1880 was miserably poor, in debt, with a large and helpless family dependent upon his daily labor for support, and was from such cause alone utterly unable to patent his said invention, or caveat it, or manufacture and introduce it upon the market."

All those allegations of the answer, important as they are, were displaced by his own testimony.

It is not a case where there was poverty which prevented him from reducing his invention to practice.

(Counsel here stated Drawbaugh's history and testimony as to his inventions.)

It was part of the story of Drawbaugh that it was impossible for him to draw a specification for a caveat.

Afterwards we found this card, one edition of one hundred and fifty of which was printed in 1874, and another edition of one hundred and fifty more was printed between 1874 and the fall of 1876; in which he holds himself out as a patent solicitor and model maker.

If he held himself out to the community as a solicitor of patents, he can hardly stand up and say that he was grossly incompetent to draw a caveat for his own invention.

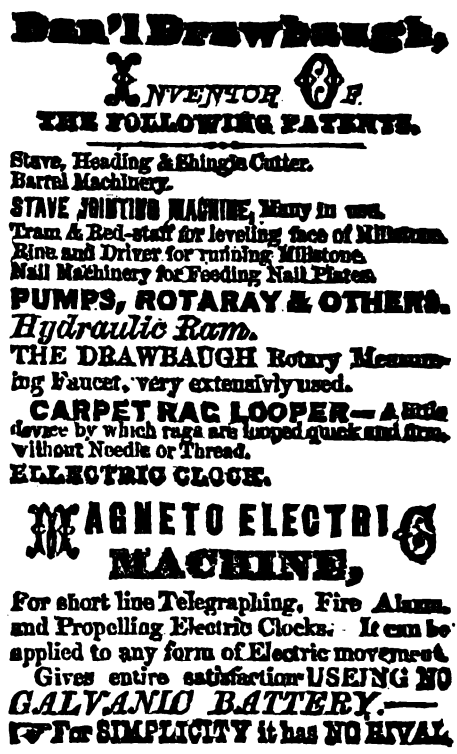
They took the depositions of two hundred and fifty witnesses after that; but they never put Drawbaugh on the stand to explain how he could have left the telephone out of that list, if he had had it.

In 1878, nearly two years after the Bell patent, Drawbaugh began to be talked of as a man who was *then* making telephones.

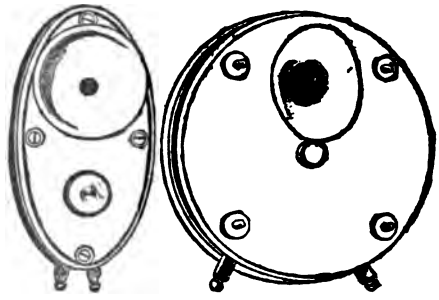
In 1878, the newspapers mentioned him as a man who was making *improvements* in telephones.

There were four, five or six articles in 1878 which spoke of him as an *improver* of the telephone.

He went to the telephone office in Harrisburg, in the spring of 1878 and carried instrument A with the mouthpiece off one side, said, "Let me look at your telephone."


Dan'l Drawbaugh,
INVENTOR OF
THE FOLLOWING PATENTS.
Stave, Heading & Shingle Cutter.
Barrel Machinery.
STAVE JOINTING MACHINE, Many in use.
Tram & Bed-staff for leveling face of Millstone.
Rine and Driver for running Millstone.
Nail Machinery for Feeding Nail Plates.
PUMPS, ROTARAY & OTHERS.
Hydraulic Ram.
THE DRAWBAUGH Rotary Measuring Faucet, very extensivly used.
CARPET RAG LOOPER—A little device by which rags are looped quick and firm, without Needle or Thread.
ELECTRIC CLOCK.
MAGNETO ELECTRIC MACHINE,
For short line Telegraphing, Fire Alarm, and Propelling Electric Clocks. It can be applied to any form of Electric movement.
Gives entire satisfaction USEING NO GALVANIC BATTERY.—
☞For SIMPLICITY it has NO RIVAL.

They showed him the "Phelps snuff-box" form.



He placed his "A" alongside of it. "Is this patented?" said he. "Yes." "Then mine is most too like it:" instead of his saying that the thing they had had for only six months, he had had in use four or five years.

At that time, he had exhibited his nail machine, his faucet, and his pump; he was then mentioned in the newspapers as an exhibitor. If he had wanted to make a sensation at that State Fair, why did he not take over the speaking-telephone?

If he had got it into the papers it would have been known; and there would have been no mortal use for Bell being born, after that had been done. The speaking-telephone would have been given to the world, if he had done that, ten years before Bell's patent.

The State Fairs where he exhibited his other

things, but no telephone, were in 1868 and 1869. These improved instruments he alleges he had in the summer of 1876, and some of his witnesses testified that those improvements were in his shop; that in the summer or fall of 1876, they saw all of them.

The dates which they allege in their brief are that these L, M, G, O, were made in the beginning of 1876, just before the Bell patent; and this, the Blake transmitter H, in the summer of 1876.

The *Baltimore American*, of November, 1878, is the only paper in existence which refers to Drawbaugh as having thought of the subject of speech, or of a telephone, or of the transmission of sounds by electricity before the Bell patent.

But his poverty, says the article, prevented his bringing even the experiments that he made to a successful result. That states him as a man who experimented, not for speech, but for sounds, through what is known as a phonetic telegraph.

The value of the testimony of a large number of our witnesses does not rest upon either mere recollection or veracity. Their whole course of conduct, as well as Drawbaugh's course of conduct, is consistent with our belief that his story is untrue, and inconsistent with the story itself.

Mr. **Edward N. Dickerson,** for the American Bell Telephone Company:

The defenses in the Dolbear Case are: That Bell has invented the only way in which it is possible to transmit speech; that Dolbear does not infringe, because he is using one of the old, well-known kinds of receivers for sound, which Bell never used, and which is not an equivalent of the receiver of the Bell patent; and that Reis was the first inventor.

The defenses in the Molecular Case are: That Bourseul and Reis described the invention of Bell in circumstantial detail, so that any one can read it out of their descriptions; and it needs, therefore, no invention to do it after those full explanations have been given to the world; that the interpretation of Bell's patent ought to be such as to secure Bell in the exclusive enjoyment of that tin and bladder contrivance on the table, known as figure 7 of the patent; but that he ought to be confined strictly to that; that such an interpretation secures what Bell invented, and enough of what he discovered to enable him to work his invention, while not excluding other inventors from access to the universal storehouse; and that the reason why Reis' invention did not get into public use at all was, that Reis freely *gave* it to the world; and that Bell never thought he invented a telephone; that figure 7 is not a telephone, never was meant by him to be one; that it is in fact a "*multiple telegraph*," and never was meant to be anything else.

The Overland-Drawbaugh-combination defense.

It is inconsistent with the theory of Drawbaugh to admit that Reis was the inventor of the telephone; because, if he were, the patents that Drawbaugh and Company are going to have by Act of Congress, when this court decides that he was the American "Faraday" who did it, would be of no value; for the Reis publications would have destroyed them. And therefore it is necessary for them to say that Reis did not invent the speaking-telephone; that he never had that invention, but only had a musical telephone. But they say that Drawbaugh did invent it.

They also assure us that Gray invented it; but he invented it after Drawbaugh did, and before Bell.

The combination also sets up that Bell did not invent at all; but being a man, as they say, of "transcendent abilities," he devoted his talents with great success to a miscellaneous variety of felonies, in consequence of which he came out with a first rate, highly scientific description of a telephone in his pocket, and upon that he succeeded in imposing upon the world.

In the Clay Case, the defenses are: the Varley patent and that it was a speaking-telephone; and that there is no such company as the Bell Telephone Company. There is another part of that defense,—that is the testimony *in pais*. We had supposed that the publications abroad were all that in law could constitute a defense; but in Germany were found seven persons who were willing to say that the telephone of Reis was a talking telephone in 1860–61.

So they took out a commission in the Overland Case (and it is before you, and made a part of the evidence here), subject, of course, to objection, and sent that abroad; and they managed to get the depositions of five or six of these German persons who knew that Reis was the inventor of the telephone. That was all ruled out by His Honor *Judge* Wallace as incompetent, as we think it obviously is; and that ruling is before Your Honors to pass upon here on appeal.

That is the testimony which is to supplement the publications.

The Gray defense has grown into immense proportions. It is the last vain hope of the infringers.

The Western Union, in the Dowd Case, set up that Bell had "surreptitiously obtained a patent" for that of which Gray was "the first inventor, who was using due diligence" in the Patent Office to procure a patent; and the whole story of this caveat was set out in the answer in the Dowd Case in 1877. Gray was a party to that Dowd litigation. Dowd was a name only,—the real party was the American Speaking Telephone Company, and Dowd was their agent. That company was to be composed of three parts: Gray and his partner, S. S. White, of Philadelphia, were one part. One third of that company was designed for Dolbear, the other first inventor, but they kicked him out.

After the eviction of Dolbear, the Gold and Stock Company, a subordinate of the Western Union Company, owned two thirds of that stock, and do so to this day; and Gray and his partner owned one third. After the Bell patent was established by the judgment against Dowd, that company got one fifth of the profits of the Bell Company for the patents and property surrendered by the Western Union Company, and its stock became valuable and Gray sold four or five hundred thousand dollars worth of that to the community, and got his money; all founded upon the fact that Bell was the first inventor, without which it was worth-

less, and which fact he is now trying to destroy.

Gray went on the stand and told his story, fighting for that one third of the business of telephony in the United States; and his story was that the first conception he had of a telephone distinct enough to mention to any one, or to put upon paper, was on the 11th day of February, 1876, which was twenty-two days after the Bell specification had been sworn to, and was waiting in the hands of Mr. Pollok to be filed. He said that he then made a sketch of his idea, and gave it into the hands of his very able and respectable counsel in this town, Mr. Baldwin, to file as a caveat; which Mr. Baldwin did, on the 14th day of February, 1876, on the afternoon of that day, the Bell application having been filed in the morning of that day.

After hearing Bell's telephone talk, Gray concluded that he would try his conception which he had got on paper; and so he made one, but he could not get anything through it. That is the only time that that experiment was ever tried, from that hour to this.

Gray tried that transmitter himself at Philadelphia and it would not talk; and he has also testified that Bell was the first inventor of the magneto telephone like figure 7.

The magneto telephone, of which Gray knew Bell was the sole inventor, figures as Gray's fig. 5 of his application.

The usual term for the Bell invention was "a speaking telegraph" in those early days, and so it was called by Gray and others generally. It was not called a "telephone" until some time after the patent.

(Counsel here presented the correspondence between Gray and Bell, in 1877, after the issuing of the Bell patent and read a letter from Gray, recognizing Bell as the inventor of the speaking telegraph.)

Gray's application for a patent is for the broad art of telephony and contains three plates. The first plate is for the details of his caveat drawing; the second is for his caveated machine in operation; and the third is for the Bell magneto telephone.

It differs from this figure 7 of the Bell patent only in the circumstances that the converging cones are similar at both ends, and of slightly different shape; whereas in Bell's patent one is a tapering cone and the other flaring.

(Counsel here reviewed the evidence as to the alleged fraud on Gray, in copying from his caveat the principal alleged discovery in Bell's patent, and replied to the charge that a part of Bell's specifications were taken from such caveat.)

When Bell conceived this idea of using true "undulatory" currents, that were to be made in unison with the sonorous vibrations of the inciting cause, that was a complete new revelation. It came like a flash to him. That application of the undulating method forms the greater part of his patent.

Go back with me now to the history of this litigation. Beginning with the Dowd Case, it was pleaded that Gray was the inventor; that Bell had "surreptitiously" obtained his patent for that which Gray had invented, the caveat for which was on file; that the Commissioner of Patents had unlawfully decided the question of dates,—it is in the amended answer in the Dowd Case, and it all broke down upon the testimony itself; for whatever might be true, Gray admitted that the first he ever did was, on February 11, 1876, to make a sketch. That ended the question, because Bell had sworn to his application on the 20th of January before; had conceived, invented it, written his application for it on October of the year before; and therefore it was entirely unimportant what Mr. Gray did or did not do after that time.

But by degrees this monstrous calumny began to grow. At first it was confined to that legal plea, and the evidence accompanying it; but it began to grow in dimensions until, like a tornado, it was sweeping through the air and carrying everything before it, and it is claimed that Bell had committed a monstrous fraud on the office; he had bribed the Examiner; he had stolen the Gray caveat; and that grew into immense proportions. Whoever has read the newspapers in the last two or three years can hardly see one where that story is not told, and it came ultimately to assume that form in the courts. It has been set up in lawsuits, and published upon the wings of the wind to the uttermost parts of the earth. It came to trial in the New Orleans Case and the whole gang were witnesses, and in that case the court decided "The fact that Bell's invention certainly dates from January 20, 1876, and that it covers a speaking-telephone, transmitting articulate speech by means of an undulatory, oscillatory, or vibratory current of electricity, renders it unnecessary to pass upon the evidence relating to the tergiversations and claims of Gray; the alleged frauds of Bell in advancing his application for a patent; the illegal conduct and conflicting statements of Examiner Wilber; and many alleged vices and irregularities, the evidence of which forms the bulk of the record, and apparently the main defense in the case.

"At the same time, it is proper to say that in all the evidence we have found nothing that shows that Bell has done or caused to be done anything inconsistent with his right to be called an honest man, with clean hands."

The hypothesis in that case was that Mr. Bell had got the Gray caveat in his patent by these formal amendments, made regularly after the 27th of February. But there stood his application, with all of what they say is the Gray caveat in it, sworn to on the 20th of January, and filed on February 14, and declared by the Examiner on February 19 to contain the substance of the caveat, before he ever amended his application in respect to these immaterial things.

He is entitled to his patent if he is the first inventor; and if he has committed any of these crimes he must be punished for them by law; but you cannot confiscate his patent for that reason; there is no such punishment for crime in the statute.

The whole of the Gray caveat was in Bell's specification of the date of January 20, three weeks before the Gray caveat existed.

According to the latest and wonderful theory, Bell proceeded to mutilate his own record by interlining into it words in pencil, which were not there in the fair-written ink application.

If that application had had in it these interlineations, they would have appeared in the

patent; just as those amendments that were lawfully put in do appear in the patent. Mr. Edmunds, counsel also for the Drawbaugh and Overland Companies, and Mr. Hill's leader, said that if there was a fraud "It was without the co-operation of Mr. Bell."

In his interference proceeding with Gray, in his preliminary statement on this record, Bell told the story exactly as it was—that he made his first liquid transmitter in Boston on March 10, 1876, three days after his patent; when all the while, according to this ingenious hypothesis, he was defrauding Gray.

Gray subsequently wrote him that letter which I have read, containing these words, "I gave you the credit for the talking feature of the telephone."

(The evidence as to the George-Brown Specifications was here reviewed by the counsel.)

After Mr. Brown had got his specification, there occurred to Bell several devices that are now described in his patent; the liquid transmitter, vibrating the plates of the battery, and those other different things now in the patent.

These amendments made to the American copy in Bell's hands did not get into Brown's papers in Canada, of course, and when Brown came to New York they were not inserted.

During all these years of litigation it never has been suggested by or to a human being, until it was done at this bar, that the Brown transaction had anything to do with the good faith of Professor Bell.

Bell supposed, and it is perfectly true in law, that if those amendments to the American specification were not there, the patent would be just exactly as strong in law as it is with them in; because that figure 7, in connection with the specification, discloses the whole method,—a truth which everybody swears to,—and all variable resistance devices are mere detailed plans, alternative and equivalent forms. Mr. Dolbear and other witnesses all swear they are plain equivalents. Therefore, it was of no consequence in a strict legal sense whether they were mentioned or not in the specification.

George Brown came home and Bell got those papers, brought them to the Patent Office, and laid them there before Mr. Gray, with whom he was in interference.

Every certified copy of Bell's specifications known to exist is just like the present paper. That is physical proof that these passages were all there February 14, 1876, when the paper was filed. We produce record proof which is conclusive.

I now come to the McDonough Case, which has not been touched orally on our side nor on the other, but is set out fully in both briefs. McDonough invented what we call the tambourine telephone. It is the same in substance as Reis'.

McDonough was a wholesale manufacturer of furniture in Chicago. Having a little taste for science, and having got hold of the Reis publications, he thought he would make one of those things himself; and he modified it in respect to the form of a triangular hopping piece, and he modified the receiver by using a diaphragm on it like Bell's. Having done that he applied to the Patent Office for a patent on this thing, after the Bell patent was out, and called it a "teleloge," or far talker. The Patent Office rejected him and said: "You can't have a patent for that, because it is anticipated by Reis, and it is not a talking telephone anyway."

It was April 10, 1876, when he made application; and the Patent Office rejected him because he was anticipated by Reis, *quoad* the whole machine, and by Bell *quoad* the receiver.

After he was rejected he attempted to amend his specification by writing Bell's invention into it, and Reis out of it, but was prevented by the Office.

He did not have a talking telephone.

McDonough then formed the usual telephone company, with several millions of stock; not to use his apparatus, of course,—that was a Reis machine—but to use the ordinary telephone; and he was then sued in the courts and enjoined.

Then there is the Varley patent, which is claimed to have anticipated Bell. I will ask attention for a minute to another way of putting into your minds the conception of a current of electricity.

An undulatory current is represented by a curve like a wave of the ocean.

What is meant by the words "current flowing" is, that the entire conductor or line-wire is charged with electricity from end to end.

In an "undulatory current" there is no interruption at all, and the line is *always* charged with electricity; but the *degree* of charge varies from instant to instant, and that variation is represented by the rise and fall of the curved line above a certain base.

There is no such thing in electricity as a *flowing current*, or an onward movement of matter.

There is an *impulse* transferred from molecule to molecule all the way through, like a jelly that is shaken, but nothing travels from end to end.

The transmission of electricity is much like the transmission of light through the ethereal medium.

Then again, there is no such thing, excepting conventionally, as a "*to-and-fro current of electricity.*" We use those terms for convenience; but we know what they mean, and that they do not mean an actual flow of an actual current either way.

(Counsel here replies to attacks on *Judge* Wallace's decision in Drawbaugh Case.)

The principles of law which govern the Drawbaugh matter are, that in any case where a patent is assailed, particularly by a stale claim made four years after the patent has been bruited all over the world, the assault must be maintained beyond any doubt, and that if there be any doubt, created that doubt at once destroys the defense. Or, as the courts put it, "To create a doubt is to resolve it in favor of the patent."

Whatever doubts there may be in this confusion of testimony we are not to be called upon to clear up and resolve.

Doubtful defenses enough can be raised; but they cannot overcome the *prima facies* of the patent granted upon examination.

We have shown you that in respect to the time, many of these witnesses are grossly mistaken.

I propose now to show you that Drawbaugh

was a charlatan and a dishonest impostor, and that he was surrounded by a gang who used him for the most dishonest purposes.

(Counsel here reviewed the evidence as to the Drawbaugh inventions and claims, and, after a long examination of the facts of the case, spoke of the treatment of Mr. Bell.)

Mr. **Causten Browne,** for Dolbear *et al:*

The Dolbear Company's defense to the Bell Company's suit is different in kind from the defense of any other appellant here. It is this: That the Dolbear method and apparatus do not infringe; that they are based upon a discovery of Mr. Dolbear as original and as fundamental as that of Bell; that he as well as Bell started from first principles to deal with the problem of electrically transmitting speech; that Bell proceeded by one road, while Dolbear proceeded by a road discovered by himself; and that, except in reaching the result of electrically transmitting speech, there is no resemblance between the two methods or the apparatus employed by the two inventors, so far as regards any patent protection enjoyed by Bell.

All the defenses of other appellants may fail and yet the defense of the Dolbear Company remain untouched.

No construction of Bell's patent will cover the Dolbear method as an infringement, except a broad construction *for the use of electricity for the purpose of transmitting articulate speech.*

A theory of invention dangerously broad was asserted by the counsel for the Bell Company. The fifth claim of the patent is limited by the expressions: "as herein described" and "substantially as set forth."

I suppose that one of these refers to the description of "electrical undulations," and that the other refers to the description of the way in which those undulations are produced and used.

Causing the sonorous motions of the air to bring about corresponding electrical changes, which electrical changes bring about sonorous motions of the air, like the first,—is the patented invention, as the appellees contend.

Mr. Justice Gray says, delivering the opinion of the court in Spencer's Case, that Bell discovered a new art, that of transmitting speech by electricity, and that his patent is not limited to a particular form of apparatus but includes the process or method.

This, while denying Bell a patent *in terms* for the use of electricity to transmit speech, gives it to him *in substance.*

Dolbear as a witness is attacked upon two grounds. The first is that he said in his testimony about the working of the Reis instrument something which contradicted what he had said in his published book. Now, that is a mistake.

In these two cases the fact is that Dolbear, the witness, was speaking about two different instruments, and the alleged contradiction in the testimony of Dolbear disappears when you come to see what he is talking about.

Then again he wrote a letter to Bell in 1877 which may be fairly construed as an offer to keep back from the public a book which he was about to publish upon the telephone, if Bell would recognize his claim to the invention of the use of the permanent magnet. This claim of invention Dolbear believed to be just. Nevertheless I agree that that letter ought not to have been written.

Dolbear was unfortunate in having counsel at that time who did not see, any more than he did, the impropriety of writing it, for the letter states that he had written it with the approval of his counsel.

Two years afterwards the road to the new use of electricity, which constitutes Dolbear's invention, was opened to him, and then the invention was made which he and his assignees now claim at your hands the right to practise.

I claim full consideration for the evidence of Dolbear upon the point I stated a little while ago—that the correspondence of electrical changes with the sonorous air changes made in speech is that in which the *electrical transmission of speech consists.*

It was a physical truth, known among scientific men and practically applied, that the electrical transmission of *sound in general* consisted in the production, in the line conductor, of electrical changes corresponding to whatever sonorous changes were made in the air by making the sounds, and the utilization of those electrical changes to produce sonorous changes in the air like the first.

Reis certainly transmitted *some* of the sonorous air vibrations made by speech, by having them produce corresponding electrical changes in the line conductor, which electrical changes produced sonorous air vibrations like the first.

The air is moved in speaking by way of vibration, the air particles moving to and fro in straight lines only. Every movement of air particles to and fro is a vibration, relatively long or short. In speech, every air particle moves or vibrates in obedience to a combination of impulses. It is the mixture of fundamental vibrations and overtone vibrations which gives what we call quality. Every vibration has some pitch, and some amplitude.

Condensation and rarefaction mean variations of pressure produced by movement of air particles to and fro. It can mean nothing else.

There is a scientific article published in 1863 in which Reis's work up to that time was discussed, showing that the problem was there stated, namely: *Let all the sonorous air vibrations of speech be electrically represented; let them all be translated into electricity, let there be electrical changes corresponding to the sonorous air vibrations, and let them reproduce sonorous air vibrations like the first; if you can do that, you will transmit speech.*

The construction which was given to the Bell patent in the court below, and which is pressed against us here, is that doing that anyhow is patented by Bell.

I read from a scientific writer of 1868, in a commentary on Reis, to show that the problem, the statement of which is called Bell's patented invention, to-day, was as well recognized then as it is now. Says the writer: *"If we succeed in transmitting with the galvanic current the oscillations of a sounding body to a distance, so that there another body is put in equally rapid and, in respect to each other, equally strong oscillations, the problem of 'telephony' is solved."*

The writer continues: "*For then exactly the same phenomena of waves are called forth on the distant points as the ear receives at the place of origin; therefore they also must make the same impression.*"

The writer tells you if you can find a way *to transmit upon the galvanic current* these changes, absolutely and proportionally, then you can transmit speech.

Bell solved that problem and that was *all* he did.

The decision of this court in *Tilghman* v. *Proctor*, seems to me to be quite conclusive of this case. The opinion says, upon page 729 of the report in 102 U. S. (26: 288), that *the claim of the patent is not for a mere principle.* The chemical principle or scientific fact upon which it is founded was not discovered by Tilghman. He only claims to have invented a particular mode of bringing about the desired chemical union. *This is a process.*

In the present case also, there is a principle or scientific fact involved. If you would transmit speech, you must have the electrical condition of the wire vary with the varying conditions of the air brought about by speech, and produce again like varying conditions of the air. This is the alternative statement of transmitting speech by electricity.

What was the method invented by Bell for solving the problem? When he took his patent, there was but one agent that had ever been used for variably attracting any object so as to make it vibrate and beat the air and give out audible sound. That agent was *magnetism.* There was but one practical use to which electricity had ever been put for the purpose of so causing a body to vibrate and give out audible sounds; and that was as *a flowing current making an iron core an electro-magnet*, the variations of current strength causing like magnetic variations. Bell found a way to get electrical changes, corresponding in form to the sound-waves, in the current traversing the coils of an electro-magnet, and so to produce corresponding variations in the magnet, and corresponding vibrations of a receiver armature.

Electrical charge or tension may be brought about by rubbing an object, sealing wax for instance. That is the property which has been *reduced to the service of mankind for the first time by Dolbear.*

The power of a body charged with electricity to attract anything, though known for two thousand years to exist, had never been put to any practical use in the arts when Dolbear made his invention; certainly it had never been supposed that variations of electrical attraction could cause corresponding vibrations of an armature.

Dolbear's receiving apparatus is properly enough called a condenser, because in structure it generally resembles the old condensers. That is to say, it has two plates electrically insulated and charged. But the operation is radically different from that of the old condensers. No operation of vibrating either plate by variations of electrical charge was contemplated or performed in the case of any of the old condensers.

In all these old condensers the elements were placed close together, with a non-conductor (I do not mean air, but a solid non-conductor) interposed and closely fitted between them, so that the electricity might be condensed, which non-conductor prevented any practical vibration of either of the elements.

In the Dolbear receiver, on the contrary, one of the plates is held firmly so that it cannot vibrate, and the other is held so as to be free to vibrate according to the variations of electrical charge, and beat the air and give an audible sound; the two plates being separated by a body of air, so that no current can pass. Here was a change in construction, designed to produce a new operation, for a new purpose, without which change that operation could not be performed nor that purpose answered.

It will not be denied that if Reis had known that to get variations of magnetism at his receiver exactly corresponding to the sonorous air motions of the speech uttered against the transmitting membrane diaphragm, he must keep the circuit closed, and had so adjusted his means of making contact between his electrodes that the vibrations of the membrane would not break the circuit, but only vary the current strength, and had so used the instrument, he would have had Bell's method, and substantially his apparatus. That is just such a change as Dolbear made in the construction and use of the old condensers. He altered their structural arrangement a little and thereby altered their operation enormously.

To hold one element of a condenser still, so that it shall not vibrate, and suspend the other so that it shall vibrate, and then make use of its vibration according to variations of electric charge, was wholly and absolutely new. No such instrument existed. No such use of any instrument had ever been proposed or supposed to be possible. It cannot be said with any show of reason that any equivalent for it was found in any of the old condensers.

For the purpose of transmitting and reproducing any sound by variations of electrical attraction, causing vibrations of any armature, nothing in the construction or use of the old condensers furnished a known substitute for the magneto receiver.

Dolbear's discovery of the capacity of variations of electrical attraction to make an armature vibrate accordingly, was accidental.

He is not now setting up any anticipation of Bell; only claiming the right to freely use a distinct method and apparatus of his own, based upon a distinct discovery of his own.

When he showed it to scientific men, without exception they expressed their astonishment at hearing that variations of the electric potential of a terminal plate could practically produce any sound vibrations of an opposed diaphragm comparable to those produced by the varying attractions of an electro-magnet.

It is, I submit then, the truth that Dolbear, like Bell, has made an application of the laws of nature which no one had ever made before, which no one had thought of before, by an instrument which did not exist before, the *result only* being the same—that is to say, the electrical transmission of speech; or, in other words, making speech bring about corresponding electrical changes on the line conductor which in turn bring about corresponding audible vibrations at the receiving station.

But the appellees say that there are flowing

currents in Dolbear's method. In a sense this is true; but not in the sense of the Bell invention or of the Bell patent. The current in which the electrical changes corresponding to the sonorous air changes are produced is the current *on the line conductor* extending from the generator through the transmitter, through the receiver and back to the generator.

These currents are, in Bell, the well-known circuit currents converted into magnetism by traversing the coils of an electro-magnet at the receiving station. In Dolbear they are merely the currents which move to or from the receiving plate which is thereby variably charged from instant to instant, so that it may exert its variable electrical attraction, *there being no magnetism at all.* The currents in the two are thus seen to be *essentially different in character, purpose and result.*

The currents of Bell do their described work of transmitting the speech to the receiving station and there delivering it, by virtue of flowing, and only while they are flowing through the coils of the receiving electro-magnet, whose corresponding magnetic variations vibrate the receiving diaphragm. All that vibrates the receiving diaphragm in Dolbear is the variations of charge of electricity in his attracting plate.

Neither Bell nor Dolbear could patent the correspondence of the electrical changes with the sonorous air changes, because that was the known law of electrically transmitting sound.

Reis tried to transmit speech by variations of current strength in an interrupted circuit. Bell tried, and succeeded, in transmitting speech by variations of current strength in a constantly closed circuit. Dolbear transmits speech by variations of electrical attraction, using no circuit, and no flowing current for that purpose at all.

He who transmits speech by Dolbear's receiver, operating by variations of electrical attraction, uses Dolbear's method and apparatus, *whatever else he does as a separate matter.* And he who only transmits speech through Bell's receiver, using *magnetic variations* to produce the vibrations of the receiving armature, does not use Dolbear's method, but uses Bell's.

But if anything in the description of the method of and apparatus for transmitting speech is *characteristic of* and *essential to* Bell's invention, it is this: that the current from transmitting station to receiving station, on which the required electrical changes are to be impressed, is a current traversing the coils of an electro-magnet, and that the operative power for vibrating the receiving diaphragm is the varying magnetism so produced in that electro-magnet.

No such current is employed by Dolbear for transmitting speech. No magnetism is used by him for reconverting the electrical changes into sonorous air changes. His method is new, because based upon a mode of using electricity not at the time of Bell's patent known to be practicable, and is substantially and fundamentally different from Bell's. His apparatus is new, and it is essentially different from Bell's, for the same reason.

The only resemblance between Bell and Dolbear is that each produces, somehow, electrical changes in the line conductor corresponding with the sonorous air changes made by speaking, and reconverts those electrical changes, somehow, into sonorous air changes at the receiving station. But this cannot be validly patented by Bell (even if his specification would bear such a construction) because it is, under another form of words, patenting the use of electricity for transmitting speech; and this, it is agreed, cannot be done.

Mr. **Wheeler H. Peckham,** for the Molecular Telephone Company:

Reis conceived the idea that quality might be or must be transmitted in order to produce speech. He knew and expressed what quality was.

The first electrical machines of which we know were magneto machines. Among the earliest were the Gausse & Weber machines, as they are called,—the earliest telegraphic instrument. It was a magneto machine, and it was followed by a number of others.

Varley first gave to his currents, so called, the word undulatory.

Wheatstone's device, a printing apparatus, operated upon the same principle—the magneto principle.

There is another method of effecting electrical work, by using a battery current and then putting a device in the wire through which that current runs, and making or breaking, or changing the current. Those two methods of effecting electrical work were well known at the time Reis made his inventions.

When Reis came to make his invention he adopted the constant current, the voltaic current, and his method was by interrupting to operate upon that current by means of a diaphragm actuated by sound-waves.

Bell, at a very much later period, speaks of an intermittent current as one which was pulsatory.

The "*Industrial Gazette*" says: "Successful experiments in telephony were made in 1861 by Reis," so that it seems not impossible to carry on conversations at miles distance, and even convey the voice itself, with its peculiar undulations.

Reis used the voltaic current and subjected it to interruptions or variations by means of the vibration of a diaphragm, caused by the action of sound therein and transmitted to a receiver, including the sounds of the human voice, and produced musical notes; and all the Reis articles speak of the production of speech.

Beyond that we have the testimony of a series of witnesses who say that at the time when Reis himself was operating, and when others operated it, that it did produce speech.

It does it far better than Bell's device (Fig. 7) ever did until after several years had elapsed, and the world had learned by constant practice how to produce instruments that would transmit speech, because the best that was ever said of Bell's instruments until the year 1879 was that they produced a faint muttering, and nothing else.

We emphatically claim that the evidence does show that the Reis telephone did produce speech, and that it was intended to produce speech, and that whatever be the theory or whatever be the explanation by which and through which speech is produced, that theory and that explanation were adopted and existed in the Reis telephone.

It was done to a far greater and better extent than Bell did it, prior to 1878 or 1879, by the instruments described by figure 7 of the first patent.

The moment you put an improvement in mechanical construction in the shape of a receiver, like the Bell receiver, this Reis transmitter will talk.

If you put the microphone with the carbon points in place of the old Reis transmitter and attach it to that Reis-Legat receiver, that will talk.

A simple improvement in the mechanical construction of the instrument, and this Reis telephone springs up into an active, strong, vigorous, practical instrument, and commercially has taken the place that otherwise would have been occupied by Bell's invention at the present day.

If Reis gave the wrong explanation, that does not affect the fact that he has produced an instrument and device operated by sound-waves made by the voice, which will convey what a person speaks into the instrument,—precisely the same thing in the way of transmitting the vibrations to the ear that is in the receiving instrument of Bell.

There is a fallacy in a statement of Bell as to the operation of his instrument. Bell says that he undulates this voltaic current, but he did not.

Reis took a voltaic circuit; he had a method of working that circuit by means of air-waves —sound-waves. That is the great invention. That is the initial step; that by means of the voice you can speak to a diaphragm, and have that diaphragm affect a voltaic circuit or affect a current of electricity, so that it will produce similar variations at the other end and be heard. Reis did that.

Varley came afterwards, and he adopted the magneto method again and he transferred sound.

He did it in three ways: First, by making and breaking a primary circuit; second, by vibrating his transmitter by the air; third, by revolving a wheel, upon the periphery of which were bar magnets, before the poles of an electro-magnet.

All those things were before Bell came. Now, what did Bell do? Bell, adopting the magneto method of effecting electrical results, *took the apparatus of Reis and adapted it to that magneto method. He did not do anything else.*

By the term "method" in the 5th claim of his patent, Bell meant *the magneto method and nothing else.*

Bell's letter of August 14, 1875, gave simply the idea of telephonic or telegraphic action—telegraphic work—*by means of the magneto current.* (Mol. Rec. p. 1618.)

He did nothing after his letter prior to the taking out of his patent, in the way of experiments, other than one or two or three experiments made in the early part of July, and which resulted in merely obtaining a sort of muttering effect. The draft specifications and claims of Bell, and his George-Brown specification or copy application, speak of a production of or causing electrical undulations which, by the terms of the specification, is necessarily confined to the magneto method, because the specification says that there is no other method.

And then when we have by some means, whatever they may be, whether fair or unfair, fraudulent or honest, new thoughts from Gray or from himself, or whatever may be the reason, the idea suggested to him and put into his patent that electrical undulations can be caused by the variations of the resistance of the circuit, we find a claim put in to correspond to that; but we do not find any change or any variation whatever of the fifth claim.

There is not in that patent to be found anywhere from the beginning to the end any suggestion that there is any other method of causing electrical undulations by sound-waves than the one which is pointed out and illustrated by figure 7. All prior methods of producing electrical undulations have reference to and are involved in the production of telegraphy. Some of them are ways that it is absolutely impossible to use in connection with the production of sound-waves; as, for instance, the vibration of a wheel with magnets on the periphery before the poles of the magnet.

We claim that Bell's patent should be construed as a patent for a multiple telegraph alone; that if not for that it should be construed as a patent for the magneto method, as contradistinguished from the voltaic method, or the resistance method; and that if construed more broadly than that, it is void as being a patent for a principle or an art; and further, we claim that the two instruments, giving the patent what construction you will, those used by the defendant and those used by the complainant, or those described in the patent sued upon, are so completely different, so varied in their principle and mode of action, that the one cannot be held to be an infringement upon the other.

Closing argument of *Mr.* **Lysander Hill,** for the People's Telephone Company and the Overland Telephone Company:

When an application is filed in the Patent Office, the practice is to allow that application to be amended, formally or informally upon the specification remaining in the Patent Office.

Then there is another class of amendments made by filing formal papers in the shape of a letter or document addressed to the Commissioner, formally amending the application. When that is received, the examiner places it on file, goes to the specification, and marks, around the passage that is amended, red lines, striking it out and noting on it that the amendment marked A, B or C, or whatever it is, is substituted for that passage.

But when the patent finally issues, that document, with its amendments, is sent to the government printer, and the government printer prints it as finally corrected, and the original is sent from the government printing office back to the Patent Office, and remains on file there, and is a part of what is called the "File wrapper and contents." It is a part of the contents of the file wrapper.

When any party applies to the Commissioner of Patents and asks for a certified copy of that file wrapper and contents, he gets a certified copy, among other things, of the document which was originally filed, with all the marks which were on it, whatever they may be, and however they may have been placed upon it.

The Commissioner is careful to make an exact facsimile copy; hence, in this case you can gather nothing from the printed patent of March 7, 1876, as to the prior history of the application in the Patent Office.

But if you take the certified copy of April 10, 1879, as printed in the Dowd record, that being a certified copy, you get not only the original document which was filed in the Patent Office, but you find noted on that copy the various changes which were made in it while it was there and before the patent issued.

The document of April 10, 1879, shows you how it had been corrected before the issue of the patent.

The damaging facts with regard to the George-Brown paper have not been explained. My learned friends say that there is no evidence as to when Brown got that copy from Bell; but yet it is proved that Brown got that copy from Bell on January 25 or 26, 1876, in New York.

What explanation had they to make of the fact that those two papers were together there, that they were both papers relating to the same subject matter, but that there were declarations of the most important character in one which do not appear in the other, declarations in one which are entirely inconsistent with those in the other?

My learned friend, Mr. Dickerson, says Bell understood perfectly that those two currents were equivalents and did not think it necessary to put it into the George-Brown specification; but Bell did not regard them as equivalents, for he had put into that George-Brown copy an explicit statement which excluded the variable resistance current from the invention.

When Brown left New York he must have known that there was not only the current that was shown in his papers, but that there was another current, the variable resistance current, which would do the work equally well; and yet, as a capitalist, he was going to Europe to patent the invention and to secure the monopoly of it.

Can you conceive of a capitalist taking an invention abroad, spending his money upon it, and trying to get a monopoly of it, under such circumstances leaving the door wide open, losing his monopoly, throwing it away?

The George-Brown copy of the specification stated only four advantages for multiple telegraph purposes of this current.

If this variable resistance matter has not been interpolated into the American patent since George Brown left for Europe, there was another advantage of that current stated in that document which would strike George Brown as of very great importance. This discovery included a means of preventing the lagging of cable signals. This was a practical improvement which would address itself to him as of great importance. Now, that advantage was not contained in Brown's specification which he took to Europe. When did it come in, and how? That was one of the three interpolated matters. It came in with the variable resistance interpolation, and is of itself a strong proof of the interpolated character of the whole thing.

Before these interpolations were made Bell had nothing in his mind except the magneto currents caused by the induction of an armature.

Bell never dreamed of using them for ocean cables; but when his associates or his attorney learned of this new current of Gray's, this current by which you can vary the resistance of a battery current, then you had something which you could use on ocean telegraphs, whereas the former current, a description of which Brown had taken to Europe in his document, could not be utilized.

The interpolated description in the specification describes two or three different ways of varying the current.

So far as Bell had any idea of varying the resistance in May, 1875, that idea was limited to one form of apparatus—to vibrate a stretched rod or wire, varying the current.

That idea was tried, failed, and was abandoned. Nothing further appears until you read it here in this patent which issued on March 7. Where did it come from?

On February 14, 1876, Gray had filed his caveat describing the wire dipping in liquid and varying the current by that means by placing the poles nearer together or moving them farther apart in a liquid. That was Gray's thought in the caveat. All of the things described in Bell's patent are on the same principle.

Although there are three different ways of doing it, the only thought, the only principle involved in those three different ways of doing it, the only thought, the only principle involved in those three different ways is simply using the liquid, an idea which has never before appeared in Bell's history.

It is very curious that without an experiment or thought or word in any letter or memorandum of his, there should suddenly appear in this document—after Brown had left for Europe with his paper containing not a word of it,—three ways, all of which should involve the use of a liquid to vary the resistance.

Nobody has any right to inspect any model in the Patent Office until after the patent is issued.

Every document, every model, every drawing connected with an application is kept inviolably secret. These gentlemen had no right to inspect Gray's models until after the patent had issued. Hence, if they saw his models, if Mr. Storrow admits that they went to the Patent Office and inspected his models, he admits all that we charge. They had no right to do it. That of itself was a violation of the law.

But this letter shows that Bell not only knew that he had gone as far as any particular model would show or any particular exhibition would show, but he was able to mark out the limits to which Gray had gone. How could he know that?

These parties, who had no right under the rules of the Patent Office to know that Gray even had an application there at all, did have that information.

There is another fact they have not been able to explain away. There is no explanation of the fact that Bell went home from his visit to Washington on February 25 or 26 to March 3, 1876, and immediately proceeded to construct a liquid transmitter like Gray's, got speech through it on March 10, and then kept still

about it and concealed the fact. There is no explanation that the next step that he took—the next thing that he did—was to construct two magneto devices just like Gray's receiver on or about the first of April, and then got speech through them.

He did not give to the world the fact as to when and where and how he first got articulate speech, but he gave them a lie instead of the fact.

They offer explanation here. They tell you that the liquid transmitter which Bell made was not the same as the Gray liquid transmitter, and therefore it could not have been stolen from Gray.

Mr. Dickerson says in his argument that those two instruments, which he has shown on that diagram there, are entirely different in principle; that Gray had the idea of varying the resistance of the liquid, but he says that was not Bell's idea.

I prefer to take Bell's theory instead of Gray's. It does not make any difference what liquid is used. His principle is to vary the distance through which the current has to flow through that liquid from pole to pole. Where did Bell get that principle? He had only to read Gray's caveat and find the whole thing there.

I do not think that this court can afford to allow my friends to do away with the printed evidence in the case, which the complainants have put on file, by coming here and saying it is all a mistake.

My theory is that this paper was put into the Dowd Case just as it is printed here in the document; that the print was a correct print from that paper; that subsequently they substituted the fraudulent copy in the Patent Office in order to clear up the record there, and conceal the thing.

Your Honors will remember how Mr. Storrow said this was altered. It was altered by laying it along side of the George-Brown copy and simply writing into the Patent-Office copy, —the certified copy from the Patent Office,—the words that he found in the George-Brown copy, so far as there was any difference between the two. There is an inherent improbability in that.

How did that word "and" get into that copy that you have before you?

Mr. Storrow says that he put in all those words by comparing it with George Brown's copy. It did not come from the George-Brown copy; it is not there. That explanation does not account for it.

My learned brothers have argued on the other side that in law oral evidence has never been allowed to overthrow a patent. It is hardly necessary for me to treat that question. If it was I would refer to *Gayler* v. *Wilder*, 51 U. S. 10 How. 477 (13:504); *Coffin* v. *Ogden*, 85 U. S. 18 Wall. 120 (21:821).

The instrument marked I in the Drawbaugh Exhibits they tell us had no magnet on it when found. It is true that when the original model was put in evidence the magnet was not with it, but after it had been produced before the examiner and put in evidence, Mr. Drawbaugh found among his various magnets at the shop a magnet which he recognized as the original used in that. He brought that magnet over and placed it on the instrument and it fitted its place exactly; both in its height, in the size of the poles which fitted holes made for it, and in every respect it showed for itself at once that it was the magnet originally in the instrument. Mr. Drawbaugh testified to the fact that that was undoubtedly the magnet.

My learned friends say that the tumbler F could not be adjusted unless the bottom was out of it originally, and yet it is the fact that the tumbler instrument F can be adjusted. The bottom was in there; it was adjusted by the screw rod at the top and not at the bottom.

Then my learned friends say the string telephone was in Drawbaugh's shop. That is clearly disproved. There is not a word of evidence of anything of the kind.

A test of those instruments was called for by my friends on the other side, and we made the test in New York. We had no time to make other instruments; we had to take the old instruments that we had which had got in a very dilapidated condition.

All those instruments operated perfectly well. They were the original instruments of Drawbaugh.

The only instruments that did not operate perfectly satisfactorily were the reproduced instruments that we had made to exhibit the arrangement of the parts; but they did operate as speaking-telephones, even those that were most dilapidated.

The tumbler operated. Mr. Benjamin testifies: "Here are some sentences, which I read from the notes, which I heard distinctly through F and A. "F" is the tumbler; "A" is the round box. That is the New York test.

We have been criticised for not making further tests in the New York Case. Why, we made the tests at the very last end of our testimony.

Professor Barker was very particular to absolutely verify the instruments with which he made those experiments. Now, my learned friends of the other side admit that we got most excellent results here at the Philadelphia test.

The whole argument is based on the fact that they will not work properly at all when held horizontally, and that the tests in New York failed for that cause, and they succeeded in Philadelphia because held at an angle. I say that it is not true; and if the court is not satisfied with the evidence of Professor Barker, which I have read, we are ready to repeat the tests here or have Professor Barker repeat them to the satisfaction of the court, and in any way the court may order, to show that those tumbler instruments F will work whether placed horizontally or placed at an angle, and that they work, if anything, better when placed as they were placed in New York, than as they were placed in Philadelphia.

Then they have complained that we did not have the carbon of the same fineness that we had in New York.

The Hunnings patent says we must pulverize the material finely. What has wheat flour got to do with it? That is not carbon pulverized. Carbon is like sand.

You will find that Drawbaugh, away back in 1881, had stated how to use those carbons, with what degree of fineness.

Before the New York tests, before the Hun-

nings patent was ever heard of, Professor Barker got better articulation from the fine than from the coarser.

The Philadelphia instruments were constructed in a much more thorough and workmanlike manner than the New York instruments, and were much better finished.

The powders used in the Philadelphia test were of hard carbon, of different degrees of fineness.

They would have to be of granular or gritty character, if they were carbon.

The New York instruments had become of such a condition that the parts intended to be rigid would not stay rigid, and the parts intended to be movable would not move easily. But in Philadelphia the parts intended to be rigid were rigid, and then you could take the instrument up in your hand and use it without difficulty and it would not get out of adjustment. That explains those two tests and all the differences there were between them.

Then, that Blake transmitter is compared with instrument H,—another story which is absolutely incorrect. All the newspaper publications show that they were speaking-telephones at Drawbaugh's shop.

Our thirteen witnesses that have been attacked were not the witnesses whose testimony we rely upon most; the attacks are easily answered. They are only thirteen witnesses out of two hundred and twenty. Brother Dickerson admitted to the court that Drawbaugh made those instruments that these witnesses say he made, and that it is a mere question of the date when he made them. He says their theory is that he commenced to make them in 1876. Our theory is that he commenced to make them a good many years before.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The important question which meets us at the outset in each of these cases is as to the scope of the fifth claim of the patent of March 7, 1876, which is as follows:

"The method of, and apparatus for, transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth."

It is contended that this embraces the art of transferring to or impressing upon a current of electricity the vibrations of air produced by the human voice in articulate speech, in a way that the speech will be carried to and received by a listener at a distance on the line of the current. Articulate speech is not mentioned by name in the patent. The invention, as described, "consists in the employment of a vibratory or undulatory current of electricity, in contradistinction to a merely intermittent or pulsatory current, and of a method of, and apparatus for, producing electrical undulations upon the line-wire." A "pulsatory current" is described as one "caused by sudden or instantaneous changes of intensity," and an "electrical undulation" as the result of "gradual changes of intensity exactly analogous to the changes in the density of air occasioned by simple pendulous vibrations."

Among the uses to which this art may be put is said to be the "telegraphic transmission of noises or sounds of any kind," and it is also said that the undulatory current, when created in the way pointed out, will produce through the receiver at the receiving end of the line "a similar sound to that uttered into" the transmitter at the transmitting end. One of the means of imparting the necessary vibrations through the transmitter, to produce the undulations, may be the human voice. Articulate speech is certainly included in this description, for it is an "uttered" "sound" produced by the "human voice."

It is contended, however, that "vocal sounds" and "articulate speech" are not convertible terms, either in acoustics or in telegraphy. It is unnecessary to determine whether this is so or not. Articulate speech necessarily implies a sound produced by the human voice, and, as the patent on its face is for the art of changing the intensity of a continuous current of electricity by the undulations of the air caused by sonorous vibrations, and speech can only be communicated by such vibrations, the transmission of speech in this way must be included in the art. The question is not whether "vocal sounds" and "articulate speech" are used synonymously as scientific terms, but whether the sound of articulate speech is one of the "vocal or other sounds" referred to in this claim of the patent. We have no hesitation in saying that it is, and that if the patent can be sustained to the full extent of what is now contended for, it gives to Bell and those who claim under him, the exclusive use of his art for that purpose, until the expiration of the statutory term of his patented rights.

In this art—or, what is the same thing under the patent law, this process, this way of transmitting speech—electricity, one of the forces of nature, is employed; but electricity, left to itself, will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. How to do it was the question.

Bell discovered that it could be done by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of intensity could be made and speech actually transmitted. Thus his art was put in a condition for practical use.

In doing this, both discovery and invention, in the popular sense of those terms, were involved; discovery in finding the art, and invention in devising the means of making it useful. For such discoveries and such inventions the law has given the discoverer and inventor the right to a patent—as discoverer, for the useful art, process, method of doing a thing he has found; and as inventor, for the means he has devised to make his discovery one of actual value. Other inventors may compete with him for the ways of giving effect to the discovery, but the new art he has found will belong to him and those claiming

under him during the life of his patent. If another discovers a different art or method of doing the same thing, reduces it to practical use, and gets a patent for his discovery, the new discovery will be the property of the new discoverer, and thereafter the two will be permitted to operate each in his own way without interference by the other. The only question between them will be whether the second discovery is in fact different from the first.

The patent for the art does not necessarily involve a patent for the particular means employed for using it. Indeed, the mention of any means, in the specification or descriptive portion of the patent, is only necessary to show that the art can be used; for it is only useful arts—arts which may be used to advantage—that can be made the subject of a patent. The language of the statute is that "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter," may obtain a patent therefor. Rev. Stat. § 4886. Thus, an art—a process—which is useful is as much the subject of a patent, as a machine, manufacture, or composition of matter. Of this there can be no doubt, and it is abundantly supported by authority. *Corning* v. *Burden*, 56 U. S. 15 How. 252, 267 [14: 683, 690]; *Cochrane* v. *Deener*, 94 U. S. 780, 787, 788 [24: 139, 141]; *Tilghman* v. *Proctor*, 102 U. S. 708, 722, 724, 725 [26: 279, 285, 286]; *New Process Fermentation Co.* v. *Maus*, 122 U. S. 413, 427, 428 [30: 1193, 1198].

What Bell claims is the art of creating changes of intensity in a continuous current of electricity, exactly corresponding to the changes of density in the air caused by the vibrations which accompany vocal or other sounds, and of using that electrical condition thus created for sending and receiving articulate speech telegraphically. For that, among other things, his patent of 1876 was in our opinion issued; and the point to be decided is, whether as such a patent it can be sustained.

In *O'Reilly* v. *Morse*, 56 U. S. 15 How. 62 [14: 601], it was decided that a claim in broad terms (p. 86) [611] for the use of the motive power of the electric or galvanic current called "electro-magnetism, however developed, for making or printing intelligible characters, letters, or signs, at any distances," although "a new application of that power" first made by Morse, was void, because (p. 120) [626] it was a claim "for a patent for an effect produced by the use of electro-magnetism, distinct from the process or machinery necessary to produce it;" but a claim (p. 85) for "making use of the motive power of magnetism, when developed by the action of such current or currents, substantially as set forth in the foregoing description, * * * as means of operating or giving motion to machinery, which may be used to imprint signals upon paper or other suitable material, or to produce sounds in any desired manner, for the purpose of telegraphic communication at any distances," was sustained. The effect of that decision was, therefore, that the use of magnetism as a motive power, without regard to the particular process with which it was connected in the patent, could not be claimed, but that its use in that connection could.

In the present case the claim is not for the use of a current of electricity in its natural state as it comes from the battery, but for putting a continuous current in a closed circuit into a certain specified condition suited to the transmission of vocal and other sounds, and using it in that condition for that purpose. So far as at present known, without this peculiar change in its condition it will not serve as a medium for the transmission of speech, but with the change it will. Bell was the first to discover this fact, and how to put such a current in such a condition, and what he claims is its use in that condition for that purpose, just as Morse claimed his current in his condition for his purpose. We see nothing in Morse's case to defeat Bell's claim; on the contrary, it is in all respects sustained by that authority. It may be that electricity cannot be used at all for the transmission of speech except in the way Bell has discovered, and that, therefore, practically, his patent gives him its exclusive use for that purpose, but that does not make his claim one for the use of electricity distinct from the particular process with which it is connected in his patent. It will, if true, show more clearly the great importance of his discovery, but it will not invalidate his patent.

But it is insisted that the claim cannot be sustained, because when the patent was issued Bell had not in fact completed his discovery. While it is conceded that he was acting on the right principle and had adopted the true theory, it is claimed that the discovery lacked that practical development which was necessary to make it patentable. In the language of counsel "there was still work to be done, and work calling for the exercise of the utmost ingenuity, and calling for the very highest degree of practical invention."

It is quite true that when Bell applied for his patent he had never actually transmitted telegraphically spoken words so that they could be distinctly heard and understood at the receiving end of his line, but in his specification he did describe accurately and with admirable clearness his process, that is to say, the exact electrical condition that must be created to accomplish his purpose; and he also described, with sufficient precision to enable one of ordinary skill in such matters to make it, a form of apparatus which, if used in the way pointed out, would produce the required effect, receive the words, and carry them to and deliver them at the appointed place. The particular instrument which he had and which he used in his experiments did not, under the circumstances in which it was tried, reproduce the words spoken, so that they could be clearly understood, but the proof is abundant and of the most convincing character, that other instruments, carefully constructed and made exactly in accordance with the specification, without any additions whatever, have operated and will operate successfully. A good mechanic of proper skill in matters of the kind can take the patent and, by following the specification strictly, can, without more, construct an apparatus which, when used in the way pointed out, will do all that it is claimed the method or process will do. Some witnesses have testified that they were unable to do it. This shows that they, with the particular apparatus they had and the skill they em-

ployed in its use, were not successful; not that others, with another apparatus, perhaps more carefully constructed or more skillfully applied, would necessarily fail. As was said in *Webster Loom Co.* v. *Higgins*, 105 U. S. 580, 586 [26: 1177, 1179], "when the question is, whether a thing can be done or not, it is always easy to find persons ready to show how not to do it." If one succeeds, that is enough, no matter how many others fail. The opposite results will show, that in the one case the apparatus used was properly made, carefully adjusted, with a knowledge of what was required, and skillfully used, and that in the others it was not.

The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation. This Bell did. He described clearly and distinctly his process of transmitting speech telegraphically, by creating changes in the intensity of a continuous current or flow of electricity in a closed circuit, exactly analogous to the changes of density in air occasioned by the undulatory motion given to it by the human voice in speaking. He then pointed out two ways in which this might be done; one by the "vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies;" and the other "by alternately increasing and diminishing the resistance of the circuit," or by alternately increasing and diminishing the power of the battery." He then said he preferred to employ for his purpose "an electro-magnet, * * * having a coil upon only one of its legs," and he described the construction of the particular apparatus shown in the patent as Fig. 7, in which the electro-magnet, or magneto method, was employed. This was the apparatus which he himself used without entirely satisfactory results, but which Prof. Cross, Mr. Watson, Dr. Blake, Prof. Pope, and others testify has done, and will do, what was claimed for it, and transmit speech successfully, but not so well indeed as another constructed upon the principle of the microphone or the variable resistance method.

An effort was made in argument to confine the patent to the magneto instrument, and such modes of creating electrical undulations as could be produced by that form of apparatus, the position being that such an apparatus necessarily implied "a closed circuit incapable of being opened, and a continuous current incapable of being intermittent." But this argument ignores the fact that the claim is, first, for the process, and, second, for the apparatus. It is to be read (1) as a claim for "the method of transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth;" and (2) as for "the apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, * * * substantially as set forth." The method, "as herein described," is to cause gradual changes in the intensity of the electric current used as the medium of transmission, which shall be exactly analogous to the changes in the density of the air, occasioned by the peculiarities in the shapes of the undulations produced in speech, in the manner "substantially as set forth;" that is to say, "by the vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies," which is the magneto method; or "by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery," which is the variable resistance method. This is the process which has been patented, and it may be operated in either of the ways set forth. The current must be kept closed to be used successfully, but this does not necessarily imply that it must be so produced or so operated upon, as to be incapable of being opened. If opened it will fail to act for the time being, and the process will be interrupted; but there is nothing in the patent which requires it to be operated by instruments which are incapable of making the break.

The apparatus, "as herein described," which is included in the claim, is undoubtedly one in which an electro-magnet is employed, and constructed "substantially as set forth" in the specification. One acting on the variable resistance mode is not described, further than to say that the vibration of the conducting wire in mercury or other liquid included in the circuit occasions undulations in the current, and no other special directions are given as to the manner in which it must be constructed. The patent is both for the magneto and variable resistance *methods*, and for the particular magneto *apparatus* which is described, or its equivalent. There is no patent for any variable resistance apparatus. It is undoubtedly true that when Bell got his patent he thought the magneto method was the best. Indeed, he said, in express terms, he preferred it, but that does not exclude the use of the other if it turns out to be the most desirable way of using the process under any circumstances. Both forms of apparatus operate on a closed circuit by gradual changes of intensity, and not by alternately making and breaking the circuit, or by sudden and instantaneous changes, and they each require to be so adjusted as to prevent interruptions. If they break it is a fault, and the process stops until the connection is restored.

It is again said, that the claim, if given this broad construction, is virtually "a claim for speech transmission by transmitting it; or, in other words, for all such doing of a thing as is provable by doing it." It is true that Bell transmits speech by transmitting it, and that long before he did so it was believed by scientists that it could be done by means of electricity, if the requisite electrical effect could be produced. Precisely how that subtle force operates under Bell's treatment, or what form it takes, no one can tell. All we know is that he found out that, by changing the intensity of a continuous current so as to make it correspond exactly with the changes in the density of air caused by sonorous vibrations, vocal and

other sounds could be transmitted and heard at a distance. This was the thing to be done, and Bell discovered the way of doing it. He uses electricity as a medium for that purpose, just as air is used within speaking distance. In effect he prolongs the air vibrations by the use of electricity. No one before him had found out how to use electricity with the same effect. To use it with success it must be put in a certain condition. What that condition was he was the first to discover; and with his discovery he astonished the scientific world. Prof. Henry, one of the most eminent scientists of the present century, spoke of it as "the greatest marvel hitherto achieved by the telegraph." The thing done by Bell was "transmitting audible speech through long telegraphic lines," and Sir William Thomson, on returning to his home in England, in August or September, 1876, after seeing at the Centennial Exposition, in Philadelphia, what Bell had done and could do by his process, spoke in this way of it to his countrymen: "Who can but admire the hardihood of invention which devised such very slight means to realize the mathematical conception that, if electricity is to convey all the delicacies of quality which distinguish articulate speech, the strength of its current must vary continuously, as nearly as may be, in simple proportion to the velocity of a particle of air engaged in constituting the sounds." Surely a patent for such a discovery is not to be confined to the mere means he improvised to prove the reality of his conception.

We come now to consider the alleged anticipation of Philipp Reis. And here it is to be always kept in mind that the question is, not whether the apparatus devised by Reis to give effect to his theory can be made, with our present knowledge, to transmit speech, but whether Reis had in his time found out the way of using it successfully for that purpose; not as to the character of the apparatus, but as to the mode of treating the current of electricity on which the apparatus is to act, so as to make that current a medium for receiving the vibrations of air created by the human voice in articulate speech at one place, and in effect delivering them at the ear of a listener in another place. Bell's patent is not alone for the particular apparatus he describes, but for the process that apparatus was designed to bring into use. His patent would be quite as good if he had actually used Reis's apparatus in developing the process for which it was granted.

That Reis knew what had to be done in order to transmit speech by electricity is very apparent, for in his first paper he said: "As soon as it is possible to produce, any where and in any manner, vibrations whose curves shall be the same as those of any given tone or combination of tones, we shall receive the same impression as that tone or combination of tones would have produced on us." Bourseul also knew it before Reis, for, in a communication published in a Paris journal in 1854, he said: "Reproduce precisely these vibrations," to wit, the vibrations made by the human voice in uttering syllables, "and you will reproduce precisely these syllables."

Reis discovered how to reproduce musical tones; but he did no more. He could sing through his apparatus, but he could not talk. From the beginning to the end he has conceded this. In his first paper he said: "Hitherto it has not been possible to reproduce the tones of human speech with a distinctness sufficient for every one. The consonants are for the most part reproduced pretty distinctly, but the vowels as yet not in an equal degree. The cause of this I will attempt to explain. According to the experiments of Willis, Helmholtz, and others, vowel tones can be produced artificially, if the vibrations of one body are from time to time augmented by those of another, something as follows: An elastic spring is set in vibration by the blow of a tooth on a toothed wheel; the first vibration is the greatest, and each subsequent one is smaller than the preceding. If, after a few vibrations of this kind (the spring not coming to a rest in the mean time), the tooth wheel imparts a new stroke, the following vibration will be again a maximum, and so on. The pitch of the tone produced in this way depends upon the number of vibrations in a given time, but the character of the tone upon the number of swellings in the same time. * * * Our organs of speech probably produce the vowels in the same manner, through the combined action of the upper and lower vocal chords, or of these latter and the cavity of the mouth. My apparatus reproduces the number of vibrations, but with an intensity much less than that of the original ones; though, as I have reason to believe, to a certain degree proportional among themselves. But in the case of these generally small variations, the difference between large and small vibrations is more difficult to perceive than in the case of the original waves, and the vowel is therefore more or less indistinct." And again: "I have succeeded in constructing an apparatus with which I am enabled to reproduce the tones of various instruments, and even to a certain extent the human voice."

No one of the many writers whose papers are found in the records claim more than this for Reis or his discoveries. Although his first paper was published in 1861, and Bell did not appear as a worker in the same field of scientific research until nearly fifteen years afterwards, no advance had been made, by the use of what he had contrived or of his method, towards the great end to be accomplished. He caused his instruments to be put on the market for sale, and both he and those whom he employed for that purpose took occasion to call attention to them by prospectus, catalogue, and otherwise, and to describe what they were and what they would do. In his own prospectus, which was published in 1865 and attached to the apparatus, he says: "Every apparatus consists * * * of two parts, the telephone proper and the receiver. * * * These two parts are placed at such a distance from each other that singing or toning of a musical instrument can be heard in no other way from one station to the other except through the apparatus." And, "Besides the human voice there can be reproduced (according to my experience) just as well the tones of good organ-pipes from F—C, and those of the piano." Albert, the mechanician employed to make the instruments, in his catalogue published in 1866, enumerates among

the things he has for sale "Telephone of Reis for reproduction of tones by electricity." In a work on electricity by Robert M. Ferguson, published by William and Robert Chambers, London and Edinburgh, in 1867, it is said, in speaking of the telephone: "This is an instrument for telegraphing notes of the same pitch. Any noise producing a single vibration of the air, when repeated regularly a certain number of times in the second (not less than thirty-two), produces, as is well known, a musical sound. * * * A person when singing any note causes the air to vibrate so many times per second, the number varying with the pitch of the note he sings, the higher the note the greater being the number of vibrations. If we then by any means can get these vibrations to break a closed circuit, * * * the note sung at one station can be reproduced, at least so far as pitch is concerned, at another. Reis's telephone (invented 1861) accomplishes this in the following way," which is then described.

But it is needless to quote further from the evidence on this branch of the case. It is not contended that Reis had ever succeeded in actually transmitting speech, but only that his instrument was capable of it if he had known how. He did not know how, and all his experiments in that direction were failures. With the help of Bell's later discoveries in 1875 we now know why he failed.

As early as 1854 Bourseul, in his communication which has already been referred to, had said, substantially, that if the vibrations of air produced by the human voice in articulate speech could be reproduced by means of electricity at a distance, the speech itself would be reproduced and heard there. As a means of stimulating inquiry to that end he called attention to the principle on which the electric telegraph was based and suggested an application of that principle to such a purpose. He said: "The electric telegraph is based on the following principle: An electric current, passing through a metallic wire, circulates through a coil around a piece of soft iron, which it converts into a magnet. The moment the current stops, the piece of iron ceases to be a magnet. This magnet, which takes the name of electro-magnet, can thus in turn attract and then release a movable plate, which, by its to-and-fro movement, produces the conventional signals employed in telegraphy." Then, after referring to the mode in which speech is transmitted by the vibrations of the air, he said: "Suppose that a man speaks near a movable disc, sufficiently flexible to lose none of the vibrations of the voice; that this disc alternately makes and breaks the connection with a battery; you may have at a distance another disc which will simultaneously execute the same vibrations."

That Reis was working all the time, from the beginning to the end of his experiments, upon the principle of the telegraph as thus suggested by Bourseul, is abundantly proven. Thus, in his first paper, after describing his cubical block apparatus, he says: "If now tones or combinations of tones are produced in the neighborhood of the block, so that sufficiently powerful waves enter the opening *a*, then these sounds cause the membrane *b* to vibrate. At the first condensation the hammer-like wire *d* is pushed back; at the rarefaction it cannot follow the retreating membrane, and the current traversing the strips remains broken, until the membrane forced by a new condensation again presses the strip * * * against *d*. In this way each sound-wave causes a breaking and closing of the current. At each closing of the circuit the atoms of the iron wire inside the distant spiral are moved away from each other; on breaking the circuit these atoms seek to regain their position of equilibrium. When this happens, in consequence of the reciprocal actions of elasticity and inertia, a number of vibrations are produced, and they give the longitudinal sound of the rod. This is the case if the making and breaking of the current occur with comparative slowness. If they occur more rapidly than the oscillations of the iron core, due to its elasticity, the atoms cannot complete their course. The paths described become shorter in proportion as the interruptions are more frequent, but then are just as numerous as these. The iron wire no longer gives its longitudinal normal tone, but a tone whose pitch corresponds to the number of interruptions in a given time; this is the same as saying that the rod reproduces the tone impressed upon the interrupter."

Such was the beginning, and it was maintained persistently to the end as well by Reis as by those who availed themselves of what he was doing. To this the Reis-Legat apparatus forms no exception, for in the paper describing it Legat says: "The operation of the apparatus described is as follows: When at rest the galvanic circuit is closed. When the air which is in the tube *a b* of the apparatus is alternately condensed and rarefied by speaking into it (or by singing or introducing the tones of an instrument), a movement of the membrane closing the smaller opening of the tube is produced, corresponding to such condensation or rarefaction. The lever *c d* follows the movements of the membrane, and opens and closes the galvanic circuit at *d g*, so that at each condensation of the air in the tube the circuit is opened, and at each rarefaction the circuit is closed. In consequence of this operation the electro-magnet of the apparatus, in accordance with the condensations and rarefactions of the column of air in the tube * * * is correspondingly demagnetized and magnetized, and the armature of the magnet is set into vibrations like those of the membrane in the transmitting apparatus." We have not had our attention called to a single item of evidence which tends in any way to show that Reis or any one who wrote about him had it in his mind that anything else than the intermittent current caused by the opening and closing of the circuit could be used to do what was wanted. No one seems to have thought that there could be another way. All recognized the fact that the "minor differences in the original vibrations" had not been satisfactorily reproduced, but they attributed it to the imperfect mechanism of the apparatus used, rather than to any fault in the principle on which the operation was made to depend.

It was left for Bell to discover that the failure was due not to workmanship, but to the principle which was adopted as the basis of

what had to be done. He found that what he called the intermittent current—one caused by alternately opening and closing the circuit—could not be made under any circumstances to reproduce the delicate forms of the air vibrations caused by the human voice in articulate speech, but that the true way was to operate on an unbroken current by increasing and diminishing its intensity. This he called a vibratory or undulatory current, not because the current was supposed to actually take that form, but because it expressed with sufficient accuracy his idea of a current which was subjected to gradual changes of intensity exactly analogous to the changes of density in the air occasioned by its vibrations. Such was his discovery, and it was new. Reis never thought of it, and he failed to transmit speech telegraphically. Bell did, and he succeeded. Under such circumstances it is impossible to hold that what Reis did was an anticipation of the discovery of Bell. To follow Reis is to fail, but to follow Bell is to succeed. The difference between the two is just the difference between failure and success. If Reis had kept on he might have found out the way to succeed, but he stopped and failed. Bell took up his work and carried it on to a successful result.

As to what is shown to have been written and done by Dr. Van der Weyde, it is only necessary to say that he copied Reis, and it was not until after Bell's success that he found out how to use a Reis instrument so as to make it transmit speech. Bell taught him what to do to accomplish that purpose.

So, as to James W. McDonough. We presume that it will not be claimed that he is entitled to more than he asked for in his application for a patent, filed April 10, 1876, and there a "circuit-breaker," so adjusted as to "break the connection by the vibrations of the membrane," is made one of the elements of his invention. The Patent Office was clearly right in holding that he had been anticipated by Reis.

The patents of Cromwell Fleetwood Varley, of London, England, granted on June 2, 1868, and the other October 8, 1870, were for "improvements in electric telegraphs." The objects of the invention covered by the first were "to cut off the disturbance arising from earth currents, to obtain a high speed of signalling through long circuits, and, should the conductor become partially exposed, to preserve it from being eaten away by electrolytic action;" and the object of the second was the "increase of the transmitting power of telegraph circuits, by enabling more than one operator to signal independent messages at the same time, upon one and the same wire, to and from independent stations." While this patentee in his specification says, "by my invention I superpose upon the currents used for working the ordinary telegraphs rapid undulations or waves, which do not practically alter the mechanical or chemical power of the ordinary signal currents," and that "these undulations are made to produce distinct and independent audible or other signals so long as these undulations are produced, whether ordinary signal currents be flowing or not," it is apparent that he uses the terms "undulations" and "waves" in an entirely different sense from Bell, for his patent implies operation on the principle of the electric telegraph; that is to say, by making and breaking the circuit. A Morse key, or something equivalent, is to be used; and besides, in the descriptive portion of the patent, it is said: "When the current is flowing through the coils of the electro-magnet the horns of the fork *k* are drawn apart and the spring *l* loses its contact; then, as the attraction of the magnet ceases, the horns of the fork spring back; this remakes the contact, and so a continual tremor is communicated to the tuning fork." In short, there is nothing in any part of the specification to indicate that the patentee had in his mind "undulations" resulting "from gradual changes of intensity exactly analogous to the changes in the density of air occasioned by simple pendulous vibrations," which was Bell's discovery, and on which his art rests. Varley's purpose was to superpose, that is to say, place upon the ordinary signal current another, which, by the action of the make and break principle of the telegraph, would do the work he wanted.

Another alleged anticipation is that of Daniel Drawbaugh.

Bell got his patent March 7, 1876, and the fortunate accident which led to his discovery occurred June 2, 1875. Active litigation to enforce his patented rights was begun by his company on the 12th of September, 1878, with a suit in the Circuit Court of the United States for the District of Massachusetts, against Richard A. Dowd. This suit was defended by the the Western Union Telegraph Company, and vigorously contested. The answer was filed November 4, 1878, setting up alleged anticipations by Gray, Edison, Dolbear and others. The record fills twelve hundred printed pages, but before a decision was reached the case was compromised and a decree entered by consent. The litigation ended at some time in the latter part of the year 1879. The last deposition was taken on the 19th of September in that year.

The next contested suit was brought in the same court on the 28th of July, 1880, against Albert Spencer and others. An answer was filed in this case September 6, 1880, and depositions afterwards taken, some of those in the Dowd suit being used in this by stipulation. On the 27th of June, 1881, a decision was announced by *Judge* Lowell sustaining the patent, upon which a decree was entered.

On the 14th of November, 1879, Abner G. Tisdel filed in the Patent Office an application for a patent for "a new and useful improvement in speaking-telephones," and on the 18th of November, 1879, Frank A. Klemm also filed an application for a patent for "a new and useful improvement in telephone-transmitters." These inventions were transferred by assignment to Ernest Marx and Frank A. Klemm of New York City, Moritz Loth of Cincinnati, and Simon Wolf of Washington. On the 6th of March, 1880, these parties entered into a mutual agreement to the effect that "each and all of their interests in said improvements and inventions, and the letters patent to be issued therefor, shall be merged and consolidated as common stock in a corporate body, under the laws of either of the States of Ohio, New York, or the general laws

of the United States, relating to the formation of incorporations in the District of Columbia, or of such other States or Territories as may be found necessary hereafter." This agreement was recorded in the Patent Office March 10, 1880.

On the 6th of May, 1880, Edgar W. Chellis, a merchant of Harrisburg, Pennsylvania, M. W. Jacobs, a lawyer at the same place, and Lysander Hill, a lawyer then residing in Washington, in the District of Columbia, made an arrangement with Daniel Drawbaugh by which they were to become jointly interested with him in his alleged telephone inventions, each to have a quarter interest. Nothing was paid for this, but each of the parties was to have one fourth of anything that should be realized from the enterprise. On the 24th of May, 1880, Simon Wolf, one of the parties interested in the Klemm and Tisdel inventions, visited Harrisburg on business with Chellis in reference to telephone matters. On the 18th of May, four days before this visit, a patent was issued to Wolf and his associates upon the invention of Tisdel. While Wolf was in Harrisburg negotiations were begun with Chellis for a transfer of the Drawbaugh inventions to the owners of those of Klemm and Tisdel. These negotiations resulted in a conditional contract of the 22d of June, by reason of which Chellis, Jacobs, Hill, and Drawbaugh went to Washington, and there on the 21st of July, 1880, Drawbaugh, claiming to "have invented certain new and useful improvements in the transmission of vocal speech, and the apparatus to be used for such purpose, for which I am about to make application for letters patent of the United States," assigned to Klemm, Marx, Wolf, and Loth "the full and exclusive right to the said invention as fully set forth and described in the specification prepared and executed by me, dated the 21st day of July, 1880, preparatory to obtaining letters patent of the United States therefor," and he, at the same time, and by the same instrument, authorized and requested the Commissioner of Patents to issue the patent to his assignees, "each as assignee of one fourth part." The specification referred to in the assignment has not been put in evidence in any of the cases. In the course of taking the testimony it was called for by the Bell Company, but the counsel for the opposite party refused to produce either the original or a copy from the Patent Office. The assignment was recorded in the Patent Office July 22, 1880, and in the official digest of assignments the following notation appears: "About to make appl'n. Spe'n dated July 21, 1880."

On the morning of July 22, 1880, the following appeared in the *Cincinnati Commercial*, a newspaper printed at Cincinnati, Ohio:

"TELEPHONE COMBINATION.
"*Special to Cincinnati Commercial.*

"WASHINGTON, D. C., *July 21.*—An application for a patent was filed to-day that, in consequence of its vastness of interest, as well as wealth of prospect, renders it a subject of national interest. A company of leading business men has been formed, that has bought up all the telephone patents antedating those now in use, and known as the Bell, Gray, and Edison patents. The company is composed of leading business men from all parts of the country, Cincinnati being largely represented and interested. The cash capital of the company is $5,000,000, with headquarters in New York, and in about sixty days they will open up the telephone, which will certainly result in the driving out of all telephones in the market, save the ones they hold, or else the compelling the Gray, Bell, and Edison lines to pay the new company a munificent royalty. It appears from the testimony now on file and in the possession of the new company, which is conclusive and exhaustive, that the inventor of the telephone is a poor mechanic, living near Harrisburg, Pa., named Daniel Drawbaugh. Owing to his poverty, he was unable to push his patent on the market. The new company have secured and are sole possessors of this invention, antedating those now in use. They are also owners of four patents for telephones issued to Mr. Klemm, of New York. A large number of capitalists were here to-day to see the filing of the application, and they assert, with a positiveness that is almost convincing, that it will not be long till they have entire charge of the telephones, not only in this country but in the world, and that they will be able to establish lines by which messages can be transmitted for almost a song.

"Mr. Lipman Levy, of the law firm of Moulton, Johnson & Levy, of Cincinnati, was here to-day, in the interest of the Cincinnati parties, who, as already stated, are among the most prominent financial men of our city."

Afterwards, on the 23d of August, 1880, the following appeared in the *Journal of Commerce*, a newspaper printed in the city of New York:

"A NEW TELEPHONE COMPANY.

A company has recently been formed in this city with a capital of $5,000,000, for the purpose of manufacturing telephones. The company is to be known as The People's Telephone Company, and a number of leading capitalists in this city and Cincinnati are interested in it. The telephones are to be manufactured under the patents of Frank A. Klemm and Abner G. Tisdel, and the application for patents of Daniel Drawbaugh, of Eberly's Mills, Cumberland County, Pa., filed July 21, 1880. It is claimed by those interested in the new enterprise that Drawbaugh is really the inventor of the telephone, and had completed one years before Professor Bell or any one else had manufactured one. He was, however, in very humble circumstances, and his neighbors who knew of his experiments looked upon him as a harmless lunatic. He continued improving his original telephone, and it is claimed that the one which the new company proposes to furnish is superior to any now in use. The company has fitted up a factory in Brooklyn, and in three months will be prepared to supply 1000 of the new telephones. As soon as operations are actively commenced, it is expected that legal proceedings will be begun against the new company by the Gold and Stock Telegraph Company, which holds most of the existing patents, and a long and interesting legal fight is anticipated."

On the 30th of August, 1880, the People's Telephone Company was incorporated under the general laws of New York, with an au-

thorized capital stock of $5,000,000, for "manufacturing, constructing, owning, furnishing, letting and selling telephones, and the apparatus used therewith, under the inventions and patents of Abner G. Tisdel, Frank A. Klemm Daniel Drawbaugh, and other inventions and patents which may hereafter be assigned to said company;" and on the 4th of September, 1880, Klemm, Loth, Marx, and Wolf, in consideration of $4,999,550, represented by 99,991 shares of stock, assigned and transferred to that company all their interest in the Klemm, Tisdel, and Drawbaugh inventions, those of Drawbaugh being described as "the inventions in telephones made by Daniel Drawbaugh of Eberly's Mills, Cumberland County, in the State of Pennsylvania, for which application for patents was made on or about the 21st day of July, 1880, and which was assigned to us on the [twenty-] first day of July, 1880, as more particularly appears in a deed of assignment recorded in the United States Patent Office in Liber W. 25, page 85, in the Book of Transfers of Patents."

For the assignment from Drawbaugh to Klemm, Marx, Loth, and Wolf $20,000 was paid in money to Chellis, Jacobs, Hill, and Drawbaugh, and they were also to have a certain amount of the stock of the proposed corporation when formed. What amount they actually got Chellis, who was sworn as a witness in the case, declined to tell, but he admitted it was large.

At this time, and in this way, the attention of the general public was called for the first time to the fact that Drawbaugh claimed to have anticipated Bell in the discovery of the telephone. Bell's success had been proclaimed more than four years before at the Centennial Exposition in Philadelphia. In the mean time inventions in aid of his discovery had been multiplied. According to the testimony of Park Benjamin, more than one hundred patents had been issued and indexed under the word "telephone." Numerous interferences had been declared and considered at the Patent Office. Gray, Edison, Dolbear, and others had either claimed for themselves, or others had claimed for them, priority of invention and discovery, and Bell had thus far been sustained as against them all. Blake had perfected his microphone apparatus, and Bell's patent had become a great commercial success.

The People's Company either began or threatened to begin operations under its charter, and on the 20th of October, 1880, the Bell Company brought suit against it in the Circuit Court of the United States for the Southern District of New York, to prevent any infringement of the Bell patents. In the bill it was alleged "that telephone exchanges now exist in more than two hundred and seventy-five towns and cities of the United States, and in every State thereof, and exist in substantially every city in the United States having more than 15,000 inhabitants, and in many smaller places;" "that there are now in use more than 100,000 electric speaking-telephones licensed by and paying royalty to" the Bell Company; "that the owners of said Bell patents, and those who now are or heretofore have been licensed by them, have devoted great time and attention and large sums of money to the development of the telephone and the introduction thereof into extensive use, and to the proper construction of the most suitable telephone lines and systems and telephonic appliances, and have constructed many thousand miles of telephone lines for use with telephones owned by" the Bell Company, "and licensed by it for such use, and that nothing which the defendants, or F. A. Klemm, A. G. Tisdel, and D. Drawbaugh * * * have done has contributed in any substantial way to the development of the telephone or the introduction thereof into use." The bill then avers that Klemm, Marx, Loth, and Wolf, having become the owners of the Klemm and Tisdel improvements, and having heard that Drawbaugh "claimed that he had made some experiments relating to electric speaking-telephones (which experiments, if made, were incomplete, imperfect, unfruitful, and long before abandoned), entered into an arrangement with him to set up and claim that he was the first inventor of the speaking-telephone, and to make application for a patent therefor; and thereafter, alleging and pretending that said Drawbaugh was the original and first inventor of the electric speaking-telephones, and that electric speaking-telephones had not before such application been in public use or on sale for more than two years, with the knowledge and consent of Drawbaugh, they did, on or about the 21st day of July, 1880, induce him to make and cause to be filed in the Patent Office of the United States an application for a patent to issue to them as assignees of the said Drawbaugh, as the first and original inventor of the electric speaking-telephone, the said defendants well knowing at the time that electric speaking-telephones had been in public use by" the Bell Company and its licensees "for more than two years before said application." It was then further alleged that if Drawbaugh had ever made his pretended inventions they "have not been by him, or any one claiming under him, introduced into public use, and that knowledge thereof has been withheld from your orators and the public, except so far as they have been disclosed within the three months last past by certain newspaper publications."

To this bill the People's Company filed an answer in December, 1880, or January, 1881. The record does not show the precise date. In this answer it was said that Drawbaugh was "the original and first inventor and discoverer of the art of communicating articulate speech between distant places by voltaic and magneto electricity," and that "long prior to the alleged inventions by" Bell, Gray, and Edison he, "then and now residing at Eberly's Mills, constructed and operated practical working electric speaking-telephones at said Eberly's Mills, and exhibited their successful operation to a great number of other persons resident in his vicinity and elsewhere;" that his telephones, as then constructed and operated, "contained all the material and substantial parts and inventions patented" in the patents of Bell, and "also other important and valuable inventions in electric and magneto telephony, and were fully capable of transmitting, and were actually used for transmitting, articulate vocal sounds and speech between distant points by means of electric currents; that some of the

original machines and instruments, invented, made, used and exhibited to many others long prior to the said alleged inventions of Bell, or either of them, are still in existence, and capable of successful practical use, and are identified by a large number of persons who personally tested and used them, and knew of their practical operation and use, in the years 1870, 1871, 1872, 1873, 1874, and both prior and subsequently thereto; that certainly more than fifty, and probably not less than one hundred, persons, or even more, were cognizant of said Drawbaugh's invention and use of said telephones and of his claim to be the original and first inventor thereof prior to the alleged inventions of said Bell, or either of them; that said Drawbaugh, for more than ten years prior to the year 1880, was miserably poor, in debt, with a large and helpless family dependent on his daily labor, and was from such cause alone utterly unable to patent his invention, or caveat it, or manufacture and introduce it on the market; that said Drawbaugh never abandoned his said invention, nor acknowledged the claims of any other person or persons thereto, but always persisted in his claims to it, and intended to patent it as soon as he could procure the necessary means therefor; that said Drawbaugh never acquiesced in the public use of said Bell, Gray, Edison, Blake or other telephones, nor in the claims of the alleged inventors thereof, nor gave his consent to such use." It is then said that Drawbaugh, after finding by experiment that his invention was capable of successful working, "conceived that its range and capacity for usefulness to the public might be very greatly enlarged; that many improvements of great value might be made and added to it, which, without departing from its principle, might increase its value to himself and to the public, and therefore set himself at work to discover and invent such improvements; that he discovered and invented some of said additional improvements prior to any alleged invention by Bell; and that notwithstanding his embarrassed and impoverished pecuniary condition, and his utter want of proper mechanical tools, materials, and appliances to conduct such work, he labored with all reasonable diligence to perfect and adapt his said improvements, and did finally, in due exercise of such reasonable diligence, perfect and adapt the same; and that in so far as the said Bell has incorporated such improvements in his said two patents, or either of them, he, the said Bell, has surreptitiously and unjustly obtained a patent or patents for that which was in fact first invented by Drawbaugh, who was using reasonable diligence in perfecting and adapting the same, and, therefore, the patent or patents of the said Bell therefor is or are invalid and void." It is then said that "the defendant in good faith, and relying upon its legal rights, * * * caused applications to be made and filed in the Patent Office for letters patent on the inventions of the said Daniel Drawbaugh, with the intention of procuring interference proceedings to be instituted, in accordance with the statute, against the patents of said Bell, and the pending applications of said Gray, Edison, and others, in order that said Drawbaugh may be adjudged by the Commissioner of Patents to be, as he rightfully is, the original and first inventor of the electric speaking-telephone, and may be adjudged entitled to receive a patent or patents therefor."

The People's Company began taking depositions on the 19th of April, 1881, but Drawbaugh himself did not appear as a witness until December 7, 1881. After that time others were examined, and when the proofs were closed between three and four hundred witnesses had been produced whose testimony was taken and put into the record to establish the priority of Drawbaugh's invention. This testimony, as is now claimed, shows the story of that invention to have been as follows:

"Early conception and experiments with the continuous current, 1862, 1866, and 1867.

"Tea-cup transmitter and receiver, 1866 and 1867.

"Tumbler and tin cup and mustard can ('F' and 'B'), 1867 and 1869.

"Improvement on 'B' ('C'), 1869, 1870.

"Further improvement upon 'C,' and the more perfect magneto instrument 'I,' 1870, 1871.

"Mouthpiece changed to centre and adjusting screw inserted (Exhibit 'A'), 1874.

"'D' and 'E,' perfectly adjusted and finished magneto instruments, January and February, 1875.

"'L,' 'M,' 'G,' and 'O,' from February, 1875, to August, 1876.

"'H,' August, 1876.

"'J,' 'N,' and 'P,' 1878."

This statement of the Drawbaugh claim we have quoted from the brief of counsel appearing in his behalf, and his success in the litigation has been placed, as we understand it, both in the answer and in the argument, on the truth or falsehood of what is thus set forth.

The letters "F," "B," etc., in the statement refer to exhibits in the cause, being certain instruments claimed to have been made and used by Drawbaugh in the progress of his work and preserved until now. The original tea-cup instrument was not produced, but Drawbaugh in his deposition gave what he said was a drawing, showing how it had been constructed. "F," "B," "C," "I," and "A" were neither of them in a condition for use when they were put in evidence, and no one of all the witnesses except Drawbaugh could tell how they were originally constructed, or what the process was by which sound was transmitted when they were used. All any of the witnesses could say on that subject was that they had used one or more of the different instruments at Drawbaugh's shop, had heard sounds and sometimes spoken words through them, and that Drawbaugh told them the sound was carried on the wire by electricity. There was nothing whatever produced in print or in writing on the subject; not even a memorandum or a drawing of any kind. And there is nothing in the testimony to show that Drawbaugh ever told any one how his earlier instruments were made, or what his process was, until he was called as a witness in December, 1881, and explained it in his testimony. This was nearly twenty years, according to the present claim, after he had begun his experiments, nearly seven after he had made and used "D" and "E," "perfectly adjusted and finished magneto instruments," and more than five after "L," "M," "G," "O," and "H" had been constructed.

and kept in his shop. It was also nearly six years after the date of Bell's patent, more than five years after the success of his discovery had been proclaimed at the Centennial Exposition in Philadelphia, four after his process had got into public use, three after it had become an established success, and two after he had brought his first suit for the establishment of his rights against Dowd, who represented the Western Union Telegraph Company, to a successful termination.

Under these circumstances it becomes important to consider the conduct of Drawbaugh in reference to his alleged invention during this twenty years of eventful history as connected with the discovery and use of telephones. If his present claim is true his experiments began almost as far back as those of Reis, and he had in his shop at Eberly's Mills, within three miles of Harrisburg, telephones that were substantially perfect months before Bell, on the 2d of June, 1875, got the clue to his subsequent discoveries. It is conceded that "D" and "E" made, as is claimed, in February, 1875, are substantially as good magneto instruments as any Bell had used before December, 1881, and "L," "M," "G," "O," and "H," all of which it is claimed were constructed by August, 1876, and some in February, 1875, are as good or nearly as good microphones as those of Blake, which were not invented until 1878. This is the theory of Drawbaugh's defense as it is set forth in the answer and in the argument, and by it his case must stand or fall. The claim is that the discovery of the process was complete, and that perfect telephones had been made and were in a condition for use a year and more before Bell got his patent.

Drawbaugh was, when he gave his deposition, fifty-four years of age, and had lived all his life at or near Eberly Mills, a small village near Harrisburg. He was a skillful and ingenious mechanic, and if he made " D " and "E," and the instruments which came after them, at the time it is said he did, he had good tools and good materials in 1875 and 1876, and was capable of doing the best of work. He was also somewhat of an inventor, and had some knowledge of electricity. According to the testimony he was an enthusiast on the subject of his "talking machine," and showed it freely to his neighbors and people from the country when they visited his shop.

The Centennial Exposition was opened at Philadelphia in May, 1876, and Drawbaugh visited it on the 17th of October, 1876, remaining four or five days. Before he went he had heard, as he says, that some one besides himself had invented a speaking telephone, which he had the impression was on exhibition there. If what he now claims is true, he had then on hand in his shop Exhibits " D," " E," " L," "M," "G," "O," and "H," all of them good instruments of their kind, and capable of transmitting speech, and some of them but just finished. Bell's apparatus had been exhibited to the Board of Judges in June before, and had attracted marked attention. The matter was much discussed in the public press, and yet it never seems to have occurred to Drawbaugh to take any of his telephones with him when he went, although they were small in size, and some, or all of them, could have been carried without serious inconvenience.

When giving his testimony he was examined in chief as to that visit, and this is what he said on the subject of telephones.

"Q. 386. Did you attend the Centennial Exhibition, at Philadelphia, in the year 1876? A. Yes, sir; I did.

"Q. 387. Can you give the date on which you went there? A. I can by reference to a book. It was October 17, 1876. The 17th was a day on which I dated a letter from Philadelphia, while I was there on that visit.

"Q. 388. How long did you visit there last? A. About four or five days, to the best of my recollection.

"Q. 389. Who went with you on that visit? A. Mr. George Leonard.

"Q. 390. Was that the only visit to the Centennial Exhibition that you made? A. Yes, sir; it was.

"Q. 391. At the time that you went there, or before that time, had you heard that somebody else besides yourself had invented a speaking telephone—or a telephone? A. Yes, sir; some time before that, I don't remember how long, but not a great while.

"Q. 392. When you went there, did you suppose it would be on exhibition there? A. I don't remember whether I had heard that it was on exhibition or not; but I got the impression some way that it was on exhibition.

"Q. 393. While you were there at the Centennial, did you see any telephones, or make an effort to see any there? A. Yes, sir; I made an effort and seen an instrument called a telephone, and supposed it to be the instrument spoken of —the one of which I had heard. I was looking and had made some inquiry, and was directed or came to a portion of the building where I saw on a counter some man's telephone, the name I don't remember. At that time, or several times that I called, there was no one there to attend to it. I spoke to another party that had something else on exhibition —I don't recollect what it was—just near by, and I asked him whether there was any one there to attend, or to show the instruments. I was informed then there was no one there to show them.

"Q. 394. If you remember, please state what kind of an instrument it was that you saw there, and state what information you were able to obtain there regarding it and its mode of operation. A. There was a number of instruments placed on to a raised portion—something like a shelf. That is, it resembled something like pigeon-holes, a box open in front, and each instrument at the back of it had an electro-magnet. The number of instruments I don't remember. I don't remember of counting them. If I am not mistaken there may have been a dozen or more, perhaps; some were larger than others. I could not give you a much better description than that. I couldn't get any information about them. This attendant made some remarks about the instruments, but he didn't understand them, and couldn't explain them. I was several feet from where the instruments were. They were placed—it occurs to me—on a raised place like a shelf, just about high enough for a man to speak into;

that is the way it looked to me. I did not go in behind the counter to examine them, although there was an opening to go in by, because I did not like to make too free, as there was no one there.

"Q. 395. Did you see any circulars lying around there referring to these instruments, or other advertisements of them? A. I don't remember about that; it may have been.

"Q. 396. What was your impression as to the character of the instruments, when you finally left them? A. I was impressed with the idea that they were instruments to telegraph by sounds. A certain sound to represent a certain letter of the alphabet. I am not certain how I got the idea, or whether any person told me that at the time, but that is the idea that I had. When I said certain sounds, I meant that sounds of a different pitch would represent different letters.

"Q. 397. Do you know whether that was 'Gray's Harmonic Telegraph' that you saw there or not? A. It didn't say 'telegraph;' I am confident it was called 'telephone.' I didn't see the working parts of the interior, except the electro-magnets. I took the name of the man and his address on a piece of paper, and put it in my pocket, but I don't know what became of it. I don't know whether it was 'Gray's Harmonic Telegraph' or not.

"Q. 398. Did you see any tuning forks about it? A. I did not."

That was all he did during his entire visit to ascertain whether any one besides himself had actually entered upon this then new and interesting field of invention and discovery. He spoke to no one about what he had done himself, and he made no special effort to find out whether that which was on exhibition was in any respect like what he had at home. Neither did he when he got home, so far as the records show, say anything to his neighbors or visiting friends about what he had seen or heard. He had apparently lost all interest in "talking machines."

Not so, however, with his other inventions. The testimony shows that during the early part of 1876, he was much occupied in building an electric clock, which he thought of exhibiting at the Centennial. This he did not do, however, but either just before he went to Philadelphia, or soon after, Rufus E. Shapley, a jeweler of Mechanicsburg, went by his invitation, or on his suggestion, to Eberly's Mills to look at the clock which he had made. Soon afterwards the clock was taken to Shapley's store in Mechanicsburg, and on the 8th of November, 1876, Drawbaugh by an instrument in writing transferred to Shapley a half interest in the "clock I am getting up, the said R. E. Shapley to pay for patenting the same." Shapley had then two thousand dollars in money which Drawbaugh was anxious to have him invest in that business, and the clock was taken by him to his shop so that it might be examined with that end in view if it should prove to be useful. Some time afterwards it was taken back to Eberly's Mills, where it remained until April 1, 1878, or thereabouts, when a clock company was formed, and that clock, or another one substantially like it, was taken about the country for exhibition. For this Drawbaugh was paid five hundred dollars, with an interest in the profits, and on the 20th of September, 1878, he applied for a patent for "improvement in earth batteries for electric clocks," which was issued January 14, 1879, to the members of the clock company. The enterprise does not seem to have been productive of any great success.

In November or December, 1878, while this clock was on exhibition at Harrisburg, Drawbaugh was introduced to Edgar W. Chellis. He had with him at the time a "wooden model of a faucet" that he wanted Chellis and another man to take each a third interest in. An arrangement was afterwards made by which Chellis got a two-thirds interest, he paying for it two hundred and fifty dollars, January 7, 1879. On the 14th of the same month Drawbaugh filed in the Patent Office an application for a patent for an "improvement in rotary measuring faucets," Chellis to have a two-thirds interest. After this application an interference was declared, March 29, 1879, between Drawbaugh and David A. Hauck, who had filed a conflicting application January 17. In his preliminary statement upon this interference Drawbaugh said that he had conceived the idea of his faucets and sketched them late in the fall of 1876; that he made a working model in the spring of 1877, and actually tested it then, but the Patent Office model was not completed until about the 1st of November, 1878. The case was closely contested, but finally decided in favor of Drawbaugh, January 15, 1880. The patent was granted to him and Chellis July 6 of the same year. In this contest Jacobs and Hill, who afterwards became interested in his telephone claims, appeared as the counsel of Drawbaugh.

On the 2d of July, 1879, Drawbaugh filed another application in the Patent Office for "improvement in water motors," Chellis to have in this also a two-thirds interest. Upon this application a patent was issued March 16, 1880.

It is impossible to believe, if Drawbaugh had in his shop, when he reached home from the Centennial, Exhibits "D," "E," "L," "M," "G," "O," and "H," or even "D" and "E" alone, that he would have set himself to work, in the first instance, at developing his clock enterprise, or perfecting his former conception of a measuring faucet, instead of making some effort to call the attention of his friends to his great discovery of the telephone, which he was in danger of losing by the patent which had been issued to another, and which he could not but have known was even then attracting the greatest attention. And in this connection it must be kept in mind that the theory of the defense is, as stated in the answer, that Drawbaugh had at that time fully perfected his invention, and that while at first he "conceived that its range and capacity for usefulness to the public might be very greatly enlarged," he had, before the date of Bell's patent, "notwithstanding his embarrassed and impoverished pecuniary condition, and his utter want of proper mechanical tools," finally perfected his work. His conduct afterwards, therefore, is to be judged, not as that of one who was still in the midst of his experiments, and doubtful of the results, but of one who had arrived at the end and had completed his success.

No man of his intelligence, with or without

the enthusiasm upon the subject which it is said he possessed, could have remained silent under such circumstances. As we have read the testimony, it is not even pretended that he took any of his instruments outside of his own village until May, 1878, when, as is claimed, he showed one to his friend Stees, in Harrisburg, whom he had known for years, and who was the first to use, and, in fact, was then using, a Bell telephone, in that place, upon a private line of his own between his office and his shops. This produced no results, and when afterwards, in January, 1879, Chellis was told that Drawbaugh had "a phonograph and a telephone that he had invented," he gave it no attention, because, to use his own language, "I was interested in the faucet and motor business, and wished to push them, and I did not think we could do much with the telephone, as Bell had a patent, and I did not know that he could antedate them." And again, when speaking of a conversation he had with Drawbaugh, he said: "I advised him to drop it—the telephone—as he could not antedate Bell. He said he did not know about that; that he had been working on it a good while. It was his way of expressing himself; when I would say, 'You can't antedate Bell,' he would say, 'I don't know about that; I have been working at it a good while.'" This, it must be remembered, was in 1879, after the telephone had become a success, and after it had been a year or more in use in Harrisburg, where Chellis lived. It is impossible to believe that either Chellis or Drawbaugh was ignorant of the approximate time of Bell's invention, which had been the subject of frequent newspaper comment from the time of its exhibition at the Centennial. The subject was often referred to in the Harrisburg and Mechanicsburg papers, and it is not for a moment to be supposed that all of these various articles escaped their attention. Under such circumstances, if it were true that Drawbaugh had made his "D" and "E," as is now claimed, in February, 1875, he certainly would have said so, and would not have contented himself with so doubting an answer to Chellis's suggestion of his inability to antedate Bell as that which Chellis now says he gave.

Another important fact in this connection is one which is proved by the testimony of Andrew R. Kiefer, who, from 1868, had been division telegraph operator, having charge of the middle division of the Pennsylvania Railroad, and residing in Harrisburg. From 1867 to the winter of 1881–2 he was a member of a partnership firm in that place which was engaged in "the manufacture of burglar alarms, electric hotel annunciators, and fine electric work for the government—instruments for the Signal Bureau, patent models, &c." He had also, since 1876, kept a place for the sale of electrical supplies. He had known Drawbaugh certainly since 1876, and probably before. Drawbaugh met him on different occasions and talked upon electrical matters. In the course of their acquaintance Drawbaugh showed him an electrical fire-alarm apparatus and the works of his electric clock, but the subject of telephones was never alluded to between them until in the summer of 1881, when this occurred. We quote from Kiefer's deposition:

"In the summer of 1881 I took my wife out for a drive, and went over to see his [Drawbaugh's] works, never having seen them, and having promised to come and see him some time; my wife, not caring about going through the shop, remained in the carriage, and I went through alone with Mr. Drawbaugh. He showed me through the shops and introduced me to Mr. Chellis, and showed me parts of the water motor and some other things of his getting up. On account of my wife's being in the carriage alone I did not stay long. As I stepped into or was just in the carriage, Mr. Drawbaugh said, 'I forgot to show you my telephone.' I did not get out again to go and see it, and I drove away without seeing it, expecting to see it again, but I have never got over to the shop since."

This was after the suit of the Bell Company against the People's Company was begun, and of course after the matter got into the hands of Chellis and his associates. It is no answer to the criticism of Drawbaugh's conduct in this particular to say, as was said in argument, that "one reason why he did not speak or apply to every man with whom he had personal acquaintance, was that he was ridiculed by his neighbors; that his invention was considered a humbug by them, and of no commercial value." Bell's success was proclaimed in the Harrisburg Patriot as early as February 26, 1877, and the days of ridicule were then past. If Drawbaugh had at that time in his shop the machines which it is now claimed were all complete as they now are by August, 1876, and most of them before, there cannot be a doubt that he would have taken them to some place where they could be tried, and show that they would do what he had all along claimed for them. All he had to do, at any time after he came back from the Centennial, was to take any pair of his little instruments to his friend Zeigler or his friend Stees at Harrisburg, attach them to a line-wire, and show what he had. They were men who could appreciate his achievement, and help him if it was, as he now says it was, a success. It would certainly have been easier then, within two years of the time the first of them were made, and within a year of the date of Bell's patent, to show that he "antedated" Bell, than it was three years afterwards, when he was brought into the controversy through the instrumentality of his associates, not, as must be evident to all, to get a patent for himself, but to defeat that of Bell. And in this connection it is specially significant that the application which it is claimed was made for a patent on the 21st of July, 1880, and the specification of his invention which was then written out, have been purposely and designedly kept out of the case, although their production was demanded. They were written before this suit was begun, and it is impossible to believe that they would have been withheld, at least upon the call of the opposite party, if they were in all respects consistent with the subsequent developments of the case. The excuse given by counsel at the time, that they were "in the secret archives of the Patent Office," and "if produced and published in this cause would possibly invite the filing of contesting applications, and result in interference and additional litigation, besides unnecessarily prolonging the taking of testimony here and increasing the

expenses," we cannot accept as satisfactory, especially as in the answer it was said that one object of filing the application was to procure "interference proceedings to be instituted against the patents of Bell, in order that Drawbaugh may be adjudged by the Commissioner to be, as he rightfully is, the original and first inventor."

We have not overlooked the depositions that have been taken in such large numbers to show that Drawbaugh was successful with "F," "B," "C," "I," and "A," before "D" and "E" were made. They have been studied with care and if they contained all the testimony in the case it would be more difficult to reach the conclusion that Drawbaugh's claim was not sustained. But in our opinion their effect has been completely overcome by the conduct of Drawbaugh, about which there is no dispute, from the time of his visit to the Centennial until he was put forward by the promoters of the People's Company, nearly four years afterwards, to contest the claims of Bell. He was silent so far as the general public were concerned, when if he had really done what these witnesses now think he did he would most certainly have spoken. There is hardly a single act of his connected with his present claim, from the time he heard, before going to Philadelphia, that some one else had invented a telephone which was on exhibition at the Centennial, that is not entirely inconsistent with the idea even then of a complete discovery or invention by himself which could be put to any practical use. It is not pretended that what he did was done in private. He had influential friends with ample pecuniary resources, ready to help him in bringing out his inventions when they promised success. He easily got aid for his clock and for his faucet. The news of Bell's invention spread rapidly and at once and it took but a few months to demonstrate to the world that he had achieved a brilliant success. If it were known at Eberly's Mills alone that Drawbaugh had been doing the same thing for years in his shop there—and it certainly would have been known all through the little village if it had actually been done—no one can believe that the public would be kept in ignorance of it until four years afterwards, when a "special" from Washington "to the Cincinnati Commercial" announced a "Telephone Combination" to have entire charge of the telephones, not only in this country, but in the world," that could transmit messages "for almost a song."

But there is another fact in this case equally striking. As has already been seen, "F," "B," "C," and "I" were in no condition for use when they were produced and put in evidence. They were mere "remains," and no one but Drawbaugh himself could tell how they were made or how they were to be used. He undertook to reproduce some of them, especially "F" and "B." This was in the latter part of 1881, while the testimony was being taken. The Bell Company proposed that they should be tried to see if they would do what the witnesses said had been done with the originals which the "remains" show must have been exceedingly primitive in their character. The testimony also shows that when they were originally used by or in the presence of the witnesses, no particular care was taken in their adjustment. They were lying around in the shop or standing upon shelves. Some say that when experiments were made they were held in the hand or allowed to stand on the table. Many testify to satisfactory results, and Drawbaugh himself said in his deposition: "I would have persons in the cellar reading printed matter—some advertisement or something—and I could hear the words that were read; and at other times I would go down into the cellar and read something, and coming up they would repeat the words to me that I had read."

The proposition of the Bell Company was accepted, and the reproductions were tried in March, 1882, under the most favorable circumstances. Three days were occupied in the test, and it is substantially conceded that it was a failure. Occasionally a sound was heard and sometimes a word, but "it would not transmit sentences." At the time of these experiments "F" which was the transmitter, was placed on a table, and used as Drawbaugh said it was originally. Two years afterwards other reproductions were presented, differently constructed and used in a different way, and these would "talk," but they were neither made nor used in the same way as the originals. To our minds the result of the second experiments conclusively showed that the original instruments could not have done what the witnesses supposed they did, and that what they saw and heard was produced by some other means than an electric speaking-telephone. We do not doubt that Drawbaugh may have conceived the idea that speech could be transmitted to a distance by means of electricity and that he was experimenting upon that subject; but to hold that he had discovered the art of doing it before Bell did would be to construe testimony without regard to "the ordinary laws that govern human conduct." *Atlantic Works* v. *Brady*, 107 U. S. 192, 203 [27: 438, 442]. Without pursuing the subject further we decide that the Drawbaugh defense has not been made out.

Another objection to Bell's patent, put forth in the oral argument of Mr. Hill, and in the printed brief signed by him and in that signed by Mr. Dixon, is that his application as originally filed in the Patent Office did not contain his present fourth claim, or any description of the variable resistance method, and that all which now appears in the specification on that subject, including the fourth claim, was surreptitiously interpolated afterwards.

Bell's application was filed February 14, 1876, and afterwards, during the same day, Elisha Gray filed a caveat, in which he claimed as his invention "the art of transmitting vocal sounds or conversations telegraphically through an electric circuit," and in his specification described the variable resistance method. The precise charge now made in the printed brief of Mr. Hill is, that "Mr. Bell's attorneys had an underground railroad in operation between their office and Examiner Wilbur's room in the Patent Office, by which they were enabled to have unlawful and guilty knowledge of Gray's papers as soon as they were filed in the Patent Office," and "that an important invention, and a claim therefor, were bodily interpolated into Bell's specification, between February 14, 1876, and February 19, 1876, by Pollok, in consequence of the guilty knowledge

which the latter already had of the contents of Gray's caveat before the declaration of interference with Gray on February 19."

So grave a charge, made in so formal a manner, is entitled to careful consideration. It involves the professional integrity and moral character of eminent attorneys, and requires us to find from the evidence that after Bell swore to his application on the 20th of January, 1876, and after the application thus sworn to had been formally filed in the Patent Office, an examiner, who got knowledge of the Gray caveat put in afterwards, disclosed its contents to Bell's attorneys; that they were then allowed to withdraw the application, change it so as to include Gray's variable resistance method over Bell's signature, and over the *jurat*, and then restore it to the files, thus materially altered, as if it were the original; and all this between February 14 and February 19.

Although much stress was laid in argument on the fact that what purported to be a certified copy of the specification of Bell, as found in the file wrapper and contents printed in the Dowd Case, differed materially from the patent, the cause of these differences has been explained in the most satisfactory manner, and we entertain no doubt whatever that the specification as now found in the patent is precisely the same as that on which the order to issue was made. If any alterations were made it was all done before February 19, and the fair copy which is now found on the files of the Office is precisely as it was when the order for the patent was granted. Not a shadow of suspicion can rest on any one growing out of the misprint of the specification in the Dowd Case.

All that remains, therefore, on which to rest this serious charge is, that in a paper handed by Bell to George Brown, of Toronto, describing his invention, and which was intended to be used in England to secure a British patent, what is now claimed to be an interpolation in the American application is not to be found. It is but right to say that during the whole course of the protracted litigation upon the Bell patent, no argument was ever presented based on this discrepancy until the brief of Mr. Hill was filed in this court on the 18th of January, 1887, six days before the argument in these appeals was begun. So far as we are advised nothing had ever before occurred in the cases that seemed to make it necessary to prove when the variable resistance method or the fourth claim was put into the American application, or why it was left out of the paper handed to Brown. It seems always to have been assumed until the cases got here, that because it was in the American patent it was rightfully there. Certainly there is nothing in the pleadings in any of the cases to direct attention to the materiality of this fact.

A comparison of the paper handed Brown with the American application shows that they differ in more than thirty different places besides those which relate to the variable resistance method and the fourth claim. The differences are generally in forms of expression, thus indicating that one was written after the other and evidently for the purpose of securing greater accuracy. The paper handed Brown was clearly a rough draft and not a fair copy, for the record shows that it bore on its face the evidence of many erasures and interlineations. Bell says in his testimony that he began writing his specification in September or October, 1875, and wrote and rewrote it a number of times, finally adopting that mode of expression which seemed to him the best to explain his invention and the relation which one portion bore to another. He visited Brown in Canada in September and again in December, 1875. The arrangement was made between them on the 29th of December, at this last interview, by which Brown was to interest himself in getting out British patents. Other inventions besides the telephone were included in the contract entered into for that purpose.

Bell returned to Boston on the 1st of January, and immediately set himself to work to complete his specification. He had it done so that it was taken to Washington by Mr. Hubbard about the 10th of that month, and delivered to Pollok and Bailey, the attorneys. It was then examined by the attorneys, found correct, and a fair copy made and returned on the 18th to Bell in Boston for his signature and oath. It was signed and sworn to in Suffolk County, Massachusetts, January 20, and immediately returned to the attorneys. Afterwards Pollok met Bell in New York, and it was again gone over with care by the two together. No change whatever was made in it at that time, and Pollok took it back with him to Washington.

On the 25th of January, 1876, Bell met Brown, who was then on the way to England, in New York. It is now assumed that the paper which Brown took to England was handed to him then, and because the variable resistance method and the fourth claim were not in that, it is argued that they could not have been in the American specification at that time. But no one has said when the paper was actually handed to Brown. Bell says he cannot tell, but that it must have been after he made his contract with Brown on the 29th of December. As the American specification was signed and sworn to five days before the interview with Brown on the 25th of January, and the paper of Brown differs from it in so many particulars besides that now in question, it would seem to be clear that the paper was a copy of some former draft which Bell had made—possibly one taken to Canada in December—and not of that which was perfected afterwards. As the specification which had been prepared and sworn to was a fair copy, without erasures or interlineations, the fact that the paper handed Brown was not a fair copy would imply that it was not intended to be an exact transcript of the other. At any rate, the bare fact that the difference exists under such circumstances is not sufficient to brand Bell and his attorneys and the officers of the Patent Office with that infamy which the charges made against them imply. We therefore have no hesitation in rejecting the argument. The variable resistance method is introduced only as showing another mode of creating electrical undulations. That Bell had had his mind upon the effect of such a method is conclusively established by a letter which he addressed to Mr. Hubbard on the 4th of May, 1875, and which is found in the Dowd record, introduced into the Overland Case by stipulation. Its insertion in his final draft of his spe-

cification is another proof of the care with which his work had been done.

In the case of the Clay Commercial Company objection was made to the sufficiency of the proof of the incorporation of the American Bell Telephone Company and of its title to the Bell patents. Upon the first point the proof was (1) a special Act of the general court of Massachusetts, entitled "An Act to Incorporate the American Bell Telephone Company," which authorized certain persons therein named and their associates to organize themselves under the provisions of chap. 224 of the Acts of 1870, and the Acts in amendment thereof, for telephone purposes; and (2) a certificate of the Secretary of the Commonwealth in the form required by § 11 of chap. 224, that certain persons, among whom were the most of those mentioned in the special Act, were legally organized and established as an existing corporation under the name of the American Bell Telephone Company. This section made such a certificate "conclusive evidence of the existence of a corporation" organized under that chapter. The authority granted by the special Act to the persons named, to organize as a corporation in this way, gave them the authority to select a corporate name, and also made the statutory certificate conclusive evidence of their corporate existence.

The objections to the proof of title are not, in our opinion, well taken. We do not deem it necessary to add to the length of this opinion by referring particularly to the testimony on that point.

This disposes of all the cases so far as the patent of March 7, 1876, is concerned. It remains only to consider the patent of January 30, 1877, about which but little has been said either in the oral or printed arguments. Apparently it received but little attention by counsel or the court in either of the cases below. In the Dolbear Case it was by consent excluded from the decree, and of course is not presented by that record in this court. In all the other cases the patent was sustained, and the Clay Commercial Company was adjudged to have infringed the third, fifth, sixth, seventh, and eighth claims; the Molecular Company the sixth, seventh, and eighth, but not the fifth; the People's Company the fifth, sixth, and eighth; and the Overland Company the third, fifth, sixth, seventh and eighth. From the decree in favor of the Molecular Company as to the fifth claim the Bell Company has appealed.

In the case of the Clay Commercial Company it was alleged in the answer that the substantial and material parts of the things described and claimed were described and claimed in a prior British patent taken out by or for Bell, dated December 9, 1876, and that, inasmuch as the American patent does not bear the same date with the foreign patent, and is not limited to expire therewith, it is void. This point has not been pressed in the argument here, and in our opinion it has been settled by the decision of this court in *O'Reilly* v. *Morse*, 56 U. S. 15 How. 62, 112 [14: 601, 623], and impliedly by that in *Siemens* v. *Sellers*, 123 U. S. 276 [30:153], at the present term, that the effect of § 4887 of the Revised Statutes is not to render invalid an American patent which does not bear the same date as a foreign patent for the same invention, but only to limit its term.

The patent itself is for the mechanical structure of an electric telephone to be used to produce the electrical action on which the first patent rests. The third claim is for the use in such instruments of a diaphragm, made of a plate of iron or steel, or other material capable of inductive action; the fifth of a permanent magnet constructed as described with a coil upon the end or ends nearest the plate; the sixth of a sounding box as described; the seventh of a speaking or hearing tube as described for conveying the sounds; and the eighth of a permanent magnet and plate combined. The claim is not for these several things in and of themselves, but for an electric telephone in the construction of which these things or any of them are used. Hence the fifth claim is not anticipated by the Schellen magnet, as was decided in the Molecular Case below. The patent is not for the magnet, but for the telephone of which it forms but part. To that extent the decree in that case was erroneous.

It follows that the decree in each of the cases, so far as it is in favor of the Bell Company and those claiming under it, must be affirmed, and that the decree in the Molecular Case, so far as it is against that company on the fifth claim of the patent of January 30, 1877, must be reversed and a decree directed to that extent in its favor. It is consequently so ordered.

Mr. Justice **Gray** was not present at the argument, and took no part in the decision of these cases.

Mr. Justice **Lamar**, not being a member of the court when these cases were argued, took no part in their decision.

Dissenting opinion of *Justices* **Field, Bradley,** and **Harlan,** delivered by *Mr. Justice* **Bradley:**

Mr. Justice Field, *Mr. Justice* Harlan and myself are not able to concur with the other members of the court, sitting in these cases, in the result which has been reached by them. Without expressing an opinion on other issues, the point on which we dissent relates to the defense made on the alleged invention of Daniel Drawbaugh, and applies to all the cases in which that invention is set up. We think that Drawbaugh anticipated the invention of Mr. Bell, who, at most, is not claimed to have invented the speaking telephone prior to June 10, 1875. We think that the evidence on this point is so overwhelming, with regard both to the number and character of the witnesses, that it cannot be overcome. As this is a question of fact, depending upon the weight of the evidence, and involves no question of law, it does not require an extended discussion on the part of those who dissent from the opinion of the majority,—which is very ably drawn, and presents the case with great clearness and force. On the point mentioned, however, we cannot concur in the views expressed.

The essence of the invention claimed by Mr. Bell is, the transmission of articulate speech to a distance, by means of an electrical current subjected to undulations produced by the air vibrations of the voice. There are two modes (as yet discovered) by which these undulations may be thus produced. In one they are produced by interposing in the circuit a substance whose electrical conductivity may be varied by

the concussions or vibrations of the air produced by the voice. This is called the variable resistance process, because the electrical current is subjected to the variable resistance (or conductivity) of the substance thus interposed. By the other mode, the undulations are produced by the inductive effect of an armature (or small, flat piece of iron), attached to the membrane spoken against, and placed near to the poles of an electro-magnet situated in the circuit. In both cases, the undulations impart the vibrations which caused them to another diaphragm at a distance (called the receiver) by means of an electro-magnet in the circuit, placed near to an armature affixed to such diaphragm. These vibrations, thus reproduced, are detected by the ear, and the spoken words are heard.

We are satisfied from a very great preponderance of evidence, that Drawbaugh produced, and exhibited in his shop, as early as 1869, an electrical instrument by which he transmitted speech, so as to be distinctly heard and understood, by means of a wire and the employment of variable resistance to the electrical current. This variable resistance was produced by causing the electrical current to pass through pulverized charcoal, carbon and other substances, acted upon by the vibrations of the voice in speaking. This was the whole invention so far as the principle of variable resistance is concerned.

We are also satisfied that as early as 1871 he reproduced articulate speech, at a distance, by means of a current of electricity, subjected by electrical induction to undulations corresponding to the vibrations of the voice in speaking, —a process substantially the same as that which is claimed in Mr. Bell's patent.

In regard to the instrument in which the principle of variable resistance was used, more than seventy witnesses were examined, who either testified to having seen it and heard it, or established such facts and circumstances in relation to it as to put its existence and date beyond a question. With regard to the instrument in which electrical induction was employed to produce the requisite undulations, some forty or fifty witnesses were produced, many of whom saw it and heard speech through it, and others either saw it, or heard it talked about in such a manner as to fix the time when it was in existence. On the questions of time and result, there is such a cloud of witnesses in both cases, that it seems almost impossible not to give credence to them. The evidence of some of them may have been shaken with regard to the time they had in mind; but that of the great majority was not shaken at all, but corroborated by circumstances which rendered the proof irrefragable. Many of them, it is true, were plain country people; but they heard the words through the instrument; and that is a matter about which they could not be mistaken. It did not require science nor learning to understand that. But the witnesses were not confined to this class. A number of them were people of position in society, official, professional, and literary,—all, however, like the inventor, regarding the matter more as one of curiosity than of public importance.

As it would serve no useful purpose to repeat the testimony of these witnesses, we shall refrain from doing so. We will only add that nearly all the original instruments used by Drawbaugh were produced on the trial, and identified by the witnesses. Some of them were broken and in a dilapidated condition, but sufficiently perfect to be accurately reproduced. Their very form and principle of construction showed that they were intended for speaking-telephones and nothing else. Drawbaugh certainly had the principle, and accomplished the result. Perhaps without the aid of Mr. Bell, the speaking-telephone would not have been brought into public use to this day; but that Drawbaugh produced it, there can hardly be a reasonable doubt.

We do not question Mr. Bell's merits. He appreciated the importance of the invention, and brought it before the public in such a manner as to attract to it the attention of the scientific world. His professional experience and attainments enabled him to see, at a glance, that it was one of the great discoveries of the century. Drawbaugh was a different sort of man. He did not see it in this halo of light. Had he done so, he would have taken measures to interest other persons with him in it, and to have brought it out to public admiration and use. He was only a plain mechanic; somewhat better instructed than most ordinary mechanics; a man of more reading, of better intelligence. But he looked upon what he had made more as a curiosity than as a matter of financial, scientific, or public importance. This explains why he did not take more pains to bring it forward to public notice. Another cause of his delay in bringing his invention to public notice was, that he was ever indulging the hope of producing speech, at the receiving end of the line, loud and distinct enough to be heard across a room, like the voice of a person speaking in an ordinary tone.

It is perfectly natural for the world to take the part of the man who has already achieved eminence. No patriotic Briton could believe that anybody but Watt could produce an improvement in the steam engine. This principle of human nature may well explain the relative feeling towards Bell and Drawbaugh in reference to the invention of the telephone. It is regarded as incredible that so great a discovery should have been made by the plain mechanic, and not by the eminent scientist and inventor. Yet the proof amounts to demonstration, from the testimony of Mr. Bell himself, and his assistant, Watson, that he never transmitted an intelligible word through an electrical instrument, nor produced any such instrument that would transmit an intelligible word, until after his patent had been issued; whilst, for years before, Drawbaugh had talked through his, so that words and sentences had again and again been distinctly heard. We do not wish to say a word depreciatory of Mr. Bell. He was original, if not first. He preconceived the principle on which the result must be obtained, by that forecast which is acquired from scientific knowledge, as Leverrier did the place of the unknown planet; but in this as in the actual production of the thing, he was, according to the great preponderance of the evidence, anticipated by a man of far humbler pretensions. A common astronomer, by carefully

sweeping the sky, might have been first in discovering the planet Neptune; whilst no one but a Leverrier, or an Adams, could have ascertained its existence and position by calculation. So it was with Bell and Drawbaugh. The latter invented the telephone without appreciating the importance and completeness of his invention. Bell subsequently projected it on the basis of scientific inference, and took out a patent for it. But, as our laws do not award a patent to one who was not the first to make an invention, we think that Bell's patent is void by the anticipation of Drawbaugh.

PETITION FOR REHEARING.

In the cases of the *People's Telephone Company* and *The Overland Telephone Company*, a motion for rehearing was made.

It was submitted May 7, 1888, *denied* May 14, 1888.

The following is a copy of the petition for rehearing:

TO THE HONORABLE JUSTICES OF SAID COURT:

The appellants' in the above-entitled cases hereby humbly pray that the court will rehear and reconsider the matters decided March 19, 1888, so far as the same involve the question of priority of invention of the electric speaking-telephone between Alexander Graham Bell and Daniel Drawbaugh; and that an order or orders be entered reversing the decisions below and dismissing the appellees' bills, with costs to the appellants in said cases respectively.

The grounds of this application are, first, that the court, in its said decision, as evidenced by its written opinion, filed on said 19th day of March, giving its reasons therefor, inadvertently erred in respect to certain matters of fact and of law material to and decisive of said question, and therefore of these cases; and, secondly, that in consequence of said errors, the decision of the court was against the weight of the evidence.

"The opinion of the court treats three portions of the evidence as controlling, viz:

I. The evidence of a great cloud of witnesses as to what Drawbaugh, prior to the fall of 1876, had accomplished in the matter of an electric speaking-telephone.

II. His conduct from that time to the year 1880, when the appellants became interested in his inventions.

III. The New York and Philadelphia tests.

I. *Proofs of Drawbaugh's Priority.*

Mr. Storrow, complainant's counsel, admitted in his oral argument that "forty-nine witnesses testified that they had heard speech in Drawbaugh's shop before the date of the Bell patent" (Oral Argument of Storrow, p. 149).

Seventy witnesses heard talk through the Drawbaugh telephones, or were present when others successfully talked through them, prior to Bell's alleged conception of the telephone, June 2, 1875.

One hundred and forty-nine witnesses actually saw the instruments, and two hundred and twenty testified to having heard of or seen them prior to that time.

Many of the witnesses testified to such circumstances, facts, and records corroborative of their evidence as to make it impossible that they could have erred, and either their testimony is true or they committed wilful perjury. No attempt has been made to impeach them. The dates they positively aver are all prior to June, 1875, the year when Bell claimed to have first conceived the idea of the telephone.

Of this class of witnesses are the following:

William H. Strickler: Never was at Milltown but once. Had made an invention for insulating telegraph wires. Visited Drawbaugh for information and advice concerning that invention. Had not then filed his application for a patent. He and Drawbaugh talked to each other through the telephone at that time, and Drawbaugh explained to him how electricity operated it. Subsequently filed his application and obtained a patent for his invention. Produced the specifications and drawings as filed, and the patent as issued. Date of filing, August 22, 1874; date of patent, April 20, 1875 (Additional Proofs, p. 233).

George W. Bowman: Resides at Mechanicsburg. Drove to Eberly's Mills with his wife to attend a baptism. After the baptism drove to Drawbaugh's shop. This was during the lifetime of his wife's mother, who died in 1871. He then and there heard Drawbaugh talk through the telephone (Additional Proofs, p. 173).

Mrs. Bowman, wife of the above, corroborates his testimony. Her mother died March 14, 1871. Knows the baptism was before her mother's death, because it was upon her mother's persuasion that they went to attend it (Additional Proofs, p. 177).

Emanuel Gregory: Resided at Milltown from March to October, 1870. Then removed to Massachusetts. Has never been in Pennsylvania since until he testified. At Milltown worked at Drawbaugh's shop for faucet company. The company's books corroborate this. Assisted Drawbaugh in his experiments, and heard him talk through his telephone a number of times. Identifies B and F as the instruments (Additional Proofs, p. 185).

William H. Zearing: Had a pair of steelyards relettered by Daniel Drawbaugh Entered the date and charge therefor in a book, November 23, 1873, as shown by book produced. Never had any steelyards relettered at any other time. When he went for them Drawbaugh talked to him through a telephone, saying, among other things, "The steelyards are finished." Zearing was the secretary of the school board of his township (Def. Sur. Reb. Testimony, p. 122).

Other witnesses of the same class are: Goodyear (Def. Sur. Reb. Tes., p. 1011); David Stevenson (Def. Add. Proofs, p. 141); his two daughters (Def. Add. Proofs, pp. 166, 169); William H. Martin (Def. Sur. Reb. Tes., p. 827); John Keefauver (Def. Sur. Reb. Tes., p. 837). See accompanying brief for many others.

II. *Drawbaugh's Conduct.*

Of the above proofs the court says: "If they contained all the testimony in the case it would be more difficult to reach the conclusion that Drawbaugh's claim was not sustained. But in our opinion their effect has been completely

overcome by the conduct of Drawbaugh,—about which there is no dispute,—from the time of his visit to the Centennial until he was brought forward by the promoters of the People's Company, nearly four years afterwards, to contest the claims of Bell."

This conduct, concerning which the court says there is no dispute, relates solely to his incapacity as a business man. It is true that there is no dispute as to his incapacity to use, to the best advantage, the opportunity his invention gave him; but the court has evidently overlooked much testimony to show the constant efforts he did make to secure capital from 1876 to 1880 to enter upon the contention which would be sure to follow an application for a patent. Among the witnesses on this point are: Moffitt (Def. Record, Vol. 1, p. 497), Chellis (Same, p. 526), Shettel (Same, p. 214). The accompanying brief cites many other witnesses to Drawbaugh's constant and earnest seeking of assistance to push his telephone inventions.

III. *Drawbaugh's Ignorance of the Date of Bell's Invention.*

Drawbaugh swore that he did not know the alleged date of Bell's invention until 1880 (Def. Record, Vol. 2, p. 870). The court must have overlooked this testimony, for they say that he must have known of the approximate time of Bell's invention, because the subject of the invention itself was often referred to in the Harrisburg and Mechanicsburg papers. He did not know but Bell had been at work on it as he himself had been for many years. The date of the patent was no guide to the date of the invention

IV. *Drawbaugh's Visit to the Centennial.*

The failure of Drawbaugh to ascertain, when visiting the Centennial Exhibition whether the telephone instruments there exhibited by Bell were similar to his own, seems to have been regarded by the court as strong evidence against his claim. But the court, after citing questions and answers from 386 to 398, inclusive, overlook the answer to the very next question, in which Drawbaugh testifies that none of the instruments he saw at Philadelphia were the instruments represented in the cuts of Bell's instruments as given in the record in this case.

The testimony of Professor Barker (Add. Proofs, p. 37) says that the Bell instruments were not easily accessible in the building at that time. They seem to have been merely exhibited to invited individuals at times of private tests. A fair inference from Drawbaugh's answers cited in the opinion of the court, and the one omitted, is that he saw the instruments he supposed to be the subject of comment, and they were not telephones at all, but were harmonic telegraphic instruments, which his answers fairly describe.

V. *Drawbaugh's Pursuit of his Invention.*

The court says that he had apparently lost all interest in talking machines from 1876 to 1880. Such a conclusion could only be reached by overlooking the evidence of many witnesses. Among these are Stees and Johnston, who operated his carbon transmitter J at Harrisburg in May, 1878, months before the Blake transmitter was invented (Add. Proofs, pp. 198 and 209). He was constantly exhibiting his telephones during the whole of those four years to numerous witnesses, as will readily be seen by citations in the accompanying brief; but what is absolutely conclusive on this point is the fact that he made the most effective and finished telephones from 1876 to 1880.

VI. *Drawbaugh's Neglect to Apply for a Patent.*

"The cost of an application for a patent being small, the failure of Drawbaugh to make such application is taken by the court as evidence that he had no invention. But this view leaves out of consideration the certainty of interference proceedings, the cost of which he was advised would be enormous, which advice has since been abundantly justified.

VII. *The Tests at New York and Philadelphia.*

Successful tests of Drawbaugh's instruments, both original and reproduced, were made in New York in 1882 and in Philadelphia in 1885.

The court says that: "It is substantially conceded that the test in New York was a failure;" that "Occasionally sound was heard, and sometimes a word, but it would not transmit sentences." That this was a very material error is shown by the testimony of Mr. Benjamin, at page 1278 of Def. Vol. 2, and by other witnesses. So far from it being conceded that the test at New York was a failure, it was conceded by complainants' counsel, Mr. Storrow, that it was a success. Concerning the single instrument F, he said: "There were one hundred and thirty-seven phrases uttered into it on the second day; seven of those were understood, and some words of seven more, and that is all. The third day they got better. They uttered one hundred and seventy-five phrases into the transmitter; thirty-five of those were heard." (Oral argument in the Circuit Court, p. 92, filed here.)

The court was of the opinion that the instruments afterwards reproduced and tested at Philadelphia were "not the same," but "differently constructed;" but the Bell Company's expert, Pope, swore that they differed only in being constructed more carefully, and with better workmanship (Complainant's Reply, p. 176).

In the opinion of the court in this very case, it is said of Bell's original instrument: "The particular instrument which he had, and which he used in his experiments did not under the circumstances in which it was tried reproduce the words spoken so that they could be clearly understood, but the proof is abundant and of the most convincing character that other instruments carefully constructed and made exactly in accordance with the specifications, without any additions whatever, have operated and will operate successfully."

The court said the instruments were used in a different way at Philadelphia than at New York; that is to say, that at New York they rested on a table, while at Philadelphia they were held in the hand. But Prof. Barker testified that he used them both ways at Philadelphia, and that they worked best when standing on the table as they did at New York. (Barker,

Ans. 81 and 84, Def. Add. Proofs, p. 28.) This evidence is more fully treated in the accompanying brief.

VIII. *The Construction of the Instruments.*

The court said that nobody knew the actual construction of the original machines except Drawbaugh himself. But there is much evidence beside that of Drawbaugh as to their construction, as will be seen by reference to the testimony cited in the accompanying brief, for example, H. K. Drawbaugh could reproduce the machines from memory. (Def., Vol. 1, pp. 566–7, Ans. 129, 130.) Steinberger described one from memory (Def., Vol. 1, pp. 844–6); and so did Schrader (Def. Sur. Reb., pp. 470–1); and see ten others cited in brief.

Finally.

The court says, in its opinion: "We do not doubt that Drawbaugh may have conceived the idea that speech could be transmitted to a distance by means of electricity, and that he was experimenting upon that subject,"—meaning, as is clear from the context, that he did this before Bell's invention.

The Drawbaugh story, then, is no afterthought growing out of Bell's discoveries, but is based upon the admitted facts of a prior conception of the possibility of electric speech-transmission and prior experiments actually made to accomplish it. The same witnesses who satisfied the judgment of the court as to these facts, identify the machines and testify to their successful working, and are neither impeached nor contradicted as to these additional facts. At another point, referring to Drawbaugh, the court says: "He was a skilled and ingenious mechanic. * * * He was also somewhat of an inventor, and had some knowledge of electricity. According to the testimony he was an enthusiast on the subject of the 'talking-machine,' and showed it freely to his neighbors and people from the country when they visited his shop."

Taking these admitted facts together, his prior conception of the possibility of electric speech transmission; his experiments to accomplish it; and, during his experiments his enthusiasm about the talking-machine—how can his *enthusiasm* be accounted for? Is it conceivable that enthusiasm resulted from constant failure? Can it be explained on any other reasonable theory than that his machines were producing the successful results about which the corroborating witnesses so abundantly testify? And why should he exhibit the invention so freely to the surrounding public, if it constantly failed to work when thus exhibited? Did he exhibit it as a failure or as a success? Can his conduct at the time, especially when taken in connection with his contemporary declarations that he had achieved the result, and was going to patent the invention, and wanted financial aid to secure the patents, be reconciled with any other theory than that of success? And is it not clear that the court has erred as to the evidential force of the facts which it admits to have been established?

On account of the errors above referred to, which will be made more apparent by reference to the accompanying brief, and to the end, therefore, that equity may be done, and that this court may, upon fuller consideration and with the advantage of oral argument, revise its former opinion (if revision be right and proper), your petitioners pray that the court may be pleased to take their suggestions under a careful consideration and grant a rehearing upon the points upon which said decision was based, and grant such other relief and order as in equity and good conscience may be proper.

New York, May 1, 1888.

LYSANDER HILL,
GEORGE F. EDMUNDS,
DON M. DICKINSON,
CHARLES P. CROSBY,
HENRY C. ANDREWS,
Of Counsel with Appellants.

The above named counsel filed a brief, discussing at length the evidence applicable to the petition.

On May 14, 1888, *Mr. Justice* **Miller** delivered the opinion of the court:

No Justice who united in the opinion of the court having asked for a rehearing, the application is *denied.*

END OF CASES IN VOL. 126.

APPENDIX I.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

ORDERED, That the first subdivision of Rule 20 be amended so as to read as follows:

RULE 20—PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the Court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the Court of Claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counselors of this Court, must be first filed.

Promulgated October 31, 1887.

APPENDIX II.

Supreme Court of the United States.

WEDNESDAY, JANUARY 4, 1888.

APPOINTMENT OF MARSHAL.

It is ordered by the Court that the following letters and order be entered upon the minutes.

Supreme Court of the United States.
Washington, Nov. 29, 1887.

My Dear Sir:

As the literary and historical labors upon which I am engaged as a co-worker will during the next few years require the whole of my time, I herewith tender you my resignation as Marshal of the Supreme Court of the United States, to take effect on the — day of December next.

In severing my official relations with the Court, I desire to convey to yourself and all its members my warm appreciation of their personal friendship and kindness during the whole of my fifteen years' service.

Sincerely Yours,

Chief Justice WAITE. JNO. G. NICOLAY.

Supreme Court of the United States.
Washington, Dec. 5, 1887.

My Dear Mr. Nicolay:

I found no convenient opportunity of communicating to the other Judges the contents of your letter of the 29th *ulto.*, resigning the office of Marshal of the Supreme Court, until we met in conference last Saturday.

Knowing as we do the great importance of the literary and historical work in which you are engaged, and its constant demands on your time, we have not felt at liberty to withhold our acceptance of a resignation tendered on that account,

but must ask you to allow us to fix the 31st of this month as the date of your retirement, rather than a day which is earlier.

You will take with you when you leave us the best wishes of every one of the Judges, and we shall all remember with gratitude your faithful attention to the duties of your office and your many acts of personal kindness.

Necessarily my intercourse with you has been closer than that of most of the Judges, and it has always been to me of the most agreeable kind.

I have relied on you implicitly in all that pertained to the administration of your office, and have never found my confidence misplaced in any particular.

Your accounts have all been scrupulously exact and in the highest degree satisfactory. I shall part from you officially with sincere regret, but with the hope that our personal relations may continue to be in the future what they have always been in the past.

Very Sincerely Yours,

JOHN G. NICOLAY, Esq. M. R. WAITE.

ORDER.

It is ordered by the Court, that John Montgomery Wright be, and he is hereby, appointed Marshal of this Court, in place of John G. Nicolay, resigned.

Mr. Wright thereupon took the following oath, presented a bond in the penal sum of twenty thousand dollars, as required by law, which was approved, and entered upon the duties of his office:

I, John Montgomery Wright, do solemnly swear, that I will faithfully execute all lawful precepts directed to the Marshal of the Supreme Court of the United States, and true returns make, and in all things well and truly and without malice or partiality perform the duties of the office of Marshal of the Supreme Court of the United States during my continuance in said office. So help me God.

JOHN MONTGOMERY WRIGHT.

Subscribed and sworn to before me, this fourth day of January, A. D. 1888.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

APPENDIX III.

Supreme Court of the United States,

OCTOBER TERM, 1887.

ORDER.

There having been an Associate Justice of this Court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said Court among the Circuits, agreeably to the Act of Congress in such cases made and provided, and that such allotment be entered of record, viz.:

For the First Circuit,	HORACE GRAY,	Associate Justice.
For the Second Circuit,	SAMUEL BLATCHFORD,	Associate Justice.
For the Third Circuit,	JOSEPH P. BRADLEY,	Associate Justice.
For the Fourth Circuit,	MORRISON R. WAITE,	Chief Justice.
For the Fifth Circuit,	LUCIUS Q. C. LAMAR,	Associate Justice.
For the Sixth Circuit,	STANLEY MATTHEWS,	Associate Justice.
For the Seventh Circuit,	JOHN M. HARLAN,	Associate Justice.
For the Eighth Circuit,	SAMUEL F. MILLER,	Associate Justice.
For the Ninth Circuit,	STEPHEN J. FIELD,	Associate Justice.

January 23, 1888.

APPENDIX IV.

In Memoriam.

WILLIAM BURNHAM WOODS, LL. D.

DIED MAY 14, 1887.*

PROCEEDINGS OF THE BENCH AND BAR OF THE UNITED STATES SUPREME COURT.

THE Bar of the Supreme Court of the United States and the officers of the Court met in the Court Room in the Capitol, Washington, on Monday, May 16, 1887, at 12.30 o'clock, to pay respect to the memory of the late *Mr. Justice* WOODS.

On motion, Hon. SAMUEL F. PHILLIPS was appointed Chairman, and Mr. JAMES H. MCKENNEY, Secretary.

Mr. WILLIAM A. MAURY offered the following:

Resolved, That a committee of ten members be appointed by the Chairman to prepare and report on the day named in the following resolution a fitting expression of the public loss caused by the death of WILLIAM BURNHAM WOODS, late a Justice of the Supreme Court of the United States.

Resolved, That when this meeting adjourns it shall be to reassemble in this chamber at 12.30 o'clock in the afternoon of the first day of the next term of the Supreme Court of the United States.

The resolutions being agreed to, the Chairman appointed the committee, as follows, viz:

Committee.

WM. A. MAURY,	A. G. RIDDLE,
J. C. B. DAVIS,	G. A. JENKS,
S. S. HENKLE,	W. D. DAVIDGE,
J. K. MCCAMMON,	NATHANIEL WILSON,
J. HUBLEY ASHTON,	ENOCH TOTTEN.

The meeting then adjourned to the time and place designated in the resolutions.

OCTOBER 10, 1887.

On taking the chair, Mr. PHILLIPS addressed the meeting as follows:

GENTLEMEN OF THE SUPREME COURT BAR:

We are now to resume and conclude proceedings begun at the very close of the last term, upon the lamented occasion of the death of *Mr. Justice* WOODS.

In calling this meeting to order, I may not presume to anticipate the exact terms in which it shall be pleased to record its judgment of the character and services of our distinguished brother.

The largeness of the attendance here, however, says plainly that in your view the career of *Mr. Justice* WOODS does honor to the country and to the profession; that the high offices which with gradually ascending steps he attained were fairly obtained and fitly discharged; and that he went out of this room and laid aside his robes, *clear* in all.

Nor is it too much to add that the life thus ended was true to all duties, whether in the domestic circle or in the social—as citizen or as man. It is a life justly entitled to the sentence, Well done! and becomes an example for all who hereafter are to enter upon the labors and look up to the rewards of the law.

On motion of Mr. A. G. RIDDLE, the following-named gentlemen were added to the Committee on Resolutions: Mr. THOMAS J. SEMMES, Mr. ALFRED GOLDTHWAITE, Mr. VAN H. MANNING.

The committee thereupon retired, and, on returning, reported through Mr. WILLIAM A. MAURY the following resolutions for adoption:

Resolutions.

The Bar of the Supreme Court of the United States and Officers of the Court have come together for the purpose of showing their respect for the memory of the late *Mr. Justice* WOODS, in whose honorable and useful life they see much that deserves to be remembered, and to be held up for the imitation of his countrymen.

Looking back to the beginning of his career, when he entered the bar at Newark, Ohio, and tracing him down the stream of time, we find at every point the evidence of a character intensely devoted to duty.

There existed in this departed judge an uncommon union of patience, moderation, and determination, which had much attracted public attention before his accession to the bench. This feature of his character became very marked in the Legislature of Ohio in 1861, where he displayed great firmness and independence, in the face of censure and even suspicion—so blinded by passion was reason—in contending for the things that made for peace, and in resisting the adoption of war measures, so long as it was possible to hope for good from a policy of conciliation.

But when the die of war was cast, he hesitated not a moment as to the course he would pursue, and his strong patriotic speech in the Legislature in favor of taking up arms in defense of the Union has become historic already.

This speech he emphasized by promptly

*For biographical sketch of *Judge* Woods' life see Vol. 1, Digest United States Supreme Court Reports, by the Lawyers' Co-op. Pub. Co.

drawing his sword, which he did not sheathe until after peace had been firmly established. His career in the army was distinguished, and, as was to be expected in so earnest and sterling a character, he was always at the front and took part in a number of pitched battles.

He was made a full Brigadier-General on the recommendation of Generals Grant, Sherman and Logan, and afterwards received the brevet of Major-General for gallant and meritorious services. It was in Alabama that General WOODS was mustered out of service, and there he determined to take up his abode and engage in cotton planting in conjunction with the law That he soon commended himself in no small degree to the people among whom he had cast his lot is evident by the fact that in 1868 he was elected the chancellor of the district in which he lived.

To the duties of that position he dedicated himself with such ability, assiduity, and singleness of purpose, that by the following year the distinction he had already attained as chancellor formed one of the strongest grounds on which he was appointed the Circuit Judge of the Fifth Judicial District of the United States, an office which Congress had just created. That he administered the duties of his new office, sometimes most delicate and perplexing, owing to the disturbed political condition of parts of his circuit, to the satisfaction of all, is established by abundant testimony; and an examination of the four volumes of his reports of cases decided in his circuit will show the learning, the fidelity, and the ability he brought to the discharge of his duties both as Circuit Judge and Circuit Justice.

The words of the Chief Justice of Georgia as presiding officer at a banquet given to *Judge* WOODS at Atlanta by the bar, on the occasion of his removing from that city, to which he had changed his residence some years before, to the seat of the National Government to take his place on the bench of the Supreme Court of the United States, would be a proud epitaph on his tomb.

Referring to *Judge* WOODS, *Chief Justice* JACKSON said: "We are proud of him because he is identified with us, and while serving as a Judge in our midst has known nothing but the law, and been loyal to nothing but the law."

It may be truly said that as a Judge of the Supreme Court of the United States he exhibited great ability and a most praiseworthy industry, and that he possessed in a high degree the invaluable judicial quality of attentiveness to the arguments at the bar.

Of this departed, able, upright Judge we believe it can be truly said that he never delayed justice to any man.

Resolved, (1) That the Bar of the Supreme Court of the United States and the officers of the Court are profoundly sensible of the loss that has been sustained in the death of WILLIAM BURNHAM WOODS, who has illustrated his country as patriot, citizen, soldier, and jurist.

(2) That we tender the family of the deceased the assurances of our sincere sympathy.

(3) That the Chairman be, and he is hereby, requested to transmit a copy of these proceedings to the Attorney-General of the United States, with the request to present the same to the Supreme Court of the United States for such action thereon as is usual and proper according to the course of the Court.

(4) That the Chairman be, and he is hereby, requested to transmit an engrossed copy of these proceedings to the family of the deceased.

REMARKS OF MR. WILLIAM A. MAURY.

I am sure, Mr. Chairman, that all who knew *Mr. Justice* WOODS must share the feeling with me that this occasion should be made profitable by recalling and dwelling upon the things in his career that deserve to be remembered.

Sir, his fellow-countrymen of all professions and callings would do well to bear in mind that his eminent success was in great part due to his spotless character and single-hearted dedication to duty; to the fact that to him nothing was irksome or to be neglected that lay in the path of duty; that duty in all circumstances and all conditions was to be followed rather than life. Such was his religion.

When this is said it is already said that he was true in every relation he held to the Republic; that the ermine she placed on his shoulders was laid down without spot or blemish; that as a soldier he defended her flag on many a bloody field; that when peace came he was as prompt to beat his sword into a plowshare as he had been to draw it from the scabbard.

To his lasting honor be it said, that his first and guiding principle of action as a Judge and Justice of the Fifth Circuit was to win back the estrangement and alienated affections of the people of that quarter of the Union by proving that his sole mission among them was to administer justice without fear or favor, to the rich and the poor alike. Permit me, sir, to read his noble words upon that interesting occasion referred to in the report of the committee when the Chief Justice of the State of Georgia indulged in a strain of eulogium that was as honorable to him as to our deceased friend to whom it was addressed. It was in reply to these allusions to himself that *Judge* WOODS gave expression to the sentiments I now read:

One word on another subject: Since I have sat upon the Federal Bench in this circuit I have kept one thing steadily in view, and that was so to administer the law as to encourage the sentiment that the courts of the United States were not courts of a foreign jurisdiction, but courts which belonged to the people of the districts in which they were held, in common with all the peoples of the United States, not organized to oppress, but to protect them in their rights and mete out even-handed justice to all classes.

* * * * * * * *

I hope to see this sentiment grow. I do want the Federal Courts to be looked upon engines of oppression, organized at Washington by an alien government, but courts to which the people may confidently turn for fairness justice, and the impartial administration of their own laws, both State and national—courts held by their own fellow-citizens for the benefit and protection of all the people of all the States of a common country.

It is proper to say that on the same occasion another judge of the State of Georgia chara

terized *Judge* WOODS as "eminently a working judge."

That he succeeded well in impressing himself favorably on the people of Alabama is shown by the tribute paid to his memory at the meeting of the bar held in Montgomery, where it is said, after speaking in high terms of his ability as a judge, "he was always welcome to our homes and firesides, and there by his conduct and bearing endeared himself to our hearts and proved himself in every relation a gentleman; and in his death we mourn not only the loss of an able, just, and upright judge, but that of one whom we loved to esteem a friend."

It is fit to be recalled at this time that he was deemed worthy of the honor of valedictorian of his class at Yale College; and that in the year 1857 he was speaker of the popular branch of the Legislature of Ohio. He was indeed a leading spirit in that Legislature, and his voice for war in 1861 was enough to quell opposition and make unanimous the vote to put the State on a proper military footing. As said a member of the Licking County Bar, referring to the part *Judge* WOODS took in this memorable and exciting legislative struggle, "his speech preceding the vote electrified us all. He was for the Government and the integrity of the nation."

There was in *Mr. Justice* WOODS a combination of prudence in counsel and intrepidity in action which is not often seen in the same character; for, as the ancient historian says, timidity is usually the outcome of caution, and rashness of daring. But as that historian also said of another, so may we say of our deceased friend, "*Ac sane, quod difficillimum in primis est, et prelio strenuus erat et bonus consilio.*

There was a manliness, a sincerity, a directness, and an abhorrence of cant and pretension about him that marked him as a sterling character and "gave assurance of a man."

It cannot be said of him, as a judge, that he "met the cause half way" or gave occasion to a party to say "his counsel or proofs were not heard," for his bearing on the judgment-seat was marked by the strictest attention to the arguments of the bar. He possessed in an eminent degree that "patience and gravity in hearing" which Lord Bacon tells us is "an essential part of justice." He was not "an over-speaking judge," nor first to find what he might have heard, in due time, from the bar. His nice sense of the proprieties of his office saved him from all these blemishes.

He had a decided aptitude for the law of patents, and was felicitous in describing all sorts of mechanical contrivances.

An examination of the reports of the Supreme Court will show that he bore his fair share of the labors of that tribunal, which is alone sufficient to prove that he was fitted for the position he held.

It was by merit and not by favor that he won distinction as a soldier and a judge.

Mr. Chairman, I hold in my hand a copy of the brief remarks of Mr. W. A. King, a life-long friend of *Mr. Justice* WOODS, made at a meeting of the Licking County Bar Association a few days after his death, and I deem it a duty I owe to his memory to conclude at this point what I have to say, and read the faithful portraiture drawn by the hand of one who knew the deceased so long and so well.

"Mr. CHAIRMAN: My acquaintance with the late *Justice* WOODS extended over the greater part of my life; but for a number of years it was my privilege to be associated with him in business, and upon the most intimate terms of personal friendship. I therefore deeply lament with you, to-day, the loss which the country has suffered in the death of an eminent citizen, and also desire to express my sense of personal bereavement over the loss of a valued and life-long friend.

"My memories of *Judge* WOODS are all of the happiest character. During our long acquaintance and association together I cannot now recall one unkind word or act from him; he was ever to me the same genial, agreeable, and companionable man.

"As a lawyer *Justice* WOODS was distinguished for the accuracy, as well as for the extent, of his learning. He also possessed a cultured literary taste, and was familiar with the great classics of our language. Among his many rare qualities, however, there were two which, next to his high character and sterling worth as a man, impressed me more than all others. One of these was a high purpose, an honorable ambition to excel in whatever he undertook, which controlled his whole life; and the other was a tireless industry, and close application to study, to thoroughly qualify himself for any and every position, either in private or public life, to which he aspired. These two traits of character were displayed by him very early in life. After spending three years in study at Western Reserve College, in this State, he, without difficulty, entered the senior class at Yale, where he immediately took high rank as a scholar; a rare achievement indeed, when we reflect how difficult it is to gain admission to the first class in that venerable seat of learning.

"As another illustration, I remember his election to the Legislature of this State, nearly thirty years ago. After his election he resolved to become the presiding officer of the branch to which he had been elected, and immediately gave his attention to the study of parliamentary law, the intricacies of which he so thoroughly mastered in a short time, that when he became speaker of the House of Representatives he proved himself to be one of the most ready, capable, and brilliant presiding officers that that body has ever had. Before the expiration of his term of office the great civil war was begun, which so deeply stirred the patriotic impulses of his heart that he determined at once to retire from his position in civil life, go to the front, and battle for our country and her flag. With all the ardor of his nature he threw himself into his new calling, and in a short time had so mastered the art and science of war that, from the very first, he became conspicuous as an accomplished and gallant soldier. He participated in every battle of importance from Fort Donelson to Vicksburg, from Chattanooga to Atlanta, and from "Sherman's March to the Sea" to Washington. In talking with a comrade of General WOODS after the war, he told me that the men under his command at first regarded him as a severe and too strict disciplinarian; but when they got into their first battle they realized the value of this strict discipline and were filled with admira-

tion for their gallant commander, who was always in the thickest of the fight and never failed them in the hour of danger.

"After the close of the war, General WOODS was appointed Circuit Judge of the United States for the five Gulf States, a most trying position for a northern man, and especially for one who had so recently been engaged in making war upon them; and it reflects the greatest credit and honor upon his high character as a man, and his ability as a jurist, that he at once won the confidence and esteem of the most extreme men who fought on the other side. Of the many high encomiums paid him by the southern press and bar at the time, I recall one from the *Mobile Register*, then edited by John Forsyth, an extreme southern man, who, after praising *Judge* WOODS for his ability as a lawyer and his impartiality as a judge, remarked that President Grant must certainly have made a mistake in selecting *Judge* WOODS for this position, as he could not believe that the President ever *intended* to confer so great a favor upon the southern people; and after his elevation to the Supreme Court, *Justice* WOODS was assigned to his old circuit by the expressed wish and at the earnest request of the leading members of the bar of those States where he had already spent twelve of the best years of his busy life.

"Thus we have seen that our distinguished brother and friend has adorned every position which he has held in public life, whether as statesman, jurist, or soldier, and has reflected honor upon himself, upon us, his brethren of the Bar, and upon this city, the place of his birth.

"I now move, Mr. Chairman, that his honor *Judge* Irvine be requested to adjourn Court when it convenes this afternoon, out of respect for the memory of our deceased brother, and that we attend his funeral in a body."

(The meeting was also addressed by Messrs. A. G. Riddle, and Thomas J. Semmes.)

SUPREME COURT OF THE UNITED STATES.

NOVEMBER 7, 1887.

Present: The HON. MORRISON R. WAITE, *Chief Justice;*
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. JOHN M. HARLAN,
HON. STANLEY MATTHEWS,
HON. SAMUEL BLATCHFORD,
HON. HORACE GRAY,
Associate Justices.

The Attorney-General addressed the Court as follows:

May it please the Court:

I have been requested by the Bar and Officers of this Court to present resolutions, recently adopted by them, expressive of their estimate of the life, character, and services of the late *Mr. Justice* WOODS and their sorrow at his death, for such action as the court may see fit to take as to them.

In performing this duty I wish to add a few words, and they need be but few, for the resolutions themselves speak so distinctly and in terms so strong of the true character of our departed friend, there is little room for anything more to be said.

I knew *Judge* WOODS well and somewhat intimately, from the time he came upon this Bench, fresh and vigorous from a field of vast labor and responsibility, second only to the one he entered upon here.

His work on the Circuit had been onerous and exacting, indeed often perplexing and harassing, for during much of that time "even peace was full of horrors."

He came here from that labor well prepared and ready for the great task that lay before him.

Manfully and conscientiously did he address himself to it, and I now say, what I have often said before of him, never did I see one grow and develop in the reports of this Court more rapidly and more decidedly than he, and his portion of the work, from the time he took his seat, January, 1881, was a full share with the other members of the Court. Coming to this Court at an age young enough to add to his already extensive knowledge, he did not fail to do so, with all the aid that energy, industry, and painstaking research could bring him.

He wrote and delivered for the time he was here, a period of not quite five years and a half, one hundred and sixty-three opinions. *Mr. Justice* Curtis—and the country knows well his wonderful ability as a lawyer—for about the same length of time wrote and delivered fifty-one opinions. The reference is not made for comparison or contrast of the merits of the two Judges, but to show that as great and demanding as the work here has grown since the time of *Mr. Justice* Curtis, *Mr. Justice* WOODS was equal to the calls upon him.

I wish to speak of another characteristic of *Mr. Justice* WOODS as a judge.

He was one of the *best listeners* I ever saw in any court; he seemed never to tire or grow weary in the progress of a case, and appeared to hear every word uttered, and to observe everything done. He illustrated very fully what Pliny, speaking of himself in his letter to Arrianus, said: "For my own part, whenever I have to hear a case I give the greatest amount of time which any counsel asks. * * * The very first duty which a judge owes to his position is to have that patience which constitutes an important part of justice. Even superfluous matter had better be brought forward than any really necessary point be omitted."

That patience here referred to marked the bearing of *Judge* WOODS upon the bench to the fullest extent, and it was manifest to all. In his other relations of life, all bear testimony that he was kind, upright, affable and generous, yet firm and true to purpose, and that he adjusted his accounts with society as fully he paid his debts to the high profession of which he was so honorable a member.

With a kind and sincere regard for the memory of one of your number now no more, I ask that the resolutions be spread upon the record of the Court as a truthful testimonial to his worth.

After the reading of the resolutions *Mr. Chief Justice* **Waite** said:

We are grateful to the Bar for this tribute to the memory of our late associate.

What has been said is no more than is just, and it meets our hearty approval.

Mr. Justice WOODS was taken from us in the midst of his usefulness, but the record of his judicial life as Chancellor for the Middle Division of Alabama, as Circuit Judge for the Fifth Judicial Circuit of the United States, and as an Associate Justice of this Court, extends over a period of nearly twenty years of the most active service.

Very soon after he took his seat on the Bench of the Circuit Court he was compelled to deal with questions of the highest importance, novel in their character, and applicable to a new order of things among those whose rights were involved. How well he met them, and with what ability he exercised the duties of his office, is shown by the reports of his judgments and by the esteem in which he was held by all throughout the entire field of his labors.

He brought to this Court a large judicial experience, and from the beginning he was zealous in his work and faithful to every duty. He was an upright man and a just judge.

The resolutions of the Bar and the remarks of the Attorney-General in presenting them will be entered on the records of the Court.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1887.

ORDER.

It is ordered that the following allotment be made of the Associate Justices of this Court among the Circuits, agreeably to the Act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit,	HORACE GRAY,	Associate Justice.
For the Second Circuit,	SAMUEL BLATCHFORD,	Associate Justice.
For the Third Circuit,	JOSEPH P. BRADLEY,	Associate Justice.
For the Fourth Circuit,	JOHN M. HARLAN,	Associate Justice.
For the Fifth Circuit,	LUCIUS Q. C. LAMAR,	Associate Justice.
For the Sixth Circuit,	STANLEY MATTHEWS,	Associate Justice.
For the Seventh Circuit,	JOHN M. HARLAN,	Associate Justice.
For the Eighth Circuit,	SAMUEL F. MILLER,	Associate Justice.
For the Ninth Circuit,	STEPHEN J. FIELD,	Associate Justice.

April 2, 1888.

APPENDIX VI.

In Memoriam.

MORRISON REMICK WAITE, LL. D.

*Died March 23, 1888.

PROCEEDINGS OF THE BENCH AND BAR OF THE UNITED STATES SUPREME COURT.

On the coming in of the Supreme Court at noon, on the 23d day of March, 1888, *Mr. Justice* **Miller** said:

"It is my painful duty to announce to the Bar of this court that its honored Chief Justice departed this life this morning at half past six o'clock. This is not the occasion to make any extended observations on the subject; this will be done in due time. The court will adjourn until 12 o'clock Monday, April 2d."

SATURDAY, *March 24, 1888.*

In pursuance of a preliminary conference, held at the Capitol this day, notice is hereby given that a meeting of the Bar of the Supreme Court of the United States will be held at the Supreme Court Room at 11 o'clock on Monday, the 26th instant, to take order for their attendance at the funeral of the Chief Justice of the United States, and for a subsequent meeting of the Bar in commemoration of his eminent character and public service in the discharge of that great office.

WM. M. EVARTS, *Chairman.*

JAMES H. MCKENNEY, *Secretary.*

MONDAY, *March 26, 1888.*

The Bar of the Supreme Court of the United States and the officers of the Court met in the Court Room in the Capitol at 11 o'clock in pursuance of the foregoing notice, and the meeting was called to order by Mr. WILLIAM A. MAURY.

On motion of Mr. MAURY, Mr. WILLIAM M. EVARTS was called to the chair.

On motion of Mr. A. G. RIDDLE, Mr. JAMES H. MCKENNEY was elected Secretary.

On taking the chair, Mr. EVARTS said:

GENTLEMEN AND BRETHREN OF THE BAR: We are called together upon the afflictive occasion of the death of the Chief Justice of the United States to take proper order, in our respect for his position and himself, for the attendance of the Bar at the funeral, and for the appointment of a committee to prepare suitable resolutions commemorative of his character, of his virtue, and of his great services, to be presented at some future meeting of the Bar. What is your pleasure, gentlemen, in reference to this arrangement?

Mr. MAURY then presented the following resolution, which was adopted:

Resolved, That the Bar of the Supreme Court will assemble in the Court Room of the said Court at 11:30 o'clock Wednesday, the 28th March instant, and proceed from there in a body to the Hall of the House of Representatives to attend the funeral services of the late Chief Justice.

The Attorney-General of the United States moved that the Chairman appoint a committee of seven members to prepare suitable resolutions to be presented to a future meeting to be called by the Chairman; which was adopted, and the Chairman then appointed the following committee:

The ATTORNEY-GENERAL;

Mr. EDMUNDS and Mr. VEST, of the Senate;

Mr. CULBERSON and Mr. EZRA B. TAYLOR, of the House;

Mr. SHELLABARGER and Mr. ASHTON, of the Bar of the District of Columbia.

Adjourned to meet at the call of the Chairman.

WASHINGTON, D. C., *March 29, 1888.*

The members of the Bar of the Supreme Court of the United States are requested to meet in the Hall of the Court on Saturday, March 31, at 12 o'clock noon, to hear and take action on the report of the committee heretofore appointed to prepare and present resolutions in regard to the death of the late Chief Justice.

WM. M. EVARTS, *Chairman.*

Attest:

JAMES H. MCKENNEY, *Secretary.*

SATURDAY, *March 31, 1888.*

Mr. EVARTS. Gentlemen of the Bar, we have met in pursuance of the Chairman's call for a meeting, and I now move that Mr. EDMUNDS take the chair.

The motion was agreed to.

Mr. EDMUNDS, on taking the chair, addressed the meeting as follows:

GENTLEMEN OF THE BAR OF THE SUPREME COURT:

We have met, as we have on similar occasions often done before, to celebrate our last formal testimonies of respect to the life and memory of the late Chief Justice of the United States. These occasions are always those of calamity to the Bar and people; but certainly, in this in-

*For Biographical Sketch of *Judge* WAITE'S see Vol. 1, Digest United States Supreme Court Reports, by the Lawyers' Co-op. Pub. Co.

stance, the event we mourn was not a calamity to the departed Chief Justice. He has achieved a triumph out of our calamity; a triumph not like those that Roman emperors and conquerors received, when the trumpets sounded war notes and the lictors cleared the way, but the triumph of the just, good, and God-fearing man and judge, who has gone to his reward. But this is not the place for me, gentlemen, to make any extended remarks; I have expressed my knowledge and opinion of the late Chief Justice recently in another place. If there be no objection, gentlemen, the Clerk of the Supreme Court, Mr. MCKENNEY, will please act as Secretary of this meeting.

At a former meeting a committee was appointed to prepare and present at this time such resolutions as they should agree upon touching the sad event which we have met to consider; is that committee ready to report?

Mr. Attorney-General GARLAND. I am instructed by the committee to report resolutions expressive of their views upon this sad occasion, and now read the same:

The Chief Justice of the United States has ended his career on earth.

He proved himself equal to all the duties which the title of his office imports.

It is fitting that the Bar of the Court over which he presided so satisfactorily should express their sense of the calamity that has visited the Court, the Bar in general, and the whole country: Therefore, be it

Resolved, I. That the Bar of the Supreme Court of the United States recognize in the late Chief Justice a combination of qualities that peculiarly fitted him for the difficult and delicate duties of president of a great court; that his ability as a judge, his strong sense of justice and his firm but mild administration, contributed to the public feeling of security and to the confidence that has made the Supreme Court the balance wheel of the Constitution; that they are grateful for the legacy of his noble and unsullied character, adorned by traits that endeared him to all who came in contact with him; that he was a type of the highest product of our free institutions, always maintaining his official and personal dignity, yet always mindful that no one was too humble for his attention and regard; and that they will remember him as one who was an honor to his country and to the whole brotherhood of men.

II. That we tender to the family of the deceased our heartfelt sympathy.

III. That the Secretary is hereby requested to furnish the Attorney-General of the United States with a copy of these proceedings, with the request to present the same to the Supreme Court of the United States for such action thereon as the Court may deem proper.

IV. That the Chairman is hereby requested to transmit an engrossed copy of these proceedings to the family of the deceased.

Under the third resolution, it is made my duty to present these resolutions at the proper time to the Court over which the late Chief Justice presided, when I shall avail myself of the opportunity of expressing briefly some additional views in reference to his career as Chief Justice on this Bench; but now it only remains for me to move the adoption of the resolutions.

Mr. MAURY. I am requested to second the motion for the adoption of these resolutions.

REMARKS OF MR. WILLIAM A. MAURY.

Mr. CHAIRMAN: Seldom has the stroke of death caused such dismay as filled the public mind when the intelligence burst upon it that the Chief Justice of the United States had breathed his last.

It was not generally known that he was ill, and few, if any, of those who knew of his illness apprehended a fatal result.

To the public, then, it was as if he had been stricken down in the fullness of health, and it is not surprising that the event stunned the people among whom he had lived and moved for so many years, and to whom he was endeared by his many public and private virtues.

The Bar, in common with the whole country, recognize the fact that a great pillar of state has fallen, and that the Constitution has lost a firm support.

The Chief Justice was, in very truth, called to the high magistracy he filled. It came to him; he did not go to it.

His country's call found him engrossed in the affairs of a busy life, ripe in experience of the world and versed in the knowledge of men, —qualities which were in no small degree the foundation of that rare and admirable administrative ability which made him the complement of the Court over which he presided.

But the great factor of his efficiency as a presiding officer was the unlimited confidence his associates reposed in his judgment and integrity of purpose. Much of the business that was dispatched by him alone in open court would no doubt have been reserved for the conference room but for that confidence of his brethren and the modesty with which he wore it.

The country will never know what it owed to that rare executive capacity which the departed Chief Justice displayed daily before our eyes. Nor is it accordant with experience that we who were so often before him, or even the tribunal of which he was the head, adequately appreciated in his lifetime that excellency;

> For it so falls out
> That what we have we prize not to the worth,
> Whiles we enjoy it, but, being lacked and lost,
> Why, then we rack the value, then we find
> The virtue that possession would not show us
> Whiles it was ours.

It is due, then, to the memory of the Chief Justice that whenever and wherever his career may be reviewed, and especially on this occasion, prominence should be given to that qualification of his which was so little known to the public, and yet which had so much to do with the efficiency of the Court of which he was a member.

When we consider how many great lawy in different parts of the country are almost known outside the limits of their respec States, because their jealous mistress—the L —will not trust them out of her sight, it n give no surprise that the attention of the co try was not directed to Mr. WAITE until Government selected him as one of her re sentatives before the Tribunal of Arbitrat that sat at Geneva under the Treaty of Wa ington. That honor, the appropriate hart

ger of the greater one that was to come, was entirely unsolicited, and the first intelligence of it excited mingled surprise and incredulity in the busy lawyer upon whom it had been bestowed.

It must have been superior qualities that commended for service as counsel before an international tribunal, and as the associate of the other eminent counsel of the United States who appeared at Geneva, a gentleman whose life had been devoted to the discussion of questions of municipal law in the courts of his State.

How well he acquitted himself in this new field is attested by his argument in reply to Sir Roundell Palmer on the special question whether Great Britain committed a violation of neutrality in supplying the Confederate cruisers with coal. The argument is a demonstration that Great Britain had permitted the war vessels of the Confederate States to make her ports their base of operations against the United States, instead of their own from which they had been shut out by the blockade.

In this argument he displays the clearness and directness which afterwards characterized his judgments, and it is not surprising that this discussion of the rights and duties of neutrals should have settled the question of his capacity when his nomination as Chief Justice came before the Senate.

The late Chief Justice was eminently a man of affairs. He was always aiming at practical results, and was entirely satisfied when he reached them. As a consequence, it will be found that his opinions are unusually free from discussions not demanded by the case before him.

He was modest, yet firm and decided. He neither sought nor shrank from responsibility. He proved himself equal to every occasion. No one ever felt his notice to be a condescension. No subject was too small for his attention that lay in the path of duty.

Looking at his first opinion, we perceive the same ease and simplicity of diction that appear in his latest judgments and nothing to betray the fact that he was but just installed in his great place. From the beginning he was easy and natural in bearing, as one born for high station and conscious of the ability to fill it.

It was one of the fine adjustments of his well-proportioned nature to have a steady, balanced mind fitted to a vivacious, cordial temperament, making a combination that recalls the observation of William of Orange on England's greatest captain, that he had the coolest head and the warmest heart of all he had ever known.

His qualities of head and heart must have been of inestimable value when he was presiding over the deliberations of the conference
om, and we are at liberty to infer his success
this most delicate and difficult branch of his
ties by the fact that none of those thrown
st intimately with the Court ever had reason
suspect the least friction or unpleasantness
tween him and any of his associates.

In the history of the Court there are instances,
rhaps, where the Chief Justice has not been
fortunate in his relations with his associates.
It adds to this triumph of administrative skill
hat it occurred during a period when the Court
as sometimes stirred by dissent as it had never
been stirred before.

It is a beautiful thing to remember of the departed Chief Justice, and as true as beautiful, that in distributing the business of the Court he consulted every one's convenience but his own.

It is the glory of his example, which is truly a legacy to his countrymen, that his great honors were not sought, but came unsolicited. As was said of of one of England's most eminent chief justices—

"He has shown us that real merit will make its own way without any assistance, without any little arts or assiduities, and that the only certain method to have a good reputation is to deserve it. Great and good men, who dare do right without regard to the strength of opposition or the clamors of a multitude, are not only a blessing to the age in which they live, but to succeeding generations, by their being incentives to a similar behavior to posterity."

The meeting was also addressed by Messrs. SAMUEL SHELLABARGER, FRANK M. HACKETT, JOHN RANDOLPH TUCKER and WILLIAM M. EVARTS.

The resolutions were unanimously agreed to; and thereupon, on motion of Mr. SHELLABARGER, the meeting adjourned.

SUPREME COURT OF THE UNITED STATES.

MONDAY, *April 9, 1888.*

Present: The Hon. SAMUEL F. MILLER,
STEPHEN J. FIELD,
JOSEPH P. BRADLEY,
JOHN M. HARLAN,
STANLEY MATTHEWS,
HORACE GRAY,
SAMUEL BLATCHFORD,
LUCIUS Q. C. LAMAR,
Associate Justices.

The ATTORNEY-GENERAL addressed the Court as follows:

MAY IT PLEASE THE COURT: At a recent meeting of the Bar and the officers of this Court, I was requested to present resolutions adopted by them respecting the late *Chief Justice* WAITE, for the proper action of the Court thereon; and now, in complying with that request, I beg leave to read the resolutions.

(Here followed the reading of the foregoing resolutions.)

In connection with these proceedings, I wish to add a few observations by way of a personal testimonial to one I so highly esteemed.

Indeed, this is an occasion for sad and solemn reflection on the part of this Court. It is but a few months since we testified to the worth and merit of *Mr. Justice* WOODS, stricken down in the midst of great labor and pressing official duties; and now, before his grave is green with the first grass of spring, we are mourning the loss of the model Chief Justice, fallen before the same shaft, at a time when all his attainments were needed in the work of this tribunal. Truly, "it is a time for memory and for tears" in this Chamber.

When the resolutions state, not by compari-

son but directly and absolutely, that he was equal to the duties of his office of Chief Justice, in all that is implied in its title, what more can or need be said? That he filled such a place, in fact, is fame and glory enough in the minds of all people who are acquainted with our institutions and understand their workings.

Coming to this post in 1874, when the country was still rocking in the throes of the terrible civil war of four years and more, when many vexed and disturbing questions of the first moment were crowding here for determination, at once he assumed his place with the ease and familiarity of a trained jurist fitted to preside.

In his first opinion (*Tappan* v. *Merchants' National Bank*, 19 Wall.), we see the same plain, direct, clear. cogent, and judicial style that runs through his later utterances, and even characterizes his very last productions.

From this volume of Wallace to the coming 126 U. S. Reports, inclusive, forty-one volumes stand the monuments of his industry, ability, and impartiality in this forum, and they will not fall to pieces at the touch of Time.

I knew him well, from almost the time he took his seat here; and from a close observation and study of him and this Court during that period, if ever the scales of Justice wavered in his hand I did not discover it.

With him as her personification, Justice can well be painted blind.

Literally was he absorbed in the obligations of his office, they were his study by day and by night.

The accumulation of business upon the docket was oppressive to him; it was almost his skeleton at the door. Scarcely did I ever meet with him that he did not have much to say on this subject, and always with an earnest expression of hope that something would be done for the relief of the Court.

With these burdens and cares upon him, calculated to the utmost to fret and annoy, yet he was mild, kind, patient. He has done his work well, whenever and wherever found, and for it he receives universal applause, not grudgingly, but freely and cheerfully rendered.

In the analysis of his work and of his character there will be discovered an inheritance his friends, his afflicted family, and his country will cherish with gratitude and pride, and one that will not perish, but will become more precious as our Government lives and "grows in its growth and strengthens in its strength"—

> Rich in saving common-sense,
> And, as the greatest only are,
> In his simplicity sublime.

I now move that the resolutions be placed among the records of the Court.

Mr. Justice MILLER replied as follows:

The Court receives with the deepest sensibility the resolutions of the Bar in regard to the death of the late Chief Justice, and the remarks of the Attorney-General in presenting them. We fully appreciate the great loss which the country, the Bar, and the officers of the Court have sustained by this sad event.

The blow falls, however, with more force upon the members of this Court, who, associated with him in the performance of its functions, have been accustomed to the benefit of his learning and of his ability in the discharge of the duties common to us all; for not only has he guided our pathway and lightened our labors by his experience, his skill, and his practical tact, but, with an urbanity and kindliness of heart rarely, if ever, excelled, he has won our affections and attached us to himself; so that, while we sympathize in the public loss, each also feels the sorrow of the final separation from a special friend.

Chief Justice WAITE came to the Court in the prime of life, with a vigorous constitution, trained in the ways of the law and the courts by a long and successful practice, and was at once recognized as a man with faculties which fitted him for presiding over this high tribunal. As to his character, his work, and the impression which he has made upon the public, we concur in the remarks made by the Attorney-General.

The results of his labors are seen in the forty-one volumes of the Reports of the decisions of this Court, from 19th Wallace to 126th United States, inclusive. In the opinions delivered by him contained in those volumes will be found the strongest evidence of his industry and his capacity as a judge. His style was eminently judicial, terse, vigorous, and clear. No one who reads them ever doubts what is meant or what the court decided. They will stand as his highest claim to the gratitude of his country and a monument to his diligence and ability.

It has been said by eminent judges, with something of regret, that however important their services, however valuable their decisions and opinions, they are, as compared with other public servants and public men, withdrawn from observation. But the influence of a great judge, like the late Chief Justice, embodied in the reports of a court of high character, will be felt as establishing rules of conduct and for the decision of important questions, and will be commented upon and appreciated by a large class constituting a learned profession, long after contemporary addresses or public efforts of whatever character shall have passed into forgetfulness. To one desirous of posthumous fame, this connection of a distinguished judge with the principles which the courts have laid down as rules governing the rights of persons and property and the powers of government over the citizen must always present a sufficient compensation for the absence of public applause accompanying the discharge of his judicial duties.

Besides these high functions of the office of Chief Justice, it would be unjust to him to omit our testimony to the eminent skill, court and tact with which he discharged those m duties which devolved upon him as the pre ing officer of the Court. He was endowed nature with qualities rarely combined in same individual, of steadiness and firmnes action and courtesy and consideration tow all with whom that action brought him in tact.

The oldest members of this Court kno no one who was better fitted to discharge administrative duties of the office of its C

Justice, or who ever did do so with more acceptability to his associates and to the public at large.

Since we must all die, it may perhaps be said of *Chief Justice* WAITE that the inevitable event came to him in a manner as near to what one could have desired it to come as was possible.

Up to within a week of his death he was in the most vigorous health, and actively engaged in the discharge of his official duties. On the morning of Monday, the 19th day of March last, the Court met after a recess of four weeks. He was present, and had an opinion ready for delivery in one of the most important causes decided while he was upon the Bench, the great Bell Telephone suits, which had been before the Court for a year.

During the recess he had written the opinion of the Court, but upon the morning of its meeting, feeling slightly unwell, he requested one of the junior Justices to read it for him. This occupied nearly two hours, thus showing the immense amount of labor he had bestowed upon its preparation during this interval, which the public supposed was one of recreation for the Justices of the Court.

As soon as the opinion was read the Chief Justice returned home and went to that bed from which he never again arose. After an illness of four days, in which his suffering was not very great, on the morning of Friday, the 28d day of March, at half past six, being assisted to turn over in his bed, he said, with apparent satisfaction, "I feel better." He then asked for a drink; the nurse stepped away a moment in the same room to get a glass of water, and when she returned to the bed he was dead. Thus, without a long or painful illness, without a struggle, in the midst of his usefulness, and just at the conclusion of what was one of the ablest and most important judicial decisions of his life, he passed away. Who does not wish that when his own end shall come it may be like this?

The resolutions of the Bar just presented to us, with the remarks of the Attorney-General, will be placed upon the records of the Court.

I have also received resolutions adopted by the Senate of the State of Ohio, the State from which the Chief Justice was appointed to this Court, expressive of their admiration and sense of the great loss. They will also be spread upon the records; and it is ordered that all proceedings in relation to the death of the late Chief Justice, which may be received by the Clerk, be placed on the files of the Court.

GENERAL INDEX

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK,

123, 124, 125, 126.

OCTOBER TERM, 1887.

ABANDONED AND CAPTURED PROPERTY.

1. The secretary of the treasury's approval of expenses in the collection and sale of abandoned property is conclusive evidence that they were proper and necessary, in the absence of fraud. *United States* v. *Johnston*, 389

2. Allowance of expenses by the secretary is not reviewable, as to amount, by the courts. *Id.*

ACCOUNT. See also OFFICE AND OFFICER, 2; PARTNERSHIP, 3; SETTLEMENT.

The statement of an account must be adopted by one party, and submitted as correct to the other, to constitute an account stated. *Nutt* v. *United States*, 821

ACTION OR SUIT. See also APPEAL AND ERROR; BONDS, 10, 11; DUTIES, II., III.; MORTGAGE, 6; PATENTS, 48; PUBLIC LANDS, 35, 36, 39; REMOVAL OF CAUSE; REPLEVIN; SALVAGE, 3; STATE AND STATE OFFICERS; TRUSTS, 1.

1. If an Act conferring jurisdiction is repealed without reservation as to pending cases, they fall with it. *Sherman* v. *Grinnell*, 278

2. The United States can be sued for such causes and in such courts only as it has by Act of Congress permitted. *United States* v. *Gleeson*, 421

ADMIRALTY. See also COLLISION; SALVAGE; SHIPS AND SHIPPING.

Findings of fact in an admiralty case have the same effect as a special verdict in an action at law. *The Maggie Smith* v. *Walker*, 175

ALIEN. See also HABEAS CORPUS; STATE AND STATE OFFICER, 4.

1. A Chinaman who departed from the United States in 1883, and then received the certificate of identification under the Act of 1882, and returned to the United States in 1885, is not subject to the Act of 1884 in respect to the certificate; his case is governed by the Act of 1882. *United States* v. *Jung Ah Lung*, 591

2. When such certificate is lost or stolen, the district court may receive other evidence of the right of a Chinese laborer to enter the United States. *Id.*

AMENDMENT. See APPEAL AND ERROR, 64, 86, 93; PLEADING, 2.

APPEAL AND ERROR.

I. WHEN LIES; JURISDICTION; AMOUNT INVOLVED.

II. APPELLATE JURISDICTION OVER STATE COURTS.

III. TIME AND MANNER OF TAKING; EFFECT.

IV. RECORD.

V. HEARING AND DETERMINATION.

VI. PRACTICE GENERALLY; MOTIONS; DISMISSAL; JUDGMENT; REHEARING, ETC.

See also ADMIRALTY; CASES CERTIFIED; COLLISION, 2; COURTS, 10; EQUITY, 12; EXECUTORS AND ADMINISTRATORS, 3; JURY, 2; NONSUIT; REMOVAL OF CAUSE, 5–9; REVIEW; SALVAGE, 4.

I. WHEN LIES; JURISDICTION; AMOUNT INVOLVED.

1. A decree remanding a cause for further proceedings is not final. *District of Columbia* v. *McBlair*, 449

2. A decree establishing the right of a junior mortgagee to redeem from a prior mortgage, but not determining the amount he must pay, or the amount due on his mortgage, is interlocutory. *Burlington, C. R. & N. R. Co.* v. *Simmons*, 78

3. Where part of property has been settled for after suit, and before judgment, so that the remainder does not exceed $5,000, a writ of error from the supreme court to the circuit court will be dismissed. *Cox* v. *Western Land & C. Co.* 178

4. In an action on an official bond, in the penal sum of $20,000, of a district court clerk, for not accounting for moneys received, where the record shows that no recovery could be had for more than $517 and a small amount of interest, after deducting the fees due the clerk, the supreme court has no jurisdiction. *United States* v. *Hill*, 275

5. Rev. Stat. § 844, providing for payment by the clerk into the treasury of surplus moneys received by him as fees of office, is not a revenue law within Rev. Stat. § 699, giving

jurisdiction to the supreme court without regard to the sum in dispute. *United States* v. *Hill*, 275

6. Where amount involved is less than $5,000, a decree of the Supreme Court of the District of Columbia not involving the decision of a Federal question, is not appealable to the United States Supreme Court. *Re Craft*, 449

7. On an appeal to the Supreme Court of United States from a territorial supreme court, the amount in controversy is determined by the amount due at the time of the judgment of the territorial supreme court; to determine that, interest must be added to the judgment of the territorial district court until that date. *Zeckendorf* v. *Johnson*, 277

8. In an action to set aside a deed for false representations, where the court found that the value of the land did not exceed $5,000, affidavits showing that that value was not the true one were not admissible to establish the jurisdiction of the Federal supreme court. *Talkington* v. *Dumbleton*, 813

9. Under Rev. Stat. § 707, no appeal lies from a judgment of the court of claims against the United States, "*pro forma* for purpose of appeal," for less than $3,000. *United States* v. *Gleeson*, 421

II. APPELLATE JURISDICTION OVER STATE COURTS.

10. State decisions as to Constitution and laws of State are generally followed by the United States courts. *Bucher* v. *Cheshire R. Co.* 795

11. Such decisions relating to some law of local character are generally conclusive and always entitled to the highest respect in the Federal courts. *Id.*

12. State decisions that a passenger traveling on Sunday, contrary to a statute of the State, cannot recover from the carrier for its negligence, are followed by the Federal court. *Id.*

13. To give the United States Supreme Court jurisdiction, under Rev. Stat. § 709, it must appear of record that a Federal question was specifically set up or claimed in the State court at the proper time and in the proper way, and that its decision was against it. *Brooks* v. *State*, 454; *French* v. *Hopkins*, 586

14. A Federal question is not set up by an objection to the admission of evidence on the ground of incompetency and irrelevancy, and not on the ground that its admission would be in violation of the Federal laws or Constitution. *Brooks* v. *State*, 454

15. Nor by an objection that indictment proceedings violate Federal laws or Constitution, and are without due process of law. *Id.*

16. Nor by an assignment of error to an instruction that the jury might find defendant guilty of murder, if satisfied from the evidence he did murder the person named in the indictment in manner charged in either of the counts, when one count was bad. *Id.*

17. Nor by an instruction that the jury should be governed by the law as given them by the court, and a refusal to allow counsel to read in argument parts of opinion of the State supreme court, where no reference was made to any provision of the Federal laws or Constitution giving defendant any right. *Id.*

18. Nor by refusal of court to admit anyone to court room during the trial, except jurors and witnesses. *Id.*

19. Nor by exceptions to rulings claimed to deprive defendant of impartial jury, where it is not claimed that the Federal Constitution guaranteed such jury. *Id.*

20. Where a State decision of an alleged Federal question was not necessary to its judgment, but the court also put its decision upon another ground not repugnant to the Federal laws or Constitution, the United States Supreme Court has no jurisdiction. *Id.*

21. The United States Supreme Court cannot review a State judgement, unless it decides a Federal question against plaintiff in error. *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.* 607

22. Nor can such judgment be reviewed on the ground that the obligation of a contract has been impaired, unless some State statute has been upheld by it. *Id.*; *Kreiger* v. *Shelby R. Co.* 675

23. Any enactment to which the State gives the force of law is a State statute within the law relating to the jurisdiction of the United States Supreme Court. *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.* 607

24. But when the State court gives no effect to a subsequent State law, and decides on grounds independent of it that the right claimed was not conferred by the contract, the court has no jurisdiction. *Id.*

25. The judgment of a State court, construing a State statute, not conflicting with the Federal Constitution or laws, is final, and not reviewable in the Federal supreme court. *Stryker* v. *Crane*, 194

26. In an action involving the ownership of real property, the supreme court is controlled by the decisions of the State in which located. *Clement* v. *Packer*, 721

27. Where the single question presented to the State court was whether there had been partition of lands between tenants in common, its decision that the proof was insufficient to establish partition, decides no question of Federal law, and is not subject to review in the United States Supreme Court. *Phillips* v. *Mound City Land & Water Asso.* 588

28. Decision of State court affirming a foreclosure sale of mortgaged property as a whole, when it was capable of division into parts, involves no Federal question. *French* v. *Hopkins*, 586

29. Jurisdiction of United States Supreme Court, under Rev. Stat. § 709, for review of State decision, does not depend upon citizenship of parties, but on questions involved. *Id.*

30. Whether lands sold by the United States are taxable within a year after title passed from the government is not a Federal question. *Stryker* v. *Crane*, 194

31. State decision affirming constitutionality of statute validating a void assessment without giving landowners a hearing thereupon, is against a right claimed under the Four-

teenth Amendment, and is one which the United States Supreme Court may review. *Spencer* v. *Merchant*, 763

32. When the Legislature ascertains for itself, and settles, the sum to be raised by tax, and the benefited district, its action is conclusive and beyond review. *Id.*

33. Where the work is one which the State has authority to do and to pay for by assessment on the property benefited, objections that the sum raised is exorbitant, and that part of the property assessed was not benefited, presents no question under the Fourteenth Amendment. *Id.*

34. In a lawsuit for taxes, the real owner of land setting up their payment by another, the question whether he thus became obligated to repay the latter is not a Federal question. *Chapman* v. *Crane*, 285

35. If decision of Federal question by State court is rendered unnecessary by the view the court properly takes of the case, within scope of pleadings, the judgment is not open to review in the Federal supreme court. *Id.*

36. Injunction restraining replevin in court established under authority of United States does not necessarily involve Federal question. *Re Craft*, 449

37. Suit for perpetual injunction against building bridge over navigable river, in case where Congress has not prohibited it, is not a suit arising under United States laws. *Willamette Iron Bridge Co.* v. *Hatch*, 629

38. Judgment of State court in an action to enforce a contract for the use of a patent, holding that the question of the validity of the reissue of the patent could not be contested in that action, and assuming jurisdiction to render judgment against the defendant, involves a Federal question which the United States Supreme Court may review. *Dale Tile Mfg. Co.* v. *Hyatt*, 688

39. An action to enforce or set aside a contract for the use of a patent is not within the Acts of Congress by which an appeal is allowable, in cases arising under the patent laws, without regard to the value of the matter in controversy. *Id.*

40. A State decision based upon a contract between the parties relating to a patent does not necessarily decide any question depending upon the patent laws of the United States. *Id.*

41. An action upon a written contract between the joint owners of a patent to recover royalties does not present any Federal question, no ruling upon the validity or construction of the patent having been made. *Felix* v. *Scharnweber*, 687

42. A claim against the purchaser of national bank shares for failure to register his ownership in bank books presents no Federal question, the banking law not requiring him to do so. *Le Sassier* v. *Kennedy*, 262

43. The supreme court permits a motion to be made in open court, at suggestion of justice to whom application is presented, for allowance of a writ of error to State court, the case being urgent and important. *Ex parte Spies*, 80

44. The proper practice is to hear counsel in support of the motion on the point whether Federal questions were made and decided in the State court, and upon the character of those questions. *Id.*

45. The writ does not issue as a matter of right; the court should ascertain whether any question reviewable was decided in court below, and whether it is of a character to justify bringing it up for re-examination. *Id.*

46. If it appears that the decision of the Federal question was so plainly right as not to require argument, the writ should not be allowed. *Id.*

III. TIME AND MANNER OF TAKING; EFFECT.

47. Signing of citation in time by lower court is sufficient allowance of appeal. *Brown* v. *McConnell*, 495

48. Citations from Territorial courts may be signed by justices of those courts or by justice of United States Supreme Court. *Id.*

49. Omission to take security does not avoid citation, and permission to supply omission may be given. *Id.*

50. Appeal in open court takes date from its allowance; and, to be kept in force, should be docketed in supreme court before end of term for which made returnable. *Radford* v. *Folsom*, 292

51. Subsequent acceptance of appeal bond by district judge, after term at which decree was rendered and where no citation was ever issued, was no allowance of new appeal at that date. *Id.*

52. Appearance of counsel at present term, on making of motion to dismiss, does not waive citation. *Id.*

53. Where appeal is inoperative because of failure to seasonably docket it, subsequent signing of citation is allowance of new appeal. *Stewart* v. *Masterson*, 507

54. New appeal, if not accompanied by another bond, will be dismissed, unless appellant shall, within time allowed by court, file proper bond. *Id.*

55. Appeal will be dismissed where appellant's excuse for failure to docket case at return term is not sufficient, and transcript of record was not lodged in office of clerk until after return term, and no attempt was made to get it upon docket until another term had passed. *Fayolle* v. *Texas Pac. R. Co.* 538

56. New suits to enjoin plaintiffs in error from further violation of ordinance which was foundation of prosecution pending on error are not violations of *supersedeas*. *Natal* v. *Louisiana*, 238

57. Under Rev. Stat. § 1007, the *supersedeas* operates only on the judgment appealed from, and not on the questions involved, considered apart from the particular suit in which they were decided. *Id.*

IV. RECORD.

58. The initials "A. B." are not the signature of the judge, or a sufficient authentication of the bill of exceptions, or sufficient evidence of its allowance by the judge. *Origet* v. *United States*, 743

59. The opinion of the Louisiana State court is considered by the United States Supreme Court, on writs of error, as part of the record. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.* 607

60. The opinion of the State court, written and recorded as required by the State statute, may be examined by the United States Supreme Court to ascertain the grounds of its judgment. *Kreiger* v. *Shelby R. Co.* 675

61. Certificate of State court, allowing writ of error, that Federal question was decided against plaintiff in error, cannot supply want of evidence to that effect in the record. *Felix* v. *Sharnweber,* 687

62. Where there is no assignment of errors in transcript, specification thereof in brief, or statement of case, nor reference to pages of record relied on to support points, case will be dismissed. *Benites* v. *Hampton,* 260

63. Assignment of errors on appeal from district to supreme court of Territory cannot be accepted in Federal supreme court. *Id.*

64. If party in regard to whom the necessary citizenship is not shown actually possesses such citizenship, record cannot be amended in the United States Supreme Court to show the fact; but the circuit court, in its discretion, may allow that to be done when the case gets back there. *Johnson* v. *Christian,* 820

65. Omissions in record may be brought before the court by certiorari by appellees. *Hoskin* v. *Fisher,* 759

V. HEARING AND DETERMINATION.

66. Abstract questions of law are not considered on writ of error, unless it appears from record that facts were such as to make such questions material to issue. *New York, L. E. & W. R. Co.* v. *Madison,* 258

67. On an application to the supreme court for a writ of error to a State court, upon the ground that a State statute, as construed by the latter court, deprived the petitioners of a trial by an impartial jury, the supreme court will only consider rulings on the challenges of the jurors who actually sat at the trial. *Ex parte Spies,* 80

68. Instruction by State court to jury, not presenting Federal question, is not considered on appeal. *Hannibal & St. J. R. Co.* v. *Missouri River Packet Co.* 781

69. Improper admission of evidence is no ground of error, where jury were instructed to disregard it, and could not have been misled. *New York, L. E. & W. R. Co.* v. *Madison,* 258

70. Under exception by defendant to court's direction to find for plaintiff, he may show there was sufficient evidence to go to jury, or that questions of law apparent upon record would control case, in opposition to direction. *North Pennsylvania R. Co.* v. *Commercial Nat. Bank,* 287

71. General exception to whole of charge cannot be regarded. *White* v. *Barber,* 243

72. Exception upon entire misconception of charge of court is not well taken; and a hypercritical criticism to part of charge will not be sustained. *Hartranft* v. *Langfeld,* 672

73. Where copies of patents offered in evidence are not in the record, an exception to a refusal to admit them in evidence cannot be sustained. *Clement* v. *Packer,* 721

74. Objection to use of letter in evidence, on ground that it was obtained from defendant by unlawful search and seizure, not made in court below, cannot be considered. *Ex parte Spies,* 80

75. Objection that defendants, foreign born, were denied by trial court rights guaranteed by treaty, cannot be raised for first time in supreme court. *Id.*

76. Objections that defendants were not actually present when sentence was pronounced cannot be made if record shows that they were present. *Id.*

77. Objection that trial was had by court without jury cannot be raised for first time on appeal. *Dundee Mortgage & T. I. Co.* v. *Hughes,* 357

78. Rulings of circuit court upon trial by it without jury, when there has been no written waiver of jury filed with clerk, are not reviewable. *Id.*

79. Objections to form of information of seizure for forfeitures under Revenue Laws, not made below, must be regarded as having been waived or cured by the verdict. *Freidenstein* v. *United States,* 736

80. Defendant's exception to denial of motion for nonsuit is waived by his offer of evidence in support of defense. *Northern Pac. R. Co.* v. *Mares,* 296

81. Findings of fact by lower court cannot be re-examined; and errors assigned, relating only to sufficiency of evidence to support findings, are not considered. *Zeckendorf* v. *Johnson,* 277

82. Findings of fact by referee, on which judgment was entered in court below, are conclusive on writ of error. *Roberts* v. *Benjamin,* 334

83. Exceptions to admission of evidence, or to findings of, or refusal to find, facts by referee, cannot be considered where case was tried by circuit court without filing written waiver of jury. *Id.*

VI. PRACTICE GENERALLY; MOTIONS; DISMISSAL; JUDGMENT; REHEARING, ETC.

84. Where stipulation is made to submit cause without oral argument, without any time being mentioned, motion to require defendant in error to submit under Rule 20, to which no reference is made in stipulation, will be denied if opposed. *Glenn* v. *Fant,* 353

85. Where, during pendency of writ of error to State court to review its affirmation of judgment on a conviction for murder, the plaintiff in error escaped and is not within the control of the court below, the submission of the cause will be set aside; and, unless plaintiff is brought within jurisdiction of court below within time specified in order of court, the cause will thereafter be left off the docket until directions to the contrary. *Bohanan* v. *Nebraska,* 854

86. Where, before stipulation for dismissal has been signed, some of plaintiffs in error as-

sign their interest in suit, entry of dismissal in vacation may be amended by adding words "without prejudice to right of assignee to proceed as he may be advised in court below for protection of his interest." *Woodman* v. *Missionary Society of M. E. Church*, 352

87. It having been suggested that the suit had been compromised, and no cause having been shown, within the time fixed by the court, why the case should not be dismissed, the suit was dismissed. *Addington* v. *Adams*, 853

88. It having been shown to the court that, by arrangement, the defendant in error is no longer a contestant in the cause, the court, after notice to the parties and hearing, dismissed the case, with costs. *East Tennessee V. & G. R. Co.* v. *Southern Tel. Co.* 853

89. Supreme Court of New Mexico, in appeals or writs of error, may render such judgment upon verdicts on all the counts of the declaration, where the evidence does not support the special count, as, upon a consideration of the whole record, justice may appear to require. *Hopkins* v. *Orr*, 523

90. Judgment of supreme court of that Territory, affirming judgment of district court as to principal sum due, and as to interest of 6 per cent upon plaintiff's remitting excess of 4 per cent, is judgment affirming that of district court. *Id.*

91. In such case supreme court may render its judgment against sureties on bond as well as against principal defendant. *Id.*

92. Upon reversal of State judgment the United States Supreme Court will not grant a motion to give effect to its judgment where it does not appear that application has been made to State court to carry mandate into effect. *Royall* v. *Virginia*, 855

93. Judgment amended by instructing court below to amend its decree by describing lands confirmed, and by declaring that if any of lands have been sold by the United States appellees may enter like quantities of public lands, and by directing reference to ascertain what sales have been made. *United States* v. *De Morant*, 565

94. Judgment was reversed on stipulation of parties, costs were paid by plaitiff in error, and cause remanded with instruction to proceed under stipulation. *Union Mut. L. Ins. Co.* v. *Waters*, 474

95. Decree reversed on stipulation of parties, and cause remanded, with instruction to enter decree in plaintiff's favor, as agreed by parties to appeal, but without prejudice to rights of other parties to suit. *Bond* v. *Davenport*, 279.

96. Cause was remanded with directions to take further proceedings therein in accordance with *Metropolitan R. R. Co.* v. *Moore*, 121 U. S. 558 (30: 1022). *Inland & Seaboard Coasting Co.* v. *Hall*, 369

97. Where judgment has been affirmed by a divided court, and no important constitutional question is involved, a rehearing may be denied. *Shreveport* v. *Holmes*, 854

98. Rehearing denied and mandate modified. *Sun Mut. Ins. Co.* v. *Kountz Line*, 79

APPEARANCE. See APPEAL AND ERROR, 52.

ARMY. See also NAVY.

Colonel on retired list of army is not entitled to longevity increased pay, under Rev. Stat. § 1262. *Marshall* v. *United States*, 475

ASSIGNMENT. See CHECKS, 6.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under Texas Law of March 24, 1879, assignment for creditors directing payment of surplus to assignor, after paying consenting creditors, is valid; under the law nonconsenting creditors may garnish assignee for such surplus. *Cunningham* v. *Norton*, 624

2. General description of property assigned is sufficient. *Id.*

ATTACHMENT. See also EQUITY, 4, 5.

1. Attachment cannot issue against national bank before judgment in suit begun in United States Circuit Court. *Pacific Nat. Bank* v. *Mixter*, 567

2. A bond given to dissolve the attachment is not good where an attachment was prohibited by law. *Id.*

3. When Federal marshal takes property of one not named in writ, rightful owner may obtain relief by intervening by petition in action. *Gumbel* v. *Pitkin*, 374

4. Where marshal took possession of goods on Sunday under writ issued on that day, illegal by State laws, he should surrender possession to sheriff appearing with lawful writ from State court. *Id.*

5. Where marshal refused to do so, he is liable in damages for loss caused thereby. *Id.*

6. Where creditor in State court applies to Federal circuit court, that court could administer equity in the case and grant him relief. *Id.*

7. In such case creditor may, by service of notice upon marshal, make constructive levy of State attachment, subject to prior liens, without disturbing marshal's possession. *Id.*

8. Where creditor made himself party to proceedings in Federal circuit court, and proceeded therein against marshal and creditors for whom he had acted, that court will hold marshal liable as garnishee and will give such creditor priority over others. *Id.*

BANKRUPTCY. See also EXECUTION, 4,

1. Where assignment of claim by firm is not within prohibition of bankruptcy law, one partner, who was party to it, cannot show that it was fraudulent against his creditors. *Crawford* v. *Halsey*, 572

2. Assignee has no interest in claim assigned more than two months before bankruptcy proceedings, and is not necessary party to its submission to arbitration. *Id.*

3. Purchaser of claim from assignee in bankruptcy has only his rights. *Id.*

4. Assignee may recover insurance moneys assigned by bankrupt to his wife while in contemplation of insolvency. *Vetterlein* v. *Barnes*, 400

5. Bankrupt's wife is not necessary party de-

fendant to action by assignee against him and insurer to enjoin collection of policies. *Id.*

6. Bank in which deposits from bankrupt estates are made in the name of the United States District Court may keep general account with district court, and need not keep separate account with each bankrupt estate; this is in accordance with Bankruptcy Rule 28. *State Nat. Bank* v. *Dodge*, 458

7. Bank must honor all checks drawn by court as trustee, and need not refuse checks drawn in any particular case, according to its number, beyond amount deposited in bank under that number. *Id.*

BANKS. See also APPEAL AND ERROR, 42; ATTACHMENT, 1; BANKRUPTCY, 6, 7; CHECKS; EQUITY, 4, 5; TAXES, 8–12.

1. Savings banks are not banking institutions in the commercial sense of that phrase. *National Bank of Redemption* v. *Boston*, 689

2. Rents received by receiver of bank, under decree of court, are distributable among its creditors. *Hits* v. *Jenks*, 156

BONDS. See also APPEAL AND ERROR, 4, 5; ATTACHMENT, 2; JUDGMENT, 9; MORTGAGE, 7–9; REPLEVIN.

1. Acceptance and use by railroad company of State aid bonds, issued in violation of State Constitution, does not create a lien in favor of the State, upon its income, of which a purchaser of the bonds can avail himself as against a purchaser of the road. *Tompkins* v. *Little Rock & F. S. R. Co.* 615

2. Neither the State nor its bondholders can sequester income arising from the road in the hands of a new company, organized by its purchasers on mortgage foreclosure. *Id.*

3. The fact that no interest had ever been paid upon State bonds, and that it had run unpaid for ten years, furnishes presumptive evidence to purchaser at auction sale that they were dishonored. *Trask* v. *Jacksonville, P. & M. R. Co.* 521

4. Purchaser of bonds with knowledge of their illegal issue acquires no title thereto which he can enforce as *bona fide* holder. *Id.*

5. Where bonds recite their issue under a certain Act and a vote, on application of "fifty legal voters," in accordance with such Act, they cannot be supported as issued under another Act, which required application by "twenty voters and taxpayers." *Gilson* v. *Town of Dayton*, 74

6. Where bonds are held void in suit between purchaser and town, the purchaser is not subrogated to right of railroad company to enforce collection of appropriation voted by town. *Ætna Life Ins. Co.* v. *Middleport*, 587

7. Where railway bonds contained promise to pay interest on day certain in each year, and further provide, if net earnings are insufficient for that purpose, scrip may be issued at option of company, such option must be exercised at time when it would be required to pay interest in money; and such scrip will draw interest from day on which interest which it takes the place of was due. *Texas & P. R. Co.* v. *Marlor*, 303

8. When option is not exercised on day interest is due to pay it in scrip, bondholder has immediate action for interest money. *Id.*

9. No demand by bondholder is necessary to entitle him to payment of interest in money in such case. *Id.*

10. Creditor of county cannot sue on collector's bond, conditioned to pay over State and other revenue collected, for breach of its condition. *Missouri* v. *Winterbottom*, 124

11. Such action is barred by settlement made with county by collector. *Id.*

BOUNDARIES.

The history of the Florida boundary stated. *Coffee* v. *Groover*, 51

BRIDGES. See also APPEAL AND ERROR, 37; WATERS AND WATERCOURSES, 7.

1. The distance of 160 feet between the piers of the bridge across the Missouri River at Kansas City, required by the Act of Congress of July 25, 1886, is obtained by measuring along a line between the piers drawn perpendicularly to their faces and the current of the river. *Hannibal & St. J. R. Co.* v. *Missouri River Packet Co.* 731

2. Such Act is construed with reference to its evident purpose to connect with the exercise of the privilege granted such limitations as guaranty protection to the navigating interests affected by the proposed legislation. *Id.*

BURDEN OF PROOF. See INSURANCE, 8; PATENTS, 58; PUBLIC LANDS, 29, 30.

CARRIERS. See also APPEAL AND ERROR, 12; COMMERCE, 5–7.

1. Carriers are subject to legislative control as to their rates of fare and freight, unless protected by their charters. *Dow* v. *Beidelman*, 841

2. In absence of legislative regulation, courts must decide for company, when controversies arise, what is reasonable. *Id.*

3. The Legislature, in the exercise of its power of regulating freights and fares, may classify the railroads according to the length of their lines, if the same rule is applied to all roads of the same class. *Id.*

4. If the classification operates uniformly, the court cannot decide whether it was the best that could have been made. *Id.*

5. Carrier must deliver cattle to party designated by terms of shipment, or to his order, at place of destination; and where it delivers them to one not entitled to receive them it is accountable. *North Pennsylvania R. Co.* v. *Commercial Nat. Bank*, 287

6. Direction on way-bills to notify named party does not qualify duty of carrier to deliver cattle to order of consignee. *Id.*

7. Last carrier in connecting lines must deliver cattle at place of destination, and to consignee there, if he was made known to it on receiving freight from preceding connecting company. *Id.*

8. Custom of company of delivering cattle without requiring production of bill of lading

or authority of shipper, does not relieve it from liability for cattle wrongfully delivered. *North Pennsylvania R. Co.* v. *Commercial Nat. Bank*, 287

9. Indorsement, by shipper to plaintiff, of receipts taken on shipment of cattle, gave plaintiff right to their possession, and, if necessary, to sell them for payment of drafts taken by him against shipper. *Id.*

10. A passenger dropping a bag containing money and jewelry, while closing a window, cannot recover the loss from the railroad company for its refusal to stop the train in order that he might get the bag. *Henderson* v. *Louisville & N. R. Co.* 92

CASES CERTIFIED.

1. Upon division in opinion of two judges of circuit, points certified to Federal supreme court must be questions of law only. *Jewell* v. *Knight*, 190

2. Whole case cannot be sent up by certificate, nor can splitting up of case into several questions enable court to take jurisdiction. *Id.*

3. When questions certified are not such as court is authorized to answer, case must be dismissed. *Id.*

4. Statement of facts should be of ultimate facts, leaving nothing but conclusions of law to be drawn. *Id.*

5. Whole case cannot be referred to decision of supreme court upon certificate of division. *Smith* v. *Craft*, 267

CERTIORARI. See APPEAL AND ERROR, 65.

CHECKS.

1. Instrument drawn upon bank simply directing payment, to party named, of specified sum of money on deposit with drawee, without designating future day of payment, is a check. *Bull* v. *First Nat. Bank*, 97

2. A check is not due until it is demanded, and is not treated as overdue merely because it has not been presented as early as it might be. *Id.*

3. Drawer is not discharged from liability for want of notice of dishonor, unless he has sustained damage. *Id.*

4. Until check is demanded, purchaser for valuable consideration, without notice of demand in drawer's hands against person to whom check is payable, is protected against its set-off. *Id.*

5. Negotiability is not affected by fact that check is payable "in current funds." *Id.*

6. Check upon bank is not equitable assignment of moneys, where there is only one fifth of its amount on deposit at time. *Florence Mining Co.* v. *Brown*, 424

7. Check not accepted or certified by cashier does not create lien on money which holder can enforce against bank. *Id.*

8. Bank need not take notice of memoranda on check, placed there by depositor for his own convenience. *State Nat. Bank* v. *Dodge*, 458

CHINESE. See ALIEN; HABEAS CORPUS.

CIRCUIT COURTS. See COURTS, 2–10.

CLAIMS. See also COURT OF CLAIMS; INTERNAL REVENUE, 8; LIMITATION OF ACTIONS, 1–3.

1. Report of quartermaster general to Congress, under Act of August 7, 1882, for relief of Julia A. Nutt, is not an award in pursuance of an arbitration; nor is it an account stated. *Nutt* v. *United States*, 821

2. Appropriation by Congress of part of amount recommended by the report to be paid to her, is not an adoption of the report, or a recognition that a larger amount was due. *Id.*

COLLISION.

1. One vessel brought into immediate jeopardy by another's fault is not liable if she has not been maneuvered with perfect skill and presence of mind. *The Maggie Smith* v. *Walker*, 175

2. Allowance of interests and costs in such case rests in lower court's discretion, and will not be disturbed on appeal. *Id.*

3. The 24th Sailing Rule applies only where there is some special cause rendering departure necessary to avoid immediate danger. *Id.*

COMMERCE. See also TAXES, 5.

1. Pa. Act of June 9, 1879, § 16, imposing license tax upon foreign corporations, does not conflict with commercial clause of Federal Constitution or with Fourteenth Amendment. *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 650

2. Only limitation upon power of State to exact conditions allowing foreign corporation to do business is where it is engaged in interstate commerce. *Id.*

3. Power of Congress to control commerce is not restricted by State authority. *Id.*

4. The State may exclude a foreign corporation entirely, or restrict its business to particular localities. *Id.*

5. Iowa Code, § 1553, amended by Act of 1886, April 5, prohibiting a common carrier from bringing intoxicating liquors into the State without first having the certificate therein required, is void as a regulation of interstate commerce. *Bowman* v. *Chicago & N. R. Co.* 700

6. Such statute is not an inspection or quarantine law, and is not a legitimate exercise of police power by the State. *Id.*

7. It constitutes no defense to an action against a carrier for refusing to carry beer into the State. *Id.*

8. State statute requiring locomotive engineers to be licensed is not regulation of interstate commerce, but is valid exercise of police power. *Smith* v. *State*, 508

9. Fee to be paid by applicant for examination is not provision for raising revenue, and is not tax upon transportation. *Id.*

10. State statute which conflicts with actual exercise of powers of Congress over commerce must give way before supremacy of National authority. *Id.*

COMMON CARRIERS. See CARRIERS, 8.

CONFISCATION. See also EVIDENCE, 8, 9.

1. Under Confiscation Act of July 17, 1862, all that could be sold was right to property seized, terminating with life of person for whose offense it had been seized. *Shields* v. *Shiff*, 445

2. Such sale does not affect mortgage on property in favor of third person; and subsequent sale under mortgage is valid. *Id.*

3. Under Act containing pact *de non alienando*, mortgagee can proceed against mortgagor, after latter's expropriation through confiscation proceedings, as though he had never been devested of title. *Id.*

4. No disposition is made by Act of property confiscated after owner's death, but it leaves it to devolve to heirs according to *lex rei sitæ*. *Id.*

CONFLICT OF JURISDICTION. See ATTACHMENT, 3–8.

CONFLICT OF LAWS. See also CONFISCATION, 4.

Mode of transfer of real estate is within jurisdiction of State Legislature, where title has passed from Federal Government and is in controversy between private citizens. *Langdon* v. *Sherwood*, 344

CONSTITUTIONAL LAW. See also CARRIERS, 1–4; COMMERCE; EMINENT DOMAIN, 9; HUSBAND AND WIFE, 5–7; INTOXICATING LIQUORS.

1. New Jersey Act of March 31, 1869, entitled "Supplemental to Act Entitled 'An Act to Ascertain Rights of State and of Riparian Owners in Lands Lying Under Waters of Bay of New York and Elsewhere in this State,'" sufficiently indicates its subject. *Hoboken* v. *Pennsylvania R. Co.* 543

2. The first ten articles of Amendment of Federal Constitution were intended to operate on National Government alone. *Ex parte Spies*, 80

3. Fifth and Sixth Amendments of the Federal Constitution apply to United States only, and not to the States. *Ex parte Sawyer*, 402

4. Provision of same Constitution prohibiting passage of *ex post facto* State laws applies only to legislation concerning crimes. *Id.*

5. Fourteenth Amendment does not take from States those powers of police that were reserved at time original Constitution was adopted. *Mugler* v. *Kansas*, 205

6. It belongs to the Legislature to exercise the police power of the State, subject to the power of the courts to adjudge whether any particular law is an invasion of rights secured by the Constitution. *Id.*

7. The statute of Kansas, prohibiting the manufacture of intoxicating liquors for use as a beverage, is not unconstitutional in respect to the owners of breweries previously established, on the ground that it deprives them of their property without due process of law, although such property is valuable chiefly, if not solely, for the manufacture of such liquors, and although at the time investments were made in such property the manufacture and sale of intoxicating liquors was lawful. *Id.*

8. Exaction of tolls, under State statute, for use of improved waterway, is not deprivation of property within Federal Constitution. *Sands* v. *Manistee River Improvement Co.* 149; *Bugles* v. *Same*, 152

9. Corporations are not citizens within Federal Constitution relating to privileges and immunities of citizens. *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 650

CONSULS.

Consular Appropriation Act, reducing salary of consul at Tangier to that of consul of fifth class, repeals prior Acts placing such consul in higher class. *Mathews* v. *United States*, 127

CONTEMPT. See COURTS, 7; STATE AND STATE OFFICERS, 4.

CONTRACT. See also DAMAGES; FRAUD AND FRAUDULENT CONVEYANCE, 7; FRAUDS, STATUTE OF; HUSBAND AND WIFE, 6; SALVAGE, 3; STATE AND STATE OFFICER.

1. Charge to jury, fairly presenting testimony, with instruction that if dealings of defendant were options to buy or sell at future day, verdict should be for plaintiff; but if they were contracts for absolute delivery of grain, verdict should be for defendant,—*Held*, not erroneous. *White* v. *Barber*, 248

2. Moneys irrevocably set apart by both plaintiff and defendant, his agent, to pay damages upon contracts for purchase of wheat, and actually paid over by agent under rules of board of trade,—*Held*, not recoverable. *Id.*

3. If contract be that promisor shall do one of two things at certain day, at his election, election cannot be exercised after day has passed. *Texas & P. R. Co.* v. *Marlor*, 308

4. Written contract may be varied by subsequent verbal contract, where there is nothing in contract itself requiring it to be in writing. *Teal* v. *Bilby*, 263

5. Where quality of cattle was to be decided by arbitrator, parties must disclose to him any disease which cattle have and which cannot be discovered by careful examination. *Id.*

6. Where one party to contract was to preserve hides of cattle which died and ears of any which had ear marks, and there was no provision when hides of cattle dying should be counted, hides preserved should be counted at the time, with view of making them available for use or sale. *Id.*

7. Practical construction of contract by parties may prevail over its literal meaning, according to which one party seeks to obtain deduction of contract price. *District of Columbia* v. *Gallaher*, 526

8. Nonaction of vendee for enforcement of contract for sale of iron ore, and vendor's subsequent failure to deliver balance of iron ore or call upon vendee to comply with contract, are evidence that it was in fact rescinded by both. *Florence Mining Co.* v. *Brown*, 424

9. Where vendor makes written demand

upon one to whom he had delivered securities for vendee, for their return, on ground that vendee had refused to fulfill contract for their purchase, it is rescission of contract. *Hinchman* v. *Lincoln*, 337

10. Bringing suit by vendor to recover purchase price does not authorize person to whom he had given securities, but who is not vendee's agent, to deliver them to vendee without performance of contract by latter. *Id.*

COPYRIGHT.

1. Rev. Stat. § 4965, limits remedy for infringement of owner's copyright to forfeiture of plates on which infringing photograph or other article is copied, and every sheet thereof; and to further forfeiture of $1 for every sheet found in possession of infringer. *Thornton* v. *Schreiber*, 577

2. Employee in store of infringing firm which has control of plates and of sheets of photographs infringing plaintiff's copyright has not possession of sheets, although he may have principal place in store. *Id.*

3. Words "found in his possession" refer to time before cause of action accrues at which they were found in defendant's possession. *Id.*

CORPORATIONS. See also COMMERCE, 1–4; CONSTITUTIONAL LAW, 8.

1. The Memphis & Little Rock Railroad Company, as reorganized by mortgage foreclosure purchasers in 1877, was not the same corporation as that chartered by the Legislature in 1853, but was a new corporation, subject to the Constitution and laws in force when it came into existence. *Dow* v. *Beidelman*, 841

2. The Massachusetts statutes duly authorized the organization of the American Bell Telephone Company as a corporation, and made the statutory certificate evidence of its corporate existence. *The Telephone Cases*, 868

COSTS. See COLLISION, 2.

COUNTIES. See BONDS, 10, 11; LIMITATION OF ACTIONS, 4–6.

COURT OF CLAIMS. See also APPEAL AND ERROR, 9; INTERNAL REVENUE, 3; LIMITATION OF ACTIONS, 1–3.

1. The court of claims has jurisdiction of an action by a State to recover moneys received by United States from sales of swamp lands granted to the State by an Act of Congress. *United States* v. *Louisiana*, 69; *United States* v. *Alabama*, 78; *United States* v. *Mississippi*, 78

2. Such action is not barred by time until six years after the amount is ascertained from proofs of sales before the commissioner of the general land office. *Id.*

3. Neither court of claims nor Federal supreme court can determine any claim against United States, except in cases defined by Congress. *United States* v. *Gleeson*, 421

COURTS. See also COURT OF CLAIMS; EJECTMENT, 3; INJUNCTION; REMOVAL OF CAUSE.

1. Where power is delegated to tribunal over subject-matter, its acts are binding and valid as to subject-matter. *Sabariego* v. *Maverick*, 480

2. Under Rev. Stat. § 629, circuit court has jurisdiction of suit to enforce performance of contract, such suit being one to recover contents of chose in action. *Shoecraft* v. *Bloxham*, 574

3. Assignee of contract cannot sue for its enforcement in circuit court if assignor could not have done so. *Id.*

4. The circuit court has jurisdiction of an action in ejectment in which plaintiff claims title under a patent from the United States the validity of which is denied by defendant, although no citizenship of either party is alleged. *Doolan* v. *Carr*, 844

5. Facts on which jurisdiction of circuit court rests must, in some form, appear on the record. *Johnson* v. *Christian*, 820

6. Circuit court has jurisdiction of suit for perpetual injunction to restrain enforcement of judgment in ejectment rendered in it, without averment of citizenship of parties. *Id.*

7 Circuit court cannot prevent removal of police judge from office, nor adjudge city officers guilty of contempt in disregarding its order. *Ex parte Sawyer*, 402

8. Federal court cannot stay proceedings in a State court, except under Bankrupt Act. *Id.*

9. The circuit court has jurisdiction in a suit in equity which is ancillary to an action at law of which it has already acquired jurisdiction, although one of the defendants is a citizen of the district of which a portion of complainants were citizens. *Dewey* v. *West Fairmont Gas Coal Co.* 179

10. Equitable powers of Federal courts, as courts of law, to prevent abuse of their process, may be invoked by strangers to litigation without regard to citizenship. *Gumbel* v. *Pitkin*, 374

11. That Federal question was not presented in brief of counsel in State court is not sufficient reason for that court omitting to consider it, where it was fairly presented and necessarily involved in determining case. *Des Moines Navigation & R. R. Co.* v *Iowa Homestead Co.* 202

12. Decree of circuit court entered by direction of district judge, while sitting in that court, is good until reversed; and from it appeal may be taken. *Bakes* v. *Power*, 382

CRIMINAL LAW. See APPEAL AND ERROR, 85; CONSTITUTIONAL LAW, 4; EQUITY, 8; INDICTMENTS; WITNESS.

CUSTOM AND USAGE. See CARRIERS, 8.

CUSTOMS DUTIES. See DUTIES.

DAMAGES. See also EMINENT DOMAIN; EQUITY, 6; PATENTS, 56–61.

1. Damages for breach of contract must be capable of certain ascertainment, and not remote, speculative, or contingent. *Western Union Tel. Co.* v. *Hall*, 479

2. Where a telegraph company omitted to give the proper address in sending a message, and its delivery was delayed for a day, until

the oil thereby ordered to be purchased had advanced in price; and the party to whom the order was addressed omitted to purchase the oil ordered because of such advance, and it does not appear that it was the purpose of the sender to purchase the oil in the expectation of profits to be derived from an immediate resale, or that he could have resold at a profit at any subsequent day,—he can recover only the cost of transmitting the delayed message, and not the difference between the value of the oil. *Western Union Tel. Co.* v. *Hall*, 479

3. Measure of damages for nondelivery of goods sold is their market value at date of breach of contract. *Roberts* v. *Benjamin*, 334

DAMS. See EMINENT DOMAIN, 1–4.

DEBTOR AND CREDITOR. See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY; BANKS, 2; BONDS, 10, 11; FRAUD AND FRAUDULENT CONVEYANCE, II., INSOLVENCY.

DECEDENTS' ESTATES. See EXECUTORS AND ADMINISTRATORS; WILL.

DEED. See ESTOPPEL, 1; FRAUD AND FRAUDULENT CONVEYANCE, 8; HUSBAND AND WIFE, 1–4.

DEFINITIONS. See INSOLVENCY.

DEMAND. See BONDS, 9; MORTGAGE, 5, 6.

DESCENT. See CONFISCATION, 4.

DEVISE AND LEGACY. See WILL.

DISMISSAL. See APPEAL AND ERROR, VI.

DISTRICT OF COLUMBIA. See HUSBAND AND WIFE, 1.

DIVORCE. See HUSBAND AND WIFE, 5–7.

DUTIES.

I. IMPOSITION; OFFICERS.

II. RECOVERING BACK EXCESS.

III. PENAL PROSECUTIONS.

See also EVIDENCE, 20; PRINCIPAL AND AGENT, 8; TREATIES, 1.

I. IMPOSITION; OFFICERS.

1. Nail rods, consisting of straight, flat pieces of iron, about an inch in width and three eighths of an inch thick, come within description of rolled iron, not otherwise provided for in Revised Statutes, § 2504, and are liable to duties of 1¼ cents per pound. *Worthington* v. *Abbott*, 494

2. Commercial understanding as to description of article by Congress must prevail. *Id.*; *Miller* v. *Butterfield*, 643

3. That 20 per cent of cotton enters into "manufactures of hair" does not change their character, under Act of 1870. *Miller* v. *Butterfield*, 643

4. Words "manufactures of hair" are sufficient designation to place such manufactures among enumerated articles under said Act. *Id.*

5. The words in § 21 of that Act, "all other manufactures of hair not otherwise herein provided for," means not otherwise provided for in Act of which they are part. *Id.*

6. Designation of cloth as hair, silk, or cotton depends upon predominance of such article in its composition. *Id.*

7. Under Act of March 3, 1883, schedule M, velvet ribbons of silk and cotton, of which silk is the material of chief value, used chiefly for trimming hats, pay a duty of 20 per cent *ad valorem*. *Hartranft* v. *Langfeld*, 672

8. Duty upon article specially provided for by one section of statute is excluded from operation of other sections. *Id.*

9. Quilts composed of cotton or silk and eider down, the latter being the component material of chief value, are chargeable with duty of 20 per centum *ad valorem*, under Act of March 3, 1883, § 2513. *Hartranft* v. *Sheppard*, 763

10. Under Act of March 3, 1883, goods imported before, but kept in bonded warehouses after, it took effect are subject only to duties thereafter leviable upon their entry for consumption. *Hartranft* v. *Oliver*, 813

11. Importer is entitled to a refund of the difference between amount of duties paid on such goods prior to their entry and amount which would be leviable if they were imported after the Act took effect. *Id.*

12. Goods on a ship in charge of a customs officer, preliminary to their removal to a bonded warehouse, are in government custody, and subject only to such duties as are leviable when they are freed therefrom. *Id.*

13. Clerk of collector of customs is not officer of United States, within Rev. Stat. § 3639, relating to safe keeping of public moneys. *United States* v. *Smith*, 534

14. Such clerks are not appointed by head of department, within constitutional provision regarding appointing officers of United States. *Id.*

II. RECOVERING BACK EXCESS.

15. Declaration to recover excess of duties paid under protest need not state that suit was brought within time limited by Rev. Stat. § 2931. *Beard* v. *Porter*, 492

16. United States waives claim of voluntary payment of duties sought to be recovered, where such duties were paid under agreement of secretary of the treasury, contained in letter, that question of voluntary payment would not be raised as defense to suit to recover back duties paid, if importer would pay them. *Id.*

17. Liquidation and payment of duties on imported goods is settlement thereof which, in absence of fraud or protest, is conclusive after one year. *Id.*

18. Protest, to prevent such settlement from being conclusive, must be one against that liquidation or settlement, and not against attempted reliquidation more than one year after. *Id.*

19. Action to recover excess of duties is not maintainable unless payment, in addition to protest, was made to obtain possession of merchandise. *Porter* v. *Beard*, 490

20. Importers can obtain benefit of exemption from duties sued for, after delivery of goods, if they are in fact illegally imposed, only by defense in suit brought by United States to recover them. *Porter* v. *Beard*, 490

21. In suit to recover excess of duties, importer may raise question of want of qualification of merchant appraiser. *Mustin* v. *Cadwalader*, 169; *Oelbermann* v. *Merritt*, 164

22. Importer may show that appraiser did not open and appraise packages designated by collector, as required by statute. *Id.*

23. Appraiser is competent witness to prove his own unfamiliarity with goods, and character of his examination of them. *Id.*

III. PENAL PROSECUTIONS.

24. Statute providing that judgment will not be reversed or arrested for any defect or want of form is applicable to informations of seizure for forfeitures. *Friedenstein* v. *United States*, 786

25. Such information need not aver that alleged acts were done with actual intent to defraud the government; but finding to that effect must be made on the trial, under the Act of June 22, 1874, § 16. *Id.*

26. General verdict against claimant will be supported if any count of the information is good against formal objections, where government was not required to elect on which count it claimed a verdict. *Id.*

27. In suit *in rem* for forfeiture of merchandise for violation of Act of June 22, 1874, § 12, a finding of the jury "that the goods were brought in with intent to defraud" the government is sufficient. *Origet* v. *United States*, 743

28. Under that section the goods are forfeited irrespective of any criminal prosecution. *Id.*

EJECTMENT. See also COURTS, 4, 6.

1. Certificates of register of land office, of location of military land warrant, or of receiver, acknowledging payment for purchase of land, are incompetent to show legal title in holder. *Langdon* v. *Sherwood*, 344

2. Until patent for land is issued under such certificates, legal title is in United States. *Id.*

3. In Federal courts recovery can only be had upon strict legal title. *Id.*

EMINENT DOMAIN. See also REMOVAL OF CAUSE, 1.

1. Under Act of July 15, 1882, the United States must give compensation for land taken for dam across Potomac River, although some part thereof is not within survey and map directed to be made by said Act. *Great Falls Mfg. Co.* v. *Garland*, 527

2. Such Act opens court of claims to every person injured by construction of dam, provided that within given time he files his petition in that court setting forth his title and amount claimed as damages. *Id.*

3. Objections to map and survey are waived by suit in court of claims by owner for compensation for lands under this Act. *Id.*

4. Paintiff, by suing in court of claims, waives right that compensation be paid in advance of taking of land, and right to demand that amount of compensation be determined by jury. *Id.*

5. Under Illinois Constitution recovery of damages may be had where private property sustains substantial damage by the making of an improvement public in its character. *Chicago* v. *Taylor*, 638

6. If construction of a railroad is cause of damage, although consequential, party may recover. *Id.*

7. Introduction of word "damaged" into above Constitution shows purpose to abolish old test of direct physical injury to property. *Id.*

8. Impairment of value to improvements on property is element of damage. *Id.*

9. A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit, so as to require any compensation to the owners of the property in question. *Mugler* v *Kansas*, 205

EQUITY. See also INTOXICATING LIQUORS, 4; LACHES; PLEDGE, 2; PUBLIC LANDS, 23, 25, 28–30.

1. Equity cannot restrain criminal proceedings unless instituted by party to suit pending before it to try same right in issue there; nor has it any jurisdiction over appointment or removal of public officers. *Ex Parte Sawyer*, 402

2. Receiver of bank may in equity sue attaching creditors and sureties on bonds, to dissolve attachment, to reduce to his possession securities held by sureties, and to restrain enforcement of bonds, although bonds are invalid. *Pacific Nat. Bank* v. *Mixter*, 567

3. Decree in such action, holding that sureties are not liable, concludes creditors from further proceedings against them on bonds. *Id.*

4. Suit in equity is not maintainable for damages from inferior quality of coke sold, where it was received without objection, and there was no warranty as to quality. *Dewey* v. *West Fairmont Gas Coal Co.* 179

5. In suit for relief from fraud, it is enough if the facts found are not substantially different from those alleged in the bill. *Tufts* v. *Tufts*, 91

6. Multifariousness as to subjects or parties, within jurisdiction of equity, must be taken advantage of by demurrer, plea, or answer; it does not render decree void so as to be collaterally impeached. *Hefner* v. *Northwestern Mut. L. Ins. Co.* 309

7. Direct and positive denials in answer under oath must be disproved by more than one witness, or by one witness and corroborating circumstances, in order that complainant may have decree. *Southern Development Co.* v. *Silva*, 678

8. On trial of equity case, jury may be called into court and issues submitted to it by court. *Wilson* v. *Riddle*, 280

9. What issues should be submitted to jury is in discretion of court. *Id.*

10. Where chancellor adopts finding of jury, appellate court will not consider formal exceptions to rulings in trial of issues before jury. *Wilson* v. *Riddle*, 280

ERROR. See APPEAL AND ERROR.

ESTOPPEL. See also JUDGMENT, 8–11; LACHES, 2; TAXES, 21.

1. Recitals in deed bind parties and claimants under them, but not strangers claiming adverse title. *Sabariego* v. *Maverick*, 430

2. Estoppels must be mutual. *Litchfield* v. *Crane*, 199

3. Brief filed at hearing in Federal supreme court by one interested in question to be decided does not make him party to suit, or estop him by decree. *Stryker* v. *Crane*, 194

EVIDENCE.

I. PRESUMPTIONS.

II. DOCUMENTARY; SECONDARY; PAROL.

III. HANDWRITING.

IV. DECLARATIONS.

V. EXPERTS; OPINIONS.

See also LIEN, 2; BONDS, 3; CORPORATIONS, 2; DUTIES, 22, 23; EJECTMENT, 1; HUSBAND AND WIFE, 2, 5; INSURANCE, 8; NEGLIGENCE; PATENTS, 58; PUBLIC LANDS, 22, 29, 30, 33; RECEIPT; WITNESS.

I. PRESUMPTIONS.

1. After twenty-one years from the return of a survey to the land office, the presumption is that the warrant was located as returned by the surveyor; but this is rebutted by proof of the existence of facts tending to show that the actual location was different from the official courses and distances. *Clement* v. *Packer*, 721

2. Presumption of performance of duty by public officers does not supply proof of substantive and independent facts. *Sabariego* v. *Maverick*, 430

II. DOCUMENTARY; SECONDARY; PAROL.

3. In action to try title to land granted by Government of Coahuila and Texas in 1828 to one Rabago, the protocol of his application for grant, produced from archives in office of secretary of state of Coahuila, is admissible as link in chain of title. *Williams* v. *Conger*, 778

4. Alleged power of attorney from Rabago, found in an old trunk, is admissible as an ancient writing. *Id.*

5. Recitals in ancient instrument that maker was citizen of Mexico, with evidence that he was merchant in City of Mexico, held sufficient evidence that he was such citizen. *Id.*

6. Instrument not duly authenticated must be proved to have been executed by the party to be charged by it. *Id.*

7. Copy of instrument is admissible to show that original was in existence when it was made, and that the latter was an ancient instrument. *Id.*

8. Documents showing sale and conveyance of premises upon confiscation of property by Spanish Government, but not showing any decree of confiscation sufficient to warrant sale, or that person whose property is thus sold was within jurisdiction of tribunal which could pronounce such decree, are not sufficient to show legal confiscation, or to pass title to purchaser at sale. *Sabariego* v. *Maverick*, 430

9. Confiscation must be proved by official record of transaction, or duly certified copy thereof, and, in case of its loss, by proof of its previous existence and contents. *Id.*

10. Certificates of other officers, referring to record collaterally, although as basis of their own official action, are not legal proof of fact itself. *Id.*

11. Copies of official letters by general land office commissioner, sworn to by clerk in office acquainted with facts, are evidence of his decisions, when written by him to parties interested. *Coan* v. *Flagg*, 107

12. Secondary evidence of proof of loss is admissible, upon a failure to produce original in evidence on notice. *Union Ins. Co.* v. *Smith*, 497

13. Where the original landmarks of the survey have disappeared, the original and well-established marks, found upon a later survey, made by the same surveyor, about the same time, and adjoining the one in dispute, are admissible to aid the jury in ascertaining the exact location of the older survey. *Clement* v. *Packer*, 721

14. Note sued on, varying from description in special count in declaration, is admissible under common counts as evidence of money had and received. *Hopkins* v. *Orr*, 528

15. Written evidence of the grant by the Mexican government, of its confirmation by the land commissioners, of the affirmance of the award of that commission by the courts, and of the record of two surveys showing the location and the confirmation of the Mexican grant, and their dates, is admissible in ejectment, to show title under grant. *Doolan* v. *Carr*, 844

16. In an action at law extrinsic evidence is admissible to prove that a patent from the United States is void for want of power in the officers to issue it, and the facts which show that want of power. *Id.*

17. Oral evidence is admissible to identify land as coming within the Mexican grant and the surveys of the land office. *Id.*

III. HANDWRITING.

18. Handwriting of instruments, proved to be genuine, in evidence for other purposes, may be compared by jury with that of signature in question, and its genuineness inferred from comparison; but other signatures cannot be introduced for purpose of comparison. *Williams* v. *Conger*, 778

IV. DECLARATIONS.

19. Declarations of captain of tug after she had become disabled, in regard to occurrence, where not shown to be part of *res gestæ*, are inadmissible. *Union Ins. Co.* v. *Smith*, 497

20. Declarations by a person having goods in possession and offering them for sale, made to a special agent of the treasury department,

making an official investigation as to whether goods should be seized for forfeiture under the Revenue Laws, are part of *res gestæ*, and admissible against persons claiming to be their owner. *Friedenstein* v. *United States*, 736

21. In Pennsylvania the declarations of deceased surveyors, in cases of boundaries between private estates, are admissible, where they spoke from personal knowledge. *Clement* v. *Packer*, 721

V. EXPERTS; OPINIONS.

22. Master, mate, and fireman of tug, on board of her at time lost, who have been engaged in navigation for many years, are competent as expert witnesses as to loss and as to prudence of management of tug. *Union Ins. Co.* v. *Smith*, 497

23. Prudence and good seamanship in management of tug are proper subjects of expert testimony. *Id.*

24. Where, owing to scarcity of ready money after the war, lands were sold for low prices at forced sale, opinions of witnesses, as to intrinsic value of land to hold in reference to future use, and not of actual cash market value at time of sale, are not sufficient to establish that lands were sold at grossly inadequate prices, so that sale could be set aside. *Boyd* v. *Wyly*, 369

EXECUTION.

1. Nebraska Act of February 23, 1875, did not, on December 2, 1875, govern proceedings for stay of judgment in Federal courts, or determine surety's liability on bonds given for such stay; and act of clerk extending judgment against sureties was void. *Lamaster* v. *Keeler*, 238

2. Sale of property under invalid execution confers no title. *Id.*

3. Confirmation of sale did not cure invalidity of execution upon which it was made. *Id.*

4. In action by assignee of bankrupt, his allegations that judgment against a bankrupt execution and sale thereunder were fraudulent as to bankrupt's creditors, were not sustained by proof. *Norton* v. *Hood*, 364

EXECUTORS AND ADMINISTRATORS.

1. In proceeding to remove testamentary executor, where it appeared he had abandoned his duties and had no domicile in State, and that certain attorneys had appeared for him to oppose application for removal, he was actual party to proceeding, and appointment of his successor was valid. *Boyd* v. *Wyly*, 369

2. Although by Indiana statute personalty vests in executor from testator's death, he cannot interfere with estate further than to preserve it until issuance of letters testamentary. *Wall* v. *Bissell*, 772

3. In absence of State decision, United States Supreme Court declines to hold that release of mortgage by executor who has never qualified and to whom no letters have been issued is valid. *Id.*

4. Such release executed as trustee by executor, but to whom letters have not been issued, is not valid. *Id.*

5. Where legal title to mortgage is in one as executor, but title to debt for which it is security is in him as surviving creditor, he may in latter capacity release it without taking out letters. *Id.*

6. Such release, although executed by him as executor, is binding upon the interests of the representatives of testator, as well as upon his own. *Id.*

EXPERTS. See EVIDENCE, V.

FEDERAL COURTS. See COURTS, 2–10.

FLORIDA. See BOUNDARIES.

FOREIGN CORPORATIONS. See COMMERCE, 1–4.

FRAUD AND FRAUDULENT CONVEYANCE.

I. FRAUD IN GENERAL.

II. FRAUD UPON CREDITORS.

See also EQUITY, 7; TRIAL, 6.

I. FRAUD IN GENERAL

1. Vendee must have relied and acted upon false representations, in order to avoid the sale therefor. *Southern Development Co.* v. *Silva*, 678

2. Expressions of opinion which are not statements of fact do not constitute fraud. *Id.*

3. Such expressions in respect to value of property sold are not fraudulent in law, to the extent that the sale will be set aside if they are untrue. *Id.*

4. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. *Id.*

5. Purchaser making his own investigations, which the vendor does not prevent from being as full as he chooses to make, cannot afterwards allege that the vendor made misrepresentations. *Id.*

6. Mere acceptance of part of profits of contractor of portion of railroad by its assistant engineer, who had no interest in and did not represent company when contract was made, or have anything to do therewith, is not ground for setting aside award of sum due on contract. *Union R. R. Co.* v. *Dull*, 417

7. To cancel an executed contract, fraud must be made clearly to appear. *Id.*

8. Bill to cancel deed is dismissed, where the issue is entirely one of fact and the integrity of the transaction is not satisfactorily impeached. *Cissel* v. *Dutch*, 642

II. FRAUD UPON CREDITORS.

9. Sale and delivery of goods in satisfaction of honest debt cannot be avoided by other creditors unless made and received with intent in fact to defraud them. *Jewell* v. *Knight*, 190

10 That one of creditors preferred was debtor's wife does not affect question. *Id.*

11. Whether agreement, that if bank would lend borrower money from time to time, he

would secure it, should anything occur by which he would not be able to pay his debts, is fraudulent,—is question of fact. *Smith* v. *Craft*, 267

12 Where borrower sold his stock in trade to bank, to pay indebtedness, stipulation in bill of sale that bank should employ him in business so long as it should continue business is valid, if its sole purpose was to obtain services necessary to wind up business and turn goods into money for benefit of other party; whether it was fraudulent in fact was question to be decided by trial court. *Id.*

13. Execution sale of father's realty to his son on judgment by confession upon note, given to son, consideration of which was fictitious, is fraudulent against father's creditors. *Woodfolk* v. *Seddon*, 598

14. Subsequent purchase of same property by son at delinquent tax sale is also void against such creditors. *Id.*

15. In Georgia husband may make voluntary settlement for wife and children provided it is recorded with clerk of superior court of county of his residence within three months after its execution; and it is valid against subsequent mortgagee with notice. *Wilson* v. *Riddle*, 280

FRAUDS, STATUTE OF.

1. Receipt and acceptance under verbal contract of sale are questions for jury. *Hinchman* v. *Lincoln*, 337

2. But where facts in relation to such contract are undisputed, their legal effect is for court. *Id.*

3. To satisfy statute, delivery must be made with intent to vest right of possession in vendee; and there must be actual acceptance by him as vendee. *Id.*

GAMING. See CONTRACT, 1, 2.

GARNISHMENT. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; ATTACHMENT, 8.

HABEAS CORPUS.

1. Habeas corpus will issue where Chinaman is held in custody on vessel in Port of San Francisco and not permitted to enter United States. *United States* v. *Jung Ah Lung*, 591

2. Act of May 6, 1882, relating to Chinese Treaty, as amended by Act of July 5, 1884, does not affect jurisdiction of Federal courts to issue such writ. *Id.*

3. Action of collector of port upon question of allowing Chinese to land in United States may be reviewed. *Id.*

4. Fourth article of Chinese Treaty does not exclude judicial cognizance, or confine remedy of Chinese to diplomatic action. *Id.*

HANDWRITING. See EVIDENCE, III.

HOMESTEAD.

1. Under Illinois Act of 1871, in enforcing lien upon premises including homestead, if value of premises exceeds homestead exemption, and they cannot be divided, sale of the whole and payment of amount of exemption to party entitled will be ordered. *Knight* v. *Paxton*, 518

2. Holder of lien paying amount of homestead exemption into court for benefit of person entitled to it is entitled to a decree for possession of entire property. *Id.*

HUSBAND AND WIFE. See also BANKRUPTCY, 4, 5; EVIDENCE, 22, 23; FRAUD AND FRAUDULENT CONVEYANCE, 10, 15.

1. Title of husband and wife to land in District of Columbia may be conveyed to secure his debts, by deed voluntarily executed by both, notwithstanding Federal Act of 1869, exempting her property from liability for his debts. *Hite* v. *Jenks*, 156

2. Wife's acknowledgment cannot be avoided by extrinsic evidence of manner examination was conducted by magistrate, except for fraud or duress. *Id.*

3. Under Illinois Act of 1869, execution of deed by married woman joining with her husband is sufficiently authenticated by her signature; her acknowledgment is only necessary to render it admissible as evidence without further proof or to release her homestead right in property. *Knight* v. *Paxton*, 518

4. Deed by married woman, made by her upon a fair settlement with the grantee, and under advice of competent counsel, will not be set aside. *De Wolf* v. *Hays*, 818

5. State Legislature may grant a divorce when either party is resident of the State; and the facts that there was no cause of divorce, and that it was obtained without the knowledge of the party, does not affect the validity of the Act. *Maynard* v. *Hill*, 654

6. Marriage is not a contract within Federal constitutional provision as to impairment of contracts. *Id.*

7. Wife divorced from husband before he had acquired vested right in donation lands has no interest in the donation claim. *Id.*

INDICTMENT. See also POSTOFFICE, 5.

1. In an indictment all material facts embraced in the definition of the offense must be stated. *United States* v. *Hess*, 516

2. Indictment for devising scheme to defraud must state scheme, with all such particulars as are essential to constitute it. *Id.*

3. Language of statute used in indictment must be accompanied with such statement of facts as informs accused of specific offense with which he is charged. *Id.*

4. Omission of matters of substance in indictment is not aided or cured by verdict. *Id.*

INFANTS. See PARTITION.

INFORMATION. See DUTIES, III.

INJUNCTION. See also APPEAL AND ERROR, 36, 37; BANKRUPTCY, 5; COURTS, 6–8; EQUITY, 3; STATE AND STATE OFFICERS, 1.

Injunction restraining operation of telegraph lines, the greater part of which are over post roads of United States, until payment or State tax, cannot be sustained; and State stat-

ute authorizing such injunction as a remedy is void. *Western U. Tel. Co.* v. *Massachusetts*, 790

INSOLVENCY.

One unable to pay his debts is insolvent. *Cunningham* v. *Norton*, 624

INSURANCE.

I. LIFE.

II. MARINE.

See also BANKRUPTCY, 4, 5.

I. LIFE.

1. Where assured answered question as to whether he had ever been addicted to intemperate use of liquors in the negative, his answer cannot be found to be untrue by jury unless he had, prior to issue of policy, been addicted to such intemperate use. *Ætna L. Ins. Co.* v. *Davey*, 315

2. Condition to policy that it shall be void if insured become so far intemperate as to impair his health, is broken by excessive use of liquor, although insured may not have had delerium tremens, and although previous to his last illness he had not indulged in strong drink for such period of time or so frequently as to become intemperate. *Id.*

3. Whether death was caused by such intemperate use is a question of fact. *Id.*

II. MARINE.

4. Where vessel is insured against perils of lake excepting certain excluded causes, if vessel is lost from perils not arising from one of excluded causes, company is liable. *Union Ins. Co.* v. *Smith*, 497

5. Warranty of seaworthiness in time policy is complied with if vessel be seaworthy at commencement of risk. *Id.*

6. Defect of seaworthiness, arising after commencement of risk and permitted to continue from bad faith of insured, discharges insurer from liability for loss occasioned thereby. *Id.*

7. But this does not affect insurance as to any other risk covered by policy, not caused by such particular defects. *Id.*

8. Defendant setting up want of ordinary care at time of loss has burden of proof. *Id.*

9. A loss whose proximate cause was a peril insured against is within the protection of a marine policy, notwithstanding it may have been occasioned remotely by the negligence of the master and mariners. *Orient Mut. Ins. Co.* v. *Adams*, 63

10. Master's misconduct, unless affected by fraud or design, will not defeat recovery on marine policy. *Id.*

11. A loss by derangement of mud valves of vessels, the derangement not being the proximate cause, is not within exception of policy freeing company from claim for loss by derangement of machinery. *Id.*

12. The right of abandonment of vessel, under the contract, is to be determined from the facts as they existed on the day of abandonment. *Id.*

13. If the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, although it should happen that she might be recovered afterwards at a less expense. *Id.*

INTEREST. See BONDS, 7–9; COLLISION, 2; PATENTS, 60.

INTERNAL REVENUE.

1. Under Federal Act of July 14, 1870, railroad company is not liable for tax of 2½ per centum on its profits for 1871 used for construction during that year. *Marquette H. & O. R. Co.* v. *United States*, 802

2. Under U. S. Rev. Stat. § 3220, internal revenue commissioner is authorized, on appeal to him, to repay judgment against collector for act in performance of duty. *United States* v. *Frerichs*, 471

3. Allowance of such judgment by commissioner and secretary of treasury makes it claim against United States; and judgment creditor may recover thereon in court of claims. *Id.*

4. Payment of judgment satisfies demand of judgment creditor against United States, and he is only required to enter satisfaction on receipt of money. *Id.*

INTOXICATING LIQUORS. See also COMMERCE, 5–7; CONSTITUTIONAL LAW, 5–7.

1. State law prohibiting manufacture of liquor within its limits, to be there sold as beverage, does not necessarily infringe any right, privilege, or immunity secured by Federal Constitution. *Mugler* v. *Kansas*, 205

2. Kansas Prohibition Law is valid. *Id.*

3. State may declare that any place maintained for illegal manufacture and sale of liquors shall be deemed common nuisance, and abated; and at same time provide for indictment and trial of offender. *Id.*

4. Proceedings in equity for purposes indicated in Kansas Act of 1885, § 18, as to abatement of such nuisances, are not inconsistent with due process of law. *Id.*

5. Provision that in prosecution by indictment, or otherwise, State need not, in first instance, prove that defendant has not permit required by State, does not deprive him of presumption of innocence. *Id.*

JUDGMENT. See also APPEAL AND ERROR, VI.; COURTS, 10; EQUITY, 5, 8; ESTOPPEL, 3.

1. Judgment by court without jurisdiction is void. *Ex parte Sawyer*, 402

2. Under Nebraska Code, § 429, a judgment rendered for a conveyance, in a State court, not complied with by the parties within the time limited, has the same operation and effect as if the conveyance had been executed pursuant thereto. *Langdon* v. *Sherwood*, 844

3. Where subject-matter, cause of action, and parties are the same as in a former suit, the judgment therein constitutes a bar to the suit. *Lyon* v. *Perin & Gaff Mfg. Co.* 889

4. Where words of qualification, such as

"without prejudice," did not accompany decree, it is presumed to be rendered on the merits. *Lyon* v. *Perin & Gaff Mfg. Co.* 839

5. Decree dismissing the complaint and entitling defendant to recover costs, if set up as a plea in bar to new bill for same cause, is conclusive, if dismissal was upon hearing and is not in direct terms "without prejudice." *Id.*

6. Decree does not bar suit for different cause of action arising afterward. *Chapman* v. *Crane,* 285

7. Where suit was removed to Federal court and all parties appeared without objection, decree of supreme court on appeal is not void, for want of jurisdiction, because it appears on face of record that some of defendants, not joining in petition for removal, were citizens of same State with plaintiff; but, until judicially annulled, vacated, or set aside, is binding on parties, and bars subsequent action for same cause. *Des Moines Navigation & R. R. Co.* v. *Iowa Homestead Co.* 202

8. Judgment on demurrer is no less conclusive of facts confessed by it than judgment on verdict. *Bissell* v. *Spring Valley Township,* 411

9. Where, by such judgment, coupons of municipal bonds were adjudged invalid, plaintiff cannot bring action upon different coupons afterwards becoming due, attached to same bond. *Id.*

10. Where one not named as party is represented by one who is party and under whom he claims, and puts in answer in name of such party, and pays part of expenses of litigation, he is bound by decree therein. *Plumb* v. *Crane,* 268

11. Prior adjudication is not binding on one not a party to suit in which it was had, although he had paid part of expenses of suit. *Litchfield* v. *Crane,* 199

JUDICIAL SALES. See also EXECUTION; TRUSTS, 2.

1. Under Act of Congress of August 18, 1856, where purchaser at sale of real estate limited by will to certain lives, with contingent limitation over, makes default in payment of consideration, resale should be made only on failure to pay unpaid portion of consideration within some reasonable time fixed by court. *District of Columbia* v. *McBlair,* 449

2. Decree ordering resale, without regard to previous payments and right to make additional payments, is erroneous. *Id.*

3. On payment of amount due by purchaser, he is entitled to decree of court for conveyance to him of title. *Id.*

JURISDICTION. See APPEAL AND ERROR, I., II.; COURT OF CLAIMS, 1, 3.

JURY. See also EQUITY, 10–12.

1. When a challenge to a juror for bias is disallowed, and the juror is peremptorily challenged and excused, and an impartial juror is obtained in his place, accused's constitutional right is maintained. *Ex parte Spies,* 80

2. The finding of the trial court upon the issue of whether jury is impartial should not be set aside by reviewing court unless error is manifest. *Id.*

3. Jurors who had formed an opinion based upon newspaper statements, about the truth of which they had expressed no opinion, and stating they could determine the case upon the proof presented, regardless of such opinion, are competent. *Id.*

LACHES. See also SALE, 2, 3.

1. If, at hearing in equity, case appears liable to objection of laches, relief will be refused. *Richards* v. *Mackall,* 396

2. Acquiesence by plaintiff for twelve years, in execution sale of his property, estops him from asking to have it set aside because of improper description of premises in advertisement of sale. *Id.*

LANDS. See PUBLIC LANDS.

LICENSE. See COMMERCE, 1.

LIEN. See BONDS, 1; CHECKS, 7; HOMESTEAD.

LIFE INSURANCE. See INSURANCE, I.

LIMITATION OF ACTIONS. See also COURT OF CLAIMS, 2; MORTGAGE, 1.

1. Claim against United States is barred within six years after suit could be commenced thereon against Government. *Finn* v. *United States,* 128

2. Rule that statute must be pleaded does not apply to suits in court of claims against United States. *Id.*

3. Judgment in court of claims for claim which record shows to be barred by statute is erroneous. *Id.*

4. Nebraska Statute of Limitations of five years does not run against county warrant. *King Iron Bridge & Mfg. Co.* v. *Otoe County,* 514

5. Cause of action upon such warrant did not accrue when payment was refused. *Id.*

6. Answer that such cause of action did not accrue within five years next before commencement of suit is insufficient. *Id.*

LIQUORS. See INTOXICATING LIQUORS.

LOST INSTRUMENTS. See EVIDENCE, 12.

MANDAMUS. See REMOVAL OF CAUSE, 4.

MARINE INSURANCE. See INSURANCE, II.

MASTER AND SERVANT.

1. Where employee was injured through negligence of engineer, evidence that latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by master, makes case for plaintiff. *Northern Pac. R. Co.* v. *Mares,* 296

2. Servant could assume that master used proper care and diligence in the employment and retention of engineer. *Id.*

MINES AND MINING. See PUBLIC LANDS, 26, 27.

MORTGAGE. See also APPEAL AND ERROR, 2, 28; CONFISCATION, 2, 3; EXECUTORS AND ADMINISTRATORS, 3–6; PRINCIPAL AND SURETY; RAILROAD COMPANIES, 3–7.

1. Prescription is lost to mortgagor by his failure to plead it in foreclosure. *Shields* v. *Shiff*, 445

2. Neither inscription nor reinscription is necessary to preserve mortgage against mortgagor. *Id.*

3. Railroad mortgagor need not account for earnings while the property is in his possession until a demand therefor or for the surrender of the possession under the mortgage. *Sage* v. *Memphis & L. R. R. Co.* 694

4. Trustees in a railroad mortgage, who have not asked possession or intervened in the suit, are not entitled to have the net earnings of the property, while it was in the hands of a receiver appointed in suit instituted by judgment creditor, applied in discharge of mortgage bonds. *Id.*

5. Until demand, railroad mortgagor having possession of property need not account for earnings. *Dow* v. *Memphis & L. R. R. Co.* 565

6. Demand for possession may be made by bringing suit for that purpose, and thereafter mortgagor must account for earnings; and it is of no consequence that receiver was not appointed until subsequently. *Id.*

7. Upon foreclosure of mortgage by trust company, all its interests in land as trustee for bondholders passes to purchaser at sale, which binds bondholders receiving share of proceeds without objection. *Richter* v. *Jerome*, 132

8. If sale was in fraud of bondholders' rights, their remedy is to set it aside and to proceed anew with another foreclosure. *Id.*

9. In such foreclosure bondholders are not necessary parties; they are represented by their trustee. *Id.*

10. Equities which form part of the security which was enforced in a foreclosure suit, if not excepted from the sale, pass by it. *Id.*

MOTIONS. See APPEAL AND ERROR, VI.

MUNICIPAL CORPORATIONS. See BONDS, 5, 6; COURTS, 7; PUBLIC LANDS, 44–47.

NAVIGABLE WATERS. See WATERS AND WATERCOURSES, 5–7.

NAVY. See also ARMY.

1. One who, at passage of Federal Acts of March 3, 1883, and July 15, 1870, was lieutenant-commander, and who had served as officer in regular navy from September 21, 1860, by continuous service in various positions, is entitled to graduated pay given by latter Act. *United States* v. *Mullan*, 140

2. Where officer has entered service but once, that is taken as last entry, within statute. *Id.*

3. Lieutenant-commander in navy, performing duty as executive officer on board a receiving ship, under an order designating his employment as "shore duty," is entitled to pay for sea services. *United States* v. *Strong*, 828

4. Student at Naval Academy appointed a midshipman was, while a midshipman, serving as officer, within Act of 1883, chap. 97. *United States* v. *Baker*, 824

5. One who was in 1867 appointed a midshipman, continued, after Act of 1870, chap. 295, an officer on the active list, although he might be properly styled, after the Act of 1870, a cadet midshipman. *Id.*

6. No legislation after July 14, 1872, when he was promoted to the grade of ensign, can affect the question, arising under Act of 1883, as to service of such officer prior to July 14, 1872. *Id.*

7. Paymaster in navy is not entitled in settlement of accounts, under Federal Act of March 3, 1883, to longevity increment on his 33½ per cent of salary allowed in lieu of fuel, etc., under Navy General Order No. 75, of 1886. *United States* v. *Allen*, 147

8. The allowances provided for in said order are ascertained by reference to amount statedly received by the officer as statutory pay at the time the order was in force. *Id.*

9. Act of Congress of March 3, 1883, providing for increase of pay to officers of navy, according to length of service, includes paymaster's clerk; and he is to be credited with actual time he served as officer or enlisted man in regular or volunteer army or navy, or both. *United States* v. *Hendee*, 465

10. Paymaster's clerk is not officer of navy within Act of Congress of June 30, 1876, and is not entitled to compensation for traveling expenses. *United States* v. *Mouat*, 468

11. Private of Marine Band, who performed on the capitol and president's grounds under proper orders, is entitled to additional pay provided by U. S. Rev. Stat. § 1613. *United States* v. *Bond*, 478

12. Assistant engineer, retired on furlough pay, is entitled to one half the leave-of-absence pay of officer on active list. *Potts* v. *United States*, 661

13. Upon being transferred to retired pay list, his pay is raised to that of officer on half sea pay. *Id.*; *United States* v. *Burchard*, 662

14. He cannot recover difference between one half and three quarters of sea pay from date of his transfer. *Potts* v. *United States*, 661

15. In suit by him to recover balance claimed to be due, United States may set up as counterclaim amount paid him over what he was entitled to by law. *United States* v. *Burchard*, 662

NEGLIGENCE. See also APPEAL AND ERROR, 12; MASTER AND SERVANT; TRIAL, 7.

Defendant charging contributory negligence must establish it by a preponderance of evidence. *Northern Pac. R. Co.* v. *Mares*, 296.

NONSUIT.

Motion for nonsuit at close of plaintiff's testimony is waived by introduction of testimony by defendant. *Union Ins. Co.* v. *Smith*, 497

OFFICE AND OFFICER. See also ARMY; CONSULS; COURTS, 7; DUTIES, I.; EVIDENCE, 1, 2; NAVY; POSTOFFICE, 1–8.

1. Unless one in service of government holds his place under appointment by president or heads of departments authorized to make appointments, he is not, under Constitution, officer of United States. *United States* v. *Mouat*, 468

2. Settlement of account by Federal accounting officer should not be opened because of technical irregularities in allowance of expenses, years afterwards, when remedy of party against United States is barred by Statute of Limitations. *United States* v. *Johnston*, 389

PARENT AND CHILD. See FRAUD AND FRAUDULENT CONVEYANCE, 13, 14.

PARTIES. See BANKRUPTCY, 2, 5; MORTGAGE, 9; TAXES, 20; TRUSTS, 1.

PARTITION.

Long acquiescence of minor, after maturity, to proceedings for partition of his property is equivalent to express affirmance of them, even if they are affected by such irregularities as would have justified court in setting them aside. *Brasee* v. *Schofield*, 484

PARTNERSHIP. See also BANKRUPTCY, 1.

1. Partner in possession of firm property must pay taxes thereon, which are a joint liability on the property; and he is not discharged from so doing by copartner's statement that he would not repay him. *Chapin* v. *Streeter*, 475

2. Partner renting copartner's share of firm property and permitting it to be sold for taxes of latter, and afterwards renting it from tax purchaser, cannot be allowed rent paid latter in action by copartner to recover rent due him. *Id.*

3. Partner cannot sue for accounting under agreement of partnership which has never gone into effect. *Davis* v. *Key*, 112

PATENTS.

I. PATENTABILITY OF INVENTION; ANTICIPATION; PRIOR USE; APPLICATION.

II. REISSUE.

III. DISCLAIMER.

IV. SALE.

V. INFRINGEMENT.

VI. TERM.

See also APPEAL AND ERROR, 38–41; PUBLIC LANDS, *passim*; STATUTES, 1.

I. PATENTABILITY OF INVENTION; ANTICIPATION; PRIOR USE; APPLICATION.

1. There is no patentable invention in applying to heating of wine from inside of cask, apparatus previously used to heat another liquid in same manner. *Dreyfus* v. *Searle*, 852

2. Patent granted to Munson on April 2, 1867, for improvements in preserving, filing, and canceling bonds, etc., is void because containing no patentable novelty, as the only change from former blank books for the purpose consists in providing spaces for the bonds and changing the order of arrangement of the coupons. *Munson* v. *Mayor, etc. New York*, 586

3. The fifth claim of the Bell patent of March 7, 1876, for improvement in telegraphy, as follows: "The method of, and apparatus for, transmitting vocal or other sounds telegraphically, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said sounds," embraces the art of transferring to or impressing upon an undulatory current of electricity the vibrations of air produced by the human voice in articulate speech, so that the speech will be carried to and received by the listener at a distance on the line of the current. *The Telephone Cases*, 863

4. Articulate speech is included in the description of the patent, the sound thereof being one of the "vocal or other sounds" referred to in the claim. *Id.*

5. Bell had the right to a patent for the discovery that this process of transmitting speech could be accomplished by gradually changing the intensity of a continuous electric current, so as to make it correspond exactly to the changes in the density of the air caused by the sound of the voice, and in devising a way in which those changes of intensity could be made and speech actually transmitted. *Id.*

6. *O'Reilly* v. *Morse*, 15 How. 62, holding that the use of magnetism as a motive power, without regard to the particular process with which it was connected in a patent, could not be claimed, but that its use in that connection could, sustains Bell's claim, which is not one for the use of electricity distinct from the particular process with which it is connected in his patent. *Id.*

7. The patent for an art does not necessarily involve a patent for the particular means employed for using it; a useful art or process is the subject of a patent. *Id.*

8. A discoverer or inventor need not have brought his art to the highest degree of perfection in order to obtain a patent; it is sufficient if he describes his method with sufficient precision to enable those skilled in the matter to understand what the process is, and points out some practicable way of putting it in operation. *Id.*

9. Bell's patent is for the process that the apparatus was designed to bring into use; and the process can be operated by the vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies, which is the magnetic method; or by alternately increasing and diminishing the resistance of the circuit or the power of the battery, which is the variable resistance method; and the patent is for both these methods, and for the particular magneto apparatus described, or its equivalent. *Id.*

10. A patent for such discovery is not confined to the mere means improvised to prove the reality of the conception. *Id.*

11. The discovery of Bell, that the true way to produce the delicate forms of the air vibra-

tions caused by the human voice in articulate speech, was to operate on an unbroken current by diminishing and increasing its intensity, was new. *Id.*

12. Bell's discovery was not anticipated by the discovery of Reis as to how to produce musical tones, since the latter never succeeded in transmitting speech. *Id.*

13. McDonough was anticipated by Reis in what he asked for in his application for a patent filed in 1876. *Id.*

14. Varley's English patents of 1868 and 1870 did not include Bell's discovery. *Id.*

15. Drawbaugh may have conceived the idea that speech could be transmitted by electricity, and was experimenting on the subject, but he did not discover the art of doing it before Bell. *Id.*

16. The evidence does not prove that the fourth claim of Bell's patent was surreptitiously interpolated afterwards. *Id.*

17. The fifth claim of Bell's patent of January 30, 1887, is not anticipated by the Schellen magnet, since the patent is not for a magnet, but for a telephone, of which it forms a part. *Id.*

18. Patent granted to Rathbone and Hailes, November 21, 1865, for improvement in coal stoves, was anticipated by prior patents. *Hailes* v. *Albany Stove Co.* 284

19. Under Act of 1839, as well as under Rev. Stat. § 4886, public use for more than two years prior to application renders patent void, whether such use was or was not with knowledge or consent of applicant. *Andrews* v. *Hovey*, 160

20. Such use for purposes of trade and profit, experiment being merely incidental, defeats right to patent. *Id.*; *Smith & Griggs Mfg. Co.* v. *Sprague*, 141

21. Where defense of prior public use to action for infringement is met only by allegation that use was by way of experiment, patentee's proof should be full and convincing. *Id.*

22. Patents to L. A. Sprague, for making buckle levers, are void by reason of prior public use for more than two years before application. *Id.*

23. Driven-well patent, No. 4872, is invalid for same reason. *Andrews* v. *Hovey*, 160

24. Patents are often granted with view to leaving open for decision of courts questions which patent office does not deem it proper to adjudicate against applicant by withholding patent. *Andrews* v. *Hovey*, 557

25. Rule of patent office, that prior use of patent for more than two years with consent of patentee invalidates it, is not judicial adjudication of question whether patent granted had been in use for such time with such consent. *Id.*

26. Two years' prior use renders patent invalid, whether with consent of inventor or not, by Act of 1839, § 7, clause 2. *Id.*

27. Determination of commissioner of patents in granting patent does not conclude determination of courts in regard thereto. *Id.*

28. Specification is construed in light of that knowledge which existed in art at time of its date. *Lawther* v. *Hamilton*, 325

29. Patent granted Lawther, September 28, 1875, for improvements in processes in treating oleaginous seeds, is valid as patent for a process; the process is to be limited by specification to use of powerful revolving rollers for crushing seeds between them under pressure. *Id.*

30. Patent granted Dryfoos in 1880, for improvement in quilting machines, cannot be extended so as to cover all mechanisms for giving circular direction to feed motion, nor to process of operation of mechanism described therein. *Dryfoos* v. *Wiese*, 362

II. REISSUE.

31. Whether delay in applying for reissue of patent has been reasonable is question of law, and the action of the patent office in granting a reissue is not sufficient to explain delay in the application which otherwise constitutes laches. *Hoskin* v. *Fisher*, 759

32. Delay, unless shown to be reasonable, in application for reissue expanding claims of original patent, invalidates it. *Id.*

33. Where it does not appear that any attempt has been made to secure by original patent enlarged claims in reissue, those claims are regarded waived, so far as reissue is concerned. *Id.*

34. Reissued letters patent must be for the same invention, and are invalid where they are not. *Parker & Whipple Co.* v. *Yale Clock Co.* 100

35. Patent cannot be reissued to enlarge claim unless there has been clear mistake in wording of claim, and application is made within reasonably short period after original patent was granted. *Id.*

36. Validity of reissued patent is question of law for the court. *Id.*

37. Patent cannot be amended so as to cover improvement invented by others after its issue. *Id.*

38. It is good defense in suit on reissued patent to show that commissioner exceeded authority in granting it. *Id.*

39. The statement in the original specification of the object of an invention, in general terms, does not make the reissue one for the same invention as that of the original, when it otherwise would not be. *Id.*

40. The invention described in the first eight claims of reissued letters patent 10,062, for improvements in clocks, differs from the original. *Id.*

41. The last clause of the Act of 1870, § 53, relates to the matter of evidence alone, and cannot enlarge the power of the commissioner as to the invention for which a reissue may be granted. *Id.*

42. Reissue, in which claim is enlarged by omitting essential element of patentee's invention, is invalid. *Matthews* v. *Iron Clad Mfg. Co.* 477

43. Action for infringement will not be sustained on reissued patent, where original patent, if unaltered, would not sustain it, and where reissue was taken out a year or two after patentee knew defendant was making article alleged to infringe, and specification in

reissue is substantially same as original, showing that it was not defective by mistake in framing it. *Id.*

44. Patentee, imposing words of limitation upon himself in his claim in taking out reissue is bound thereby in subsequent suits on reissued patent. *Crawford* v. *Heysinger*, 269

45. Claims of a patent for a combination of parts found in reversed position in a former device are construed as covering only precise combinations described. *Id.*

46. Patentee, abandoning under pressure from patent office clauses in his application and claim for a reissue, cannot insist that it was the intent of the office to include in the patent the abandoned clauses and parts. *Yale Lock Mfg. Co.* v. *James*, 807

III. DISCLAIMER.

47. Disclaimer cannot be used to change character of invention. *Hailes* v. *Albany Stove Co.* 284

48. Rev. Stat. § 4917, authorizing disclaimer to be filed in certain cases, and § 4922, enabling patentee to sue in these cases provided disclaimer is filed without unreasonable delay, apply to the same class of cases and have one purpose. *Id.*

IV. SALE.

49. Purchase of set of rollers, used for crushing seeds between them under pressure, with consent of patentee, does not confer consent upon purchaser to use patented process for treating oleaginous seeds. *Lawther* v. *Hamilton*, 325

V. INFRINGEMENT.

50. Claims 1 and 2 of reissued letters patent No. 9803, for improvement in device for inserting metallic staples, are not infringed by defendant's device called "Victor Tool." *Crawford* v. *Heysinger*, 269

51. A patent for a device for inserting metallic staples, which in view of the state of the art is to be construed to cover only the precise form claimed, and consists of a stationary staple, support, or anvil, and a reciprocating slotted or recessed hammer, or driver, is not infringed by a device in which the anvil or staple blade is movable and the recessed clinching base is fixed or stationary. *Id.*

52. A patent for improvement in quilting machines, in which the machine gives circular motion to goods by mechanism accomplishing result in one way, is not infringed by machine in which result is accomplished by different mechanism in different way. *Dryfoos* v. *Wiese*, 362

53. Decree dismissing suit for infringement of driven-well patent affirmed, pursuant to stipulation that it should abide result of case of *Andrews* v. *Hovey*, *ante*, 160. *Andrews* v. *Cone*, 564

54. Decree dismissing injunction for infringement of reissued letters patent No. 8,914, for improvement in railroad frog, affirmed on facts of case. *Weir* v. *Morden*, 645

55. Only actual damages sustained by infringement of patent are recoverable at law; but the court may inflict, as punitive damages, thrice the amount of the verdict. *Tilghman* v. *Proctor*, 664

56. But amount of actual profits made by use of infringing invention are recoverable in equity. *Id.*

57. Plaintiff has burden of proving such profits. *Id.*

58. Under Patent Act of 1870 the court in equity may increase the damages as in actions upon the case. *Id.*

59. Interest is not allowed on the profits until after their amount has been judicially ascertained. *Id.*

60. Master's report as to damages will not be set aside, unless clearly erroneous. *Id.*

VI. TERM.

61. Term of American patent issued after English patent runs from publication of latter; Act of 1839 is not repealed by Act of 1861. *Guarantee Ins. T. & S. D. Co.* v. *Sellers*, 153

62. Addition of new improvement does not exempt patent from operation of law on that subject. *Id.*

63. Rev. Stat. § 4887, does not make an American patent, not bearing the same date as a foreign patent of the same invention, invalid, but only limits its term. *The Telephone Cases*, 868

PAYMENT.

Money paid for accomplishment of illegal purpose and upon illegal contract cannot be recovered. *White* v. *Barber*, 243

PENALTIES. See DUTIES, III.; SHIPS AND SHIPPING.

PLEADING. See also DUTIES, 15; EQUITY, 8, 9; EVIDENCE, 14.

1. Pleadings and practice in action on common-law side of Federal circuit court are governed by State law. *Henderson* v. *Louisville & N. R. Co.* 92

2. Under the practice in Louisiana, the court may consider an amendment as a mere addition to the original petition, and thus preclude the plaintiff from contesting a material fact within his own knowledge, which he had therein averred. *Id.*

PLEDGE.

1. Pledgor who indorsed bonds to bearer, and delivered them to pledgee for sale without notice to him, cannot claim any right under former sale against *bona fide* purchasers from pledgee. *Lacombe* v. *Forstall*, 255

2. Pledgor, after value of such bonds has risen, cannot in equity recover their value where he has never made tender to redeem them nor effort to reclaim them. *Id.*

POSTOFFICE.

1. Postmaster general need not readjust salaries of postmasters oftener than once in two years. *United States* v. *Vilas*, 329

2. But he may, in his discretion, do so oftener in special cases. *Id.*

3. Such readjustment can only establish salaries for two years thereafter, and cannot be

made unless there are quarterly returns for two years prior thereto upon which it can be based. *Id.*

4. Each letter taken out of or put in post-office, to carry out fraudulent scheme contrary to U. S. Rev. Stat. § 5480, is distinct violation thereof. *Re Henry*, 174

5. Three distinct offenses committed within same six months may be joined in same indictment; and, when joined, there is to be single sentence for all. *Id.*

POWERS. See PRINCIPAL AND AGENT, 1, 2.

PRACTICE. See APPEAL AND ERROR; CASES CERTIFIED; JUDGMENT; PLEADING; REFERENCE; REMOVAL OF CAUSE; REVIEW; TRIAL.

PRESCRIPTION. See MORTGAGE, 1, 2.

PRESUMPTIONS. See EVIDENCE, I.; FRAUD AND FRAUDULENT CONVEYANCE, 2, 4; INTOXICATING LIQUORS, 5.

PRINCIPAL AND AGENT.

1. Where agent employed by State fund commissioners to prosecute claims against United States was to receive certain commissions on amount collected for his services and expenses, the agency was revocable by the State at its will, by an Act repealing the Act under which he was employed. *Missouri* v. *Walker*, 769

2. The interest coupled with a power, to make it irrevocable, must be an interest in the thing itself, and not that which is to be produced by the exercise of the power. *Id.*

3. Agents assuming duty of recovering back excess of duties paid on importation of goods for principal are liable to him therefor, by failure to bring action until barred by statute. *Bowerman* v. *Rogers*, 815

4. Agent of person engaged in perpetrating fraud upon railroad company by appropriating bonds issued by it to his own use can acquire no lien thereon on account of his services as agent, where his principal had no title against company. *Trask* v. *Jacksonville, P. & M. R. Co.* 521

PRINCIPAL AND SURETY. See also REPLEVIN.

1. Surety of railroad company on injunction bond given to protect its rolling stock from execution sale is entitled to indemnity from receiver of property on mortgage foreclosure. *Union Trust Co.* v. *Morrison*, 825

2. He is entitled, upon paying judgment against him on the bond, to be reimbursed out of the property of the company, prior to a mortgage given thereon. *Id.*

3. Bondholders purchasing the railroad on foreclosure sale, subject to the lien of all claims then pending against it, were bound to take notice of the surety's claim for indemnity, and the property in their hands is subject to it. *Id.*

PRIVATE LAND CLAIMS. See PUBLIC LANDS, *passim*.

PUBLIC LANDS. See also COURT OF CLAIMS, 1; EVIDENCE, 1, 8–11, 13, 15–17; TAXES, 7.

1. Grants of land by a government *de facto* are invalid as against the goverment *de jure*. *Coffee* v. *Groover*, 51

2. Where grants by either of two States are found, upon adjustment of disputed boundary between the States, to be within the other's terrritory, they are void unless confirmed by latter State; such confirmation cannot affect titles to same lands previously granted by latter State itself. *Id.*

3. Act of Congress of 1876, chap. 246, providing that, before any land granted to any railroad company by the United States shall be conveyed to it, unless it is exempted by law from payment of costs, there shall first be paid into Federal treasury cost of survey of land by company, applies to all lands theretofore granted to any company by the United States, and to the cost of surveying such land, whether previously conveyed or not. *New Orleans Pac. R. Co.* v. *United States*, 888

4. On failure of company to complete its road within time limited, Congress has power to impose new condition upon which right to conveyance could be earned in future. *Id.*

5. Until cost of survey as provided by Act is paid, equitable title of company is incomplete. *Id.*

6. Land covered by a Mexican grant is not public land, within the meaning of the Acts of Congress making grants to railroads, but was reserved from the granting clause of those statutes. *Doolan* v. *Carr*, 844

7. To the extent of such claims, when the grant was for land with specific boundaries or known by a particular name, and also to the extent of the quantity named within outboundaries containing a greater area, Mexican claims are excluded from the grant to the railroad company. *Id.*

8. Under Donation Act of Oregon, notice to surveyor general of claim of settler may be given after his death by his widow, where public survey was not made during his life. *Brasee* v. *Schofield*, 484

9. Where settlement has been joint by husband and wife, benefit of donation should be secured, in case of death of either, to his or her heirs. *Id.*

10. One deriving title through conveyances of deceased settler, through patent, is estopped from setting up that requirements of Donation Act were not complied with, or that widow and children were not entitled to the land under the Act. *Id.*

11. Third parties cannot complain that surveyor general has carried out a division agreed upon by the widow and heirs themselves. *Id.*

12. Under Federal Act of July 7, 1838, § 2, forbidding issuance of patent upon Virginia military warrants where survey is excessive, applicant's right is merely to withdraw survey and resurvey location, excluding such surplus quantity. *Doan* v. *Flagg*, 107

13. The proviso in the Act of March 23, 1807, does not make excessive surveys binding

on the government so as to entitle the holder of the warrant to a patent for the whole or part of the survey. *Id.*

14. The Act of May 20, 1826, § 2, is limited to cases provided for by the preceding section, and ceased to operate after the dates therein mentioned. *Id.*

15. The Act of February 18, 1871, grants to Ohio all the lands in the Virginia military district which had not, at that time, been legally surveyed and sold by the United States. *Id.*

16. The Act of May 27, 1880, § 4, confirms and ratifies previous titles made by the Ohio Agricultural and Mechanical College, under the Act of February 18, 1871. *Id.*

17. It was essential to the vesting of any interest under an entry and survey within the Virginia military land district, made prior to January 1, 1852, that the survey should be returned to the commissioner of the general land office at Washington on or before that date. *Id.*

18. Under Federal Act of 1860, date of cession of Florida to the United States, or time of transferring possession, is point from which to test validity of Spanish land grants. *United States* v. *De Morant*, 171

19. Erection of houses, and residence, upon lands shortly after date of grant is sufficient evidence of cultivation. *Id.*

20. Part owner of lands claimed, or his heirs or representative, may have benefit of proceeding authorized by Act of 1860. *Id.*

21. Failure to annex sworn copy of government surveys to petition is matter relating merely to form of procedure. *Id.*

22. Original *testimonios*, signatures to which were identified, and English translation certified by keeper of public archives of West Florida, is sufficient evidence that alleged grants were genuine. *Id.*

23. Suit in equity for cancellation of approved plat, delivered by United States to alleged actual settler, for part of Las Animas grant, on ground that it was illegal, is not maintainable by one claiming undivided interest in residuum of grant remaining after satisfaction of claims of actual settlers, nor on the ground that the patent issued on such plat has cut off complainant's right of appeal from the register and receiver. *Downs* v. *Hubbard*, 114

24. Where ascertainment of actual settlers upon such grant was intrusted to register and receiver of proper land district, right of appeal from their decision is not hindered by its fraudulent character. *Id.*

25. Where there were no actual settlers and improvements on any of the lands, as falsely set out in the affidavits in support of pre-emption claims, it is a fraud upon the United States sufficient in equity to justify the cancellation of the patents; but it is not such fraud as prevents the passing of a legal title by the patents. *Colorado Coal & Iron Co.* v. *United States*, 182

26. Words "vein or lode of quartz, etc., known to exist," in Rev. Stat. § 2333, refer to knowledge of existence of vein or lode within boundaries of placer claim; and belief, after examination, in existence of lode, is not knowledge of fact that will prevent patent from carrying title to vein or lode. *Iron Silver Mining Co.* v. *Reynolds*, 466

27. An instruction that a patent issued upon an application which was made with intent to acquire a title to a lode or vein which may exist in the ground beneath the surface of the placer claimed, will not convey such lode or vein; and that such intention, formed on investigation and belief in the existence of a valuable lode, amounts to knowledge,—is erroneous. *Id.*

28. To bill in equity to cancel patents upon grounds of fraud in pre-emption claims, defense of *bona fide* purchaser for value without notice is perfect. *Colorado Coal & Iron Co.* v. *United States*, 183

29. Burden of producing proofs overthrowing presumption in favor of *bona fide* purchaser is upon government. *Id.*

30. To raise suspicion of fraud of own officers does not justify government in casting upon defendant burden of establishing his title. *Id.*

31. To constitute exemption contemplated by Pre-emption Acts under head of "known mines," there should be ascertained coal deposits of such extent as to make land more valuable as coal mine than for agricultural purposes. *Id.*

32. New discoveries, after sale, by which land becomes profitable to work as mine, cannot affect title as it passed at time of sale. *Id.*

33. Government documents are not evidence of title as against parties claiming pre-existing, adverse, and paramount title. *Sabariego* v. *Maverick*, 430

34. Prior possession entitles plaintiff to recover as against mere intruder, but it must appear it has been continuous. *Id.*

35. Action to recover prior possession must be brought within reasonable time after its loss. *Id.*

36. Prior possession will be deemed abandoned by delay in bringing action, unless satisfactorily explained. *Id.*

37. Holder of legal title in bad faith must yield to one who had prior right from United States, in force when his possession was made under which his patent issued. *Widdicombe* v. *Childers*, 427

38. Where purchaser had for thirty-five years been in possession of southwest quarter, instead of southeast quarter, through error of land register, a third party securing patent vesting title in himself, with knowledge of purchaser's rights, is purchaser in bad faith, and equity will charge him as trustee. *Id.*

39. United States may sue to set aside patent for land obtained by fraud or mistake, but only when the government has an interest of its own to protect, or when fraud has been practiced on it to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or its duty to the public requires such action. *United States* v. *San Jacinto Tin Co.* 747

40. When a suit is brought to benefit one of

two claimants to land, the government has no interest in the matter, and the suit must fail. *Id.*

41. The initiation and control of such a suit lies with the attorney general. *Id.*

42. The testimony on which it is proposed to set aside a patent for fraud must be clear, unequivocal, and convincing. *Id.*

43. The fact that the survey on which the patent issued was contested at every step by the interested parties, and was finally decided, after six months' consideration, by the secretary of the interior affirming the decision of the land office,—affords strong evidence of its correctness and honesty. *Id.*

44. Act of Congress of July 1, 1864, to settle titles in California, conveyed to city of San Francisco lands within its corporate limits for purposes specified in ordinances of city ratified by State Act of March 11, 1858. *Clark* v. *San Francisco*, 553

45. Two squares designated in report of commissioners, approved by supervisors in 1856, were dedicated to public use. *Id.*

46. Lands so dedicated could not lawfully be conveyed by the city to private parties; and therefore conveyance to the city by Act of Congress did not enure to benefit of a prior grantee of the city. *Id.*

47. City ordinance No. 822, passed in 1855, for quieting land titles in city, granted only such titles as city was permitted by Congress and State to convey. *Id.*

48. Citizens of Mexico never lost the right of disposing of their Texas lands by the division of the empire. *Williams* v. *Conger*, 778

RAILROAD COMPANIES. See also BONDS, 1–4, 6–9; CARRIERS, 8–10; CORPORATIONS, 1; FRAUD AND FRAUDULENT CONVEYANCE, 6, 7; INTERNAL REVENUE, 1; MASTER AND SERVANT; MORTGAGE, 3–6; PRINCIPAL AND SURETY; RECEIVER.

1. Land grant to railroad, on condition that it should revert to grantor upon nonuse for railroad purposes, contains no covenant that railroad will build its road through land, or continue there. *Hoard* v. *Chesapeake & O. R. Co.* 130

2. If there was such covenant, plaintiff's remedy, where route has been changed before being built or abandoned afterward, is by action at law for damages. *Id.*

3. Purchasers at foreclosure sale are not obliged to perform obligations or pay debts of company defendant. *Id.*

4. Mortgage securities, upon which current earnings of insolvent railroad company are applied before current expenses are paid, are chargeable in equity with restoration of fund so misapplied. *St. Louis & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* 882

5. Lessee of railroad, not being in default of rent, may appropriate surplus of its gross earnings to payment of interest on bonds or for additional equipment of its road; and need not accumulate a fund to meet possible contingencies in the future in respect to rent. *Id.*

6. Where lessee applies earnings of road on mortgage bonds, leaving rent unpaid, equity of lessor, if it exists, is against holder of such first mortgage bonds, and not against proceeds on foreclosure sale of railroad. *Id.*

7. Lessor actually receiving, in payment of rent, more than entire earnings of the property, has no equitable ground for payment of the amount due for rent out of the fund arising from foreclosure sale, in preference to prior mortgagees. *Id.*

RECEIPT.

Agreement in receipt is as conclusive as any other paper executed between parties; but mere receipt is subject to explanation. *Davison* v. *Davis*, 635

RECEIVER. See also BANKS, 2; EQUITY, 4, 5.

1. Appointment of a receiver in the case of railroad companies is a matter of discretion. *Sage* v. *Memphis & L. R. R. Co.* 694

2. Where such appointment is in the power of the court, the order appointing him is not a nullity. *Id.*

3. Where a railroad company did not object at the appointment of a receiver that an execution was not sued out and returned *nulla bona* before the suit was commenced, that point may afterwards be disregarded. *Id.*

RECORD. See APPEAL AND ERROR, IV.

REFERENCE. See also APPEAL AND ERROR, 82, 83.

Under common-law reference, court cannot modify or vary referee's report as to matters of fact; and if report be set aside, cause stands for trial as if it had never been referred. *Dundee Mort. & T. I. Co.* v. *Hughes*, 357

REHEARING. See APPEAL AND ERROR, VI.

RELEASE AND DISCHARGE. See EXECUTORS AND ADMINISTRATORS, 3–6.

REMOVAL OF CAUSE.

1. Condemnation proceeding is suit at law within Federal Constitution and Laws; and party may have it removed to Federal court on ground of citizenship. *Searl* v. *School District*, 415

2. Petition for removal must be filed at or before term at which cause could be first tried in State court. *Baltimore & O. R. Co.* v. *Burns*, 333

3. Where cause is removed from State court of one county to that of another county, removal to Federal court is too late unless petition was filed at or before term at which cause could be tried in former county. *Id.*

4. Federal supreme court cannot issue mandamus to circuit court, to set aside order to remand suit removed from State court, on ground that at time of hearing court did not have complaint before it. *Ex parte Sherman*, 423

5. Since Federal Act of March 3, 1887, no appeal or writ of error lies to Federal supreme court, under Act of 1875, from order remand-

ing suit to State court. *Wilkinson* v. *Nebraska*, 152

6. Under Act of 1887, an order of circuit court remanding suit is not appealable. *Morey* v. *Lockhart*, 68

7. Nor can such order be reviewed on a certificate of division under U. S. Rev. Stat. § 698. *Id.*

8. The prohibitions against appeal and writs of error in the Act of 1887 apply to removals for other causes as well as for prejudice or local influence. *Id.*

9. Federal supreme court cannot review order of circuit court remanding suit, made while Act of 1875 was in force, where writ of error was not brought until after passage of Act of 1887. *Sherman* v. *Grinnell*, 278

REPLEVIN. See also APPEAL AND ERROR, 36.

1. In action on replevin bond, conditioned for payment of damages and for return of goods in same condition as when taken, defendant, if he succeeds in action and goods are not returned, may recover their value when taken and interest thereon. *Washington Ice Co.* v. *Webster*, 799

2. Obligors in bond are liable for value, at time when taken, of part of goods not returned, and for depreciation in value of part not returned in good condition. *Id.*

3. Sureties must pay damages recovered against plaintiff in replevin action, in case he has not paid them. *Id.*

4. It makes no difference that part of such interest recoverable by defendant is allowed in replevin suit and part in suit on bond, so long as there is no duplication. *Id.*

5. In action on bond, defendant may show value of property to be greater than named in bond or writ. *Id.*

6. The finding of the jury of the value of the goods replevied, where judgment has been entered thereon, is conclusive upon the parties and also on those who became sureties upon the bond to abide its event. *Id.*

RES JUDICATA. See JUDGMENT, 8–11.

REVENUE. See DUTIES; INTERNAL REVENUE; TAXES.

REVIEW.

On bill of review, nothing avails for reversal of decree but errors of law apparent on record. *Willamette Iron Bridge Co.* v. *Hatch*, 629

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES.

SALE. See also CONTRACT, 5, 6, 8; DAMAGES, 3; EQUITY, 6; FRAUD AND FRAUDULENT CONVEYANCE, 1–5; FRAUDS, STATUTE OF.

1. Receipt in words "said note is given me for purchase of 379 shares of stock now held by me, and to be delivered upon payment of his note to said D," is conditional sale. *Davison* v. *Davis*, 635

2. Only equitable relief applicable is bill for relief from condition, or for specific performance; and both of these remedies are lost by laches. *Id.*

3. Where, during delay of several years, stock has increased in value, specific performance will be denied. *Id.*

SALVAGE.

1. To bar a meritorious claim for salvage by special contract, it is necessary to plead and prove a binding contract to pay whether the property be lost or saved. *Potomac Steamboat Co.* v. *Baker Salvage Co.* 75

2. A binding contract of that character is not proved by a loose conversation between the respective parties after the salvage service had been partly rendered. *Id.*

3. An agreement to arbitrate in case of non-agreement does not bar action for salvage brought in ordinary way in admiralty division. *Id.*

4. The supreme court should not reduce the amount awarded, if it can be justified on any reasonable view of the case. *Id.*

SAVINGS BANKS. See BANKS, 1.

SEQUESTRATION. See BONDS, 2.

SETTLEMENT. See also OFFICE AND OFFICER, 2.

Where in settlement of account plaintiff was allowed claim for shortage, made in good faith, in absence of fraud, defendant cannot have account reopened. *Roberts* v. *Benjamin*, 334

SHIPS AND SHIPPING. See also COLLISION; SALVAGE.

1. Fine imposed upon master of vessel for carrying too many passengers, by Rev. Stat. § 4253, is, by § 4270, lien upon vessel, recoverable by proceeding *in rem*. *United States* v. *The Strathairly*, 580

2. Rev. Stat. § 4264, amended by Act of February 27, 1887, subjects steam vessels to penalties included in § 4255, as one of several sections of chapter relating to space in vessels appropriated to use of passengers. *Id.*

3. Rev. Stat. § 4266, requiring master of vessel to furnish list of passengers to collector of district in which vessel arrives does not apply to steam vessel; and penalty for its violation is not chargeable as lien on vessel. *Id.*

4. Penalty recoverable against vessel is limited to amount adjudged as penalty by way of fine against master, and payment on part of either is satisfaction of whole. *Id.*

SPECIFIC PERFORMANCE. See COURTS, 2, 3; SALE, 2, 3; STATE AND STATE OFFICERS, 1.

STATE AND STATE OFFICERS. See also BONDS, 1–4; BOUNDARIES; HUSBAND AND WIFE, 5–7; TAXES, I.; WATERS AND WATERCOURSES, 1–4.

1. There is no remedy by suit against State itself for breach of its contract; and bill object of which is by injunction indirectly to compel specific performance of contract, by

forbidding those acts which constitute breaches, is suit against State. *Ex parte Ayers*, 316

2. In such case, though State be not nominally a party on record, if defendants are its officers, suit is still one against State. *Id.*

3. Suits will lie against individual defendants who, under color of authority of unconstitutional State legislation, are guilty of personal trespasses and wrongs, and against officers, as such, where such suits are authorized by law, and act to be done or omitted is purely ministerial. *Id.*

4. A suit by alien to enjoin Virginia from bringing suit to enforce collection of taxes for payment of which coupons, originally attached to its bonds, had been tendered, is within prohibition of Eleventh Amendment. *Id.*

5. Orders in such suit adjudging officers of Commonwealth in contempt for bringing suit in violation of order of same court forbidding them, are void; and imprisonment under such orders is without authority of law and prisoners will be discharged by habeas corpus. *Id.*

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES. See also ACTION OR SUIT, 1; CONSTITUTIONAL LAW.

1. Question regarding construction of statute of United States concerning patents is not judicially settled until determined by United States Supreme Court. *Andrews* v. *Hovey*, 557

2. Contemporaneous construction of statute by those charged with its execution should not be disregarded, except for cogent reasons. *United States* v. *Johnston*, 389

3. Statute granting a privilege is construed most strongly against the grantee. *Hannibal & St. J. R. Co.* v. *Missouri River Packet Co.* 731

STAY OF PROCEEDINGS. See COURTS, 8; EXECUTION, 1.

SUBROGATION. See also BONDS, 6.

1. Mere volunteer in paying debt of another person is not entitled to subrogation. *Ætna Life Ins. Co.* v. *Middleport*, 537

2. Subrogation in equity requires that the person to be benefited has paid an obligation to a third party, constituting a superior lien or claim, to save himself from loss. *Id.*

SUNDAY. See also APPEAL AND ERROR, 12.

An act done must be itself a charitable act, to constitute it such an act of charity as is exempt from Massachusetts Sunday Law. *Bucher* v. *Cheshire R. Co.* 795

SUPERSEDEAS. See APPEAL AND ERROR, 56, 57.

SURVEY. See also EVIDENCE, 1, 21.

In Pennsylvania surveys are to be located together as a block or one large tract; and all the lines and the corners marked upon any part of the block belong to each tract of which it is composed. *Clement* v. *Packer*, 721

TAXES.

I. IN GENERAL; POWER OF STATES.

II. ASSESSMENT; COLLECTION; SALE.

See also APPEAL AND ERROR, 31–35; COMMERCE, 1; FRAUD AND FRAUDULENT CONVEYANCE, 14; INJUNCTION; INTERNAL REVENUE.

I. IN GENERAL; POWER OF STATES.

1. The unpaid balance of the direct tax apportioned to a State by the Act of 1861 is not a debt of the State. *United States* v. *Louisiana*, 69; *United States* v. *Alabama*, 73; *United States* v. *Mississippi*, 73

2. Act of Congress of July 24, 1866, Rev. Stat. §§ 5253–5269, giving telegraph companies the right to run lines over public domain, does not exempt them from ordinary burdens of taxation. *Western U. Tel. Co.* v. *Massachusetts*, 790

3. Telegraph companies, receiving benefit of State laws for protection of their property and rights, are liable to be taxed upon their real or personal property as any person would be. *Id.*

4. Government agencies are only exempt from State taxation so far as it interferes with their efficiency in performing functions by which they serve government. *Id.*

5. Tax, although nominally upon shares of stock of telegraph company, is a tax upon it on account of property used by it in the State, where the proportion of the length of its lines in the State to their entire length is the basis for ascertaining the value of the property; and is not forbidden by commercial clause of Constitution. *Id.*

6. United States Supreme Court will not hold tax void because it might have adopted different rule for ascertaining taxable value, provided rule adopted is not unfair or unjust. *Id.*

7. There was nothing in Act admitting Iowa which interfered with power of State to tax lands as soon as they ceased to be Federal property. *Stryker* v. *Crane*, 194

8. Act of Congress concerning tax on national bank shares does not require perfect equality of taxation between State and national banks, but only that national bank share shall not be taxable at higher rate than other moneyed capital in hands of individuals. *Davenport Nat. Bank* v. *Board of Equalization*, 94

9. Deposits in savings bank are not within meaning of Act of Congress in such sense as to require that, because they are exempted, national bank shares must also be exempted. *Id.*

10. Within the limits that State taxation shall not discriminate unfavorably to the holder of national bank stock, the manner of assessing and collecting State taxes is uncontrolled by the Act of Congress. *Id.*

11. Exemption of deposits in savings bank from State taxation does not affect rule for taxation of national bank shares, provided they

are taxed at a rate no greater than moneyed capital in the hands of individuals otherwise subject to taxation. *National Bank of Redemption* v. *Boston*, 689

12. The Massachusetts law permits the taxation of shares of a national bank, owned by another national bank, on the same footing with all other shares. *Id.*

II. ASSESSMENT; COLLECTION; SALE.

13. Where a hearing is given by the Taxing Act as to apportionment among landowners, such hearing is sufficient, and the Act in that respect is constitutional. *Spencer* v. *Merchant*, 768

14. New assessment made by State Legislature, including interest upon unpaid part of old assessment and part of expenses of levying it, is valid. *Id.*

15. In an action by the United States against a railroad company for unpaid taxes, under Federal Act of June 30, 1864, amended by Act of June 13, 1866, assessment is not required, or, if made, conclusive upon either party. *United States* v. *Philadelphia & R. R. Co.* 188

16. In action to set aside, as void, tax deed made upon sale of lands of nonresident owner, which were assessed at higher rate than lands of resident owner, there was not sufficient evidence of any purpose to discriminate against such nonresident owner. *Besson* v. *Johns*, 860

17. Where question relates to action of assessor, or of township board of equalization, which does not profess to be carried on with any purpose of making any such discrimination, mere errors in assessment should be corrected in proceedings, as provided by statute, before sale is made. *Id.*

18. By Iowa statute, if tax deed is invalid, lien is only interest in land that purchaser at sale acquires. *Hefner* v. *Northwestern Mut. L. Ins. Co.* 809

19. If deed is valid, it extinguishes all prior titles and incumbrances of private persons and all equities arising out of them. *Id.*

20. Where title in land was in mortgagor at date of mortgage, and tax title was subsequent in time, although paramount in right, to title acquired under mortgage foreclosure, upon foreclosure of mortgage in equity the court could determine validity of tax title; and owner of such title was a proper, if not necessary, party to foreclosure. *Id.*

21. Decree against owner of tax title, adjudging that he has no valid title, estops him from setting up such title in subsequent action. *Id.*

TELEGRAPH COMPANIES. See DAMAGES, 2; INJUNCTION; TAXES, 2–6.

TREATIES. See also HABEAS CORPUS, 2, 4.

1. Ninth article of Dominican Treaty, that duty on importation of products of that country shall be no higher than that on like articles from other foreign countries, was not designed to prevent special concessions touching importation of specific articles into this country from another foreign country. *Whitney* v. *Robertson*, 886; *Kelly* v. *Hedden*, 889

2. For infraction of provisions of treaty, remedy must be sought by injured party through reclamations upon the other; whether complaining nation has just cause of complaint is not matter for judicial cognizance. *Id.*

3. So far as a treaty can be made subject of a judicial cognizance in courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal. *Id.*

4. By Federal Constitution a treaty is made of like obligation as an Act of Legislature. *Id.*

5. Validity of a law, clear in its provisions, cannot be assailed before courts for want of conformity with stipulations of previous treaty not already executed. *Id.*

TRIAL. See also EQUITY, 10, 12; FRAUD AND FRAUDULENT CONVEYANCE, 1, 11, 12; FRAUDS, STATUTE OF, 1, 2; INSURANCE, 3; JURY; NONSUIT; PATENTS, 86.

1. Court may give to jury its opinion on weight of evidence. *Williams* v. *Conger*, 778

2. On trial in Federal court, judge may give opinion upon questions of fact, provided questions are submitted to jury. *United States* v. *Philadelphia & R. R. Co.* 188

3. An instruction the tendency of which is to withdraw from the consideration of the jury a considerable amount of important and pertinent testimony is error. *Clement* v. *Packer*, 721

4. Circuit court may direct verdict for plaintiff upon evidence, where it is clear he is entitled to recovery. *North Pennsylvania R. Co.* v. *Commercial Nat. Bank*, 287

5. Where there is evidence for plaintiff sufficient to go to jury, it is error to direct verdict for defendant. *Humiston* v. *Wood*, 354

6. Whether sale of goods is fraudulent as against plaintiff is either question of fact, or of mixed law and fact. *Jewell* v. *Knight*, 190

7. Whether it was contributory negligence for a servant, with knowledge of the unfitness of an engineer, to work with him, is a question for the jury. *Northern Pac. R. Co.* v. *Mares*, 296

8. Omission of word "dollars" in verdict is not such defect as prevents rendering of judgment according to intent of jury. *Hopkins* v. *Orr*, 528

TRUSTS.

1. In action to set aside trust deed for fraud, *cestui que trust* need not be joined. *Vetterlein* v. *Barnes*, 400

2. Whatever binds the trustee in any legal proceeding which he begins and carries on in good faith to enforce a trust, to which the *cestuis que trust* are not actual parties, binds them. *Richter* v. *Jerome*, 182

UNITED STATES. See ACTION OR SUIT, 2; CLAIMS; EMINENT DOMAIN, 1–4.

VENDOR AND PURCHASER.

1. Vendor not making any positive representations as to quantity of land, or any statements intended to deceive purchaser, is not

liable for deficiency in quantity of land sold. *Lawson* v. *Floyd*, 847

2. Continued payments upon land after purchaser had opportunity to discover deficiency in quantity afford presumption that vendor did not intend to warrant quantity. *Id.*

3. In contract for sale of land, words "about 1,000 acres," and in subsequent contract of compromise, words "estimated to contain 1,000 acres," are to be construed with reference to circumstances surrounding parties which would probably influence them in making contract. *Id.*

4. Where contract was for exchange of lands, some of which were incumbered by judgment liens, without agreed price per acre, it will not be construed so strictly as regards quantity as if it were an independent purchase to be paid for in money. *Id.*

WAGER. See CONTRACT, 1, 2.

WAIVER. See APPEAL AND ERROR, 52, 79, 80; DUTIES, 16; EMINENT DOMAIN, 3, 4; NONSUIT.

WATERS AND WATERCOURSES. See also APPEAL AND ERROR, 37; BRIDGES; CONSTITUTIONAL LAW, 1, 7.

1. Under New Jersey Riparian Laws, lands below highwater mark of navigable waters belong to State. *Hoboken* v. *Pennsylvania R. Co.* 543

2. State may either sell or convey its title to riparian owner or his assigns, or to stranger who, succeeding to its title, has no relation to adjacent riparian owner, except that of common boundary. *Id.*

3. New Jersey grants of such lands are of the estate in the lands, and transfer or extinguish every previous right of the State therein, except such sovereign right as it may lawfully exercise over other private property. *Id.*

4. Grantees from the State have exclusive possession of premises against adverse claim of municipality to easement over them by virtue of dedication of streets to highwater mark by proprietor of premises. *Id.*

5. Obstructions in navigable streams within States are indictable as offenses against its laws, but not as against United States laws which do not exist. *Willamette Iron Bridge Co.* v. *Hatch*, 629

6. Congress is not deemed to have assumed police power over navigable river in consequence of expenditures in improving its navigation. *Id.*

7. Erection of bridge over Willamette River at Portland is not violation of Admission Act of Oregon. *Id.*

WILL.

1. Where third clause of will gave testator's wife income of estate, and fourth clause provided that his two sisters, if living at death of himself and wife, should have such income during life and at their death it should be divided between three named charitable societies,—widow takes estate for life, with estate over for life to the others, contingent upon one of them surviving widow, with ultimate remainder to charitable societies. *Robison* v. *Female Orphan Asylum*, 293

2. Death of sisters before testator did not cause bequests to societies never to take effect, or give wife estate absolutely. *Id.*

3. If property be limited upon death of one person, to another, and first donee happened to predecease testator, gift over will take effect, notwithstanding failure, by lapse, of prior gift. *Id.*

WITNESS.

Defendant, a witness in his own behalf, is bound to submit to a cross-examination, the extent of which is a question of State law as administered in State courts. *Ex parte Spies*, 80